The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al.,
Plaintiffs,
and
BNSF RAILWAY COMPANY,
Plaintiff-Intervenor,
v.
JAY INSLEE, et al.,
Defendants,
and
WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Defendant-Intervenors.

No. 3:18-cv-05005-RJB

STATE DEFENDANTS' AND WEC'S JOINT REPLY IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT ON BNSF'S FOREIGN AFFAIRS DOCTRINE CLAIM

AND

JOINT OPPOSITION TO BNSF'S CROSS-MOTION FOR SUMMARY JUDGMENT ON ITS FOREIGN AFFAIRS DOCTRINE CLAIM

RE-NOTE ON MOTIONS CALENDAR (PURSUANT TO DKT. 251):

March 15, 2019

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I. INTRODUCTION

Though "rarely invoked," the Foreign Affairs Doctrine's bounds have been clearly—and narrowly—set by the Supreme Court and the Ninth Circuit. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012) (en banc). The few cases where courts have found state laws preempted under the Foreign Affairs Doctrine involved unusual state statutes that targeted specific countries based on specific foreign policy issues, such as the resolution of insurance claims from the Armenian Genocide or the Holocaust. Rather than address that case law, Plaintiff-Intervenor BNSF asks the Court to expand the Foreign Affairs Doctrine in unprecedented ways—to preempt a single environmental permitting decision for a single proposed export facility, made under a state's Congressionally delegated authority, based on nothing more than Administration officials' vague expressions of support for energy export generally and BNSF's unsupported conspiracy theory that "anti-coal" views secretly motivated state decision-makers.

Despite the fact that no one challenged the Final Environmental Impact Statement ("EIS") and its findings of numerous harmful impacts to the environment and human health, and despite Plaintiff Lighthouse's admission that the Washington Department of Ecology ("Ecology") lacked reasonable assurances that state water quality standards would be met, BNSF now suggests that the "only reasonable explanation" for the Section 401 certification denial by Ecology is that State Defendants were determined to "stop coal exports from reaching American allies in Asia." Dkt. 214 at 20. To the contrary, while Ecology's Section 401 decision undeniably protects Washington's residents and environment from the adverse impacts identified in the EIS, it does not "stop coal exports" to Asia. Dkt. 214 at 20. Nor does it even prevent Lighthouse from shipping coal from the West Coast; Lighthouse confirmed that it is already shipping coal to Asian countries through Canadian ports. Dkt. 1 ¶ 50. Lighthouse may wish to increase its profits with a new export facility at the existing Millennium Bulk Terminals in Longview, Washington ("Millennium"), and BNSF may to share in that business.

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But there is no federal law or policy that entitles Lighthouse to build an enormous and injurious port project in its preferred location.

The Court should reject BNSF's request, grant State Defendants' and Washington Environmental Council's ("WEC") motions for summary judgment on BNSF's Foreign Affairs Doctrine claim (Count IV, Dkt. 121), and deny BNSF's cross-motion for summary judgment.

II. ARGUMENT

BNSF's Foreign Affairs Doctrine claim fails as a matter of law under the Doctrine's straightforward preemption framework, for at least three reasons. First, Ecology's Section 401 decision is not conflict-preempted because (1) it was an exercise of the State's delegated authority under the federal Clean Water Act; and (2) BNSF has failed to adduce evidence of a "clear" and "consistent" federal foreign policy with which Ecology's decision conflicted. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). Second, Ecology's decision is not field-preempted because it addressed a "traditional state responsibility" and did not "intrude[] on the federal government's foreign affairs power." *Movsesian*, 670 F.3d at 1071. Third, BNSF has no equitable cause of action under the constitution's Foreign Affairs Doctrine because BNSF is not the regulated party subject to the Section 401 decision, and its business interest in Millennium falls outside the zone of interests protected by the Constitution's foreign affairs provisions.

A. Conflict Preemption Does Not Apply to Ecology's Section 401 Decision

The gist of BNSF's conflict preemption theory is that Ecology's Section 401 Decision conflicts with an "express federal foreign policy" to maximize coal exports. Dkt. 214 at 6. Yet BNSF fails to marshal sufficient evidence and legal authority to survive a motion for summary judgment—let alone win one. As a matter of law, its conflict preemption claim fails at every step of the analysis.

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1. Ecology's Section 401 decision cannot be conflict-preempted because it is a valid exercise of delegated federal authority

The most basic flaw in BNSF's foreign affairs preemption claim is that it challenges neither a state statute nor an administrative rule but a single permit decision made pursuant to federal law. BNSF cites no case from any jurisdiction—and State Defendants and WEC are aware of none—in which a court applied the Foreign Affairs Doctrine to invalidate a state permitting decision, let alone one exercising federally delegated authority. The Court should reject BNSF's unprecedented attempt to deploy the Doctrine against the Clean Water Act certification authority Congress has specifically entrusted to the states.

Even if this were a standard foreign affairs challenge to a state statute or regulation, no executive branch policy could preempt a state's exercise of a Congressionally delegated power. Two similar federal district court decisions—one in California, the other in Vermont—illustrate this point. In *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1182 (E.D. Cal. 2007) (*Central Valley*), the court held that the Foreign Affairs Doctrine did not conflict-preempt California motor vehicle emissions standards because the federal Clean Air Act "empowered [the state] to develop alternative regulations" more stringent than federal emissions standards, 42 U.S.C. § 7543(b)(1), and "executive branch policy may not interfere with that intent." In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 395–97 (D. Vt. 2007), the court upheld identical Vermont emissions standards against a Foreign Affairs Doctrine challenge. Both decisions relied on *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that the executive's foreign affairs powers did not permit the EPA to ignore its statutory mandate to regulate greenhouse gas emissions. *See id.* at 534 (President's foreign affairs "authority does not extend to the refusal to execute domestic laws").

As a matter of law, BNSF's foreign affairs preemption claim fails for similar reasons. Like the Clean Air Act, the Clean Water Act "expressly empowered [states] to impose and

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1 enforce water quality standards that are more stringent than those required by federal law."
2 *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citing 33 U.S.C. § 1370). Section 401's
3 certification requirement, 33 U.S.C. § 1341(a)(1), is "[o]ne of the primary mechanisms through
4 which the states may assert [that] broad authority." *Id.* at 622. Section 401 "gives a primary
5 role to states to block local water projects by imposing and enforcing water quality standards
6 that are more stringent than applicable federal standards." *City of Tacoma v. FERC*, 460 F.3d
7 53, 67 (D.C. Cir. 2006) (internal quotation marks, ellipsis, and citation omitted). A purported
8 pro-coal foreign policy could no more preempt Washington's Congressionally delegated
9 Section 401 authority than a foreign policy against greenhouse gas regulation could preempt
10 California's Congressionally authorized power to set its own stricter emissions standards. *See*
11 *Central Valley*, 529 F. Supp. 2d at 1182 ("executive branch policy cannot interfere with the
12 congressionally-established pathway in the Clean Air Act that enables California to . . . require
13 compliance with the more protective . . . regulations").

14 BNSF's only response is its bald assertion that Ecology's Section 401 decision may be
15 challenged under foreign affairs preemption because it was "beyond the pale of any authority
16 delegated to the State under the Clean Water Act." Dkt. 214 at 13. BNSF is mistaken. This
17 case does not involve whether Ecology acted "within the scope of [its] delegated authority"
18 under Section 401. Dkt. 214 at 13 n.45. This Court is not the proper forum to review the
19 appropriateness of a Section 401 decision, which—because it "generally turns on questions of
20 state law"—is a state tribunal. *City of Tacoma*, 460 F.3d at 67. In fact, Lighthouse has already
21 done just that, appealing Ecology's Section 401 decision under state and federal administrative
22 law theories to the Washington State Pollution Control Hearings Board, which rejected
23 Lighthouse's claims and affirmed Ecology's decision. Dkt. 130-6. BNSF does not allege that
24 State Defendants violated the Clean Water Act or any other federal statute, and it may not
25 sneak a second administrative challenge through the back door of its foreign affairs claim. *See,*
26 *e.g.*, *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) ("[A] State's

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decision on a request for Section 401 certification is generally reviewable only in State court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law."). Because BNSF's foreign affairs claim seeks to preempt state action taken pursuant to delegated federal statutory authority, it fails as a matter of law.

2. BNSF has failed to establish a "clear conflict" between Ecology's Section 401 decision and an "express" federal foreign policy

Although BNSF's Complaint invoked various treaties and international agreements that supposedly supported its conflict preemption claim, it has abandoned them all in its brief. *Compare* Dkt. 121 ¶ 85 ("Multiple federal treaties . . . preempt Defendants' scheme to prevent coal exports to Asia . . . ."), *with* Dkt. 214 (no treaty references). BNSF no longer contends that Ecology's Section 401 decision conflicts with any federal treaty or executive agreement. *See generally Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013) ("Conflict preemption occurs when a state acts under its traditional power, but the state law conflicts with a federal action such as a treaty, federal statute, or executive branch policy."). Instead, BNSF's foreign affairs conflict preemption claim relies on four sources: (1) President Trump's National Security Strategy Report ("Report") (Dkt. 216, Ex. A), which mentions coal only once, and then only in the context of domestic energy access, Dkt. 214 at 22[1]; (2) Executive Order 13783, which requires administrative review of certain regulations and agency actions but does not itself set forth—nor has it led an agency to adopt—any policy on coal exports; (3) scattered remarks by current and former Administration officials; and (4) the declarations of political consultants claiming expertise in foreign policy or energy policy. Those sources fail to establish a "clear" and "consistent" federal policy with which Ecology's Section 401 decision conflicts. *Garamendi*, 539 U.S. at 421.

[1] BNSF never explains how State Defendants could have violated the Report when Ecology issued its Section 401 decision in September 2017—two months before the Report was released.

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a. The National Security Strategy Report does not establish an express foreign policy that conflict-preempts Ecology's Section 401 decision

BNSF primarily relies on the Report as proof of a purported policy to "maximize exports of . . . coal." Dkt. 214 at 6. Yet the Report is not a source of executive policy; it is a high-level summary of it. Required annually by statute, 50 U.S.C. § 3043, the Report "outlines the major national security concerns" of the Administration and how it "plans to address them." Jt. Publication (JP) 5-0, *Joint Planning*, Joint Chiefs of Staff, ¶ 2-5, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp5_0_20171606.pdf because The Report is "purposely general in content," such that implementing it requires "elaborating direction provided in supporting documents." JP 5-0, ¶ 2-5.

Even if the Report alone could establish a foreign policy with preemptive force, it does not evidence BNSF's supposed policy to "maximize" coal exports in general, let alone to do so specifically through West Coast port terminals, Millennium, or at the expense of other public policy goals. BNSF's own framing of the Report demonstrates its inadequacy for the purpose for which BNSF invokes it: "the U.S. Executive Branch foreign and national security policy is to 'Embrace Energy Dominance.'" Dkt. 214 at 7. Nowhere does the Report mention Millennium, nor does it claim to provide authority to override federal, state, and local laws that protect human health and the environment in an effort to achieve "energy dominance." To the contrary, the Report explicitly affirmed the United States' commitment to "safeguard[ing] the environment" and "remain[ing] a global leader in reducing . . . greenhouse gases." Dkt. 216, Ex. A at 32, 36. BNSF cites no case that suggests the Foreign Affairs Doctrine is so broad as to usurp a state's permitting power under long extant state and federal laws based on nothing more than a general White House goal to promote energy exports.

The Administration's high-level goal of U.S. energy "dominance" is more of a slogan than a "clear" and "consistent" foreign policy with the preemptive force to nullify local, state, and federal laws and command construction of Millennium. *Garamendi*, 539 U.S. at 421.

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Notably, the President's actual foreign trade policies, such as imposing tariffs on steel and aluminum, have resulted in retaliatory measures from other countries, some of which target U.S. coal. *See* Dkt. 206 at 11–12 (citing National Coal Council report that outlines federal policies that are barriers to U.S. coal exports). Nor has there been a clear and consistent policy supporting coal exports "spanning presidential administrations of both parties." Dkt. 214 at 6. In 2016, the Army Corps of Engineers denied a Clean Water Act permit for a similar coal terminal proposed in northwestern Washington due to the proposed terminal's adverse impacts on Tribal treaty-protected fishing—a federal agency action that does not suggest a strong federal policy in favor of coal exports. Dkt. 213-15.

Whatever foreign policy the Report may reflect, it is neither sufficiently specific nor sufficiently longstanding to trigger foreign affairs conflict preemption. Similar to *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 443 (D. Me. 2017), it is clear here that "[t]he foreign affairs cases require a greater conflict with a more consistent federal policy; they do not authorize preemption of local restrictions whenever an industry as a whole is economically powerful enough to affect this Country's national and by extension international interests." *Garamendi* is also instructive: the U.S. Supreme Court struck down a California statute that directly conflicted with U.S. executive agreements with Germany, Austria, and France regarding Holocaust-era insurance claims. 539 U.S. at 408; *see also Central Valley*, 529 F. Supp. 2d at 1186 ("The 'policy' in evidence in *Garamendi* was evinced by the *results* of the President's negotiations and was embodied in an *agreement* . . . ."). Having abandoned its original theory that Ecology's 401 decision conflicts with U.S. treaty obligations, BNSF has failed to identify any source of a supposed federal policy to maximize coal exports. The Report does not provide such conflict-preemptive force.

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b. Executive Order 13783 does not establish an express foreign policy that conflict-preempts Ecology's Section 401 Decision

BNSF next suggests that Executive Order 13783 evidences the coal-export maximization foreign policy it wishes the administration to have. *See* Dkt. 214 at 7. That Executive Order does no such thing. It requires agencies to review within 180 days certain regulations and other agency actions that "potentially burden the development or use of domestically produced energy resources," and to make "specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production." Exec. Order No. 13783, § 2(a), (d), 82 Fed. Reg. at 16093, 16094 (Mar. 28, 2017).

BNSF points out that the Executive Order states that "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources." Dkt. 214 at 7 (quoting Exec. Order 13783, 82 Fed. Reg. at 16,093). A few lines later, however, the Executive Order provides that "agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic." Exec. Order 13,783, § 1(d), 82 Fed. Reg. 16,093. The Executive Order does not explain how to balance those two policy objectives. Nor does it take a position on any specific energy project or coal exports generally. Indeed, the Executive Order does not so much as mention the word "export." The 180-day review period has long since passed, but BNSF has identified no specific rulemaking or other agency action to evidence its purported coal-export maximization policy. The Executive Order alone does not do so.

c. Scattered remarks by executive officials do not establish an express foreign policy that conflict-preempts Ecology's Section 401 Decision

Equally unpersuasive is the smattering of comments from current and former members of the Administration that BNSF assembles in support of its desired coal-export maximization policy. *See* Dkt. 214 at 7–8 & n.19. None of those statements—by President Trump, Vice

President Pence, Former Interior Secretary Ryan Zinke, and others—says anything about coal exports generally, let alone Millennium specifically. For the reasons explained in the State Defendants' Motion, Dkt. 208 at 14–16, BNSF's cherry-picking of highly generalized remarks by executive officials does not establish a "clear" and "consistent" foreign policy in conflict with Ecology's Section 401 decision. *Garamendi*, 539 U.S. at 421. BNSF's assertion that the Administration's supposed coal-export maximization policy is "unequivocal" and "not subject to serious debate" is hyperbolic at best. Dkt. 214 at 8.

d. The improper declarations by BNSF's purported experts should be stricken

Lacking any official source evidencing its putative coal-export maximization policy, BNSF relies on conclusory declarations from two public policy consultants—G. David Banks, Dkt. 219, and Kenji Ushimaru, Dkt. 215. Those declarations are improper and should be stricken for at least two reasons. *See* LCR 7(g).

First, the declarations contain improper expert opinion testimony. Both Mr. Banks and Mr. Ushimaru offer numerous opinions on the foreign policies of the United States and Japan. *See, e.g.*, Dkt. 219 ¶ 18 ("United States policy is to maximize exports of energy resources, which includes thermal coal that is mined in western U.S. states."); Dkt. 215 ¶ 28 ("I see these actions as putting pressure on the Japanese government, which is consequently less able to fulfill the energy policy promises it has made to its citizens."). Such testimony is at best a matter of expert opinion, if not a pure question of law. *Compare Certain Underwriters at Lloyd's London v. Great Socialist People's Libyan Arab Jamahiriya*, 811 F. Supp. 2d 53, 56 (D.D.C. 2011) (accepting scholar as expert witness concerning Syrian government and its foreign policy), *with United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000) (interpretation of treaties, statutes, and executive orders are questions of law).

Yet Plaintiffs did not identify either Mr. Banks or Mr. Ushimaru as an affirmative expert witness by the expert disclosure deadline. Mr. Ushimaru was not identified as an expert

at all. Plaintiffs did disclose Mr. Banks as an expert—but only as a rebuttal witness to State Defendants' expert Ian Goodman. *See* Dkt. 219 ¶ 8; Dkt. 216 at 75. Mr. Goodman's expertise concerns the economic impact of the Section 401 decision. Mr. Goodman is not an expert in—and offers no opinions on—U.S. foreign policy. Mr. Banks' opinions regarding the content of U.S. foreign policy—even assuming *arguendo* that subject is the province of expert opinion—do not concern the "same subject matter" as Mr. Goodman's economic analysis. Fed. R. Civ. P. 26(b)(2)(D)(ii). Mr. Banks' declaration and report, *see* Dkt. 216, Ex. B, fall outside the scope of his role as a rebuttal witness. *See, e.g.*, *Theoharis v. Rongen*, No. C13-1345RAJ, 2014 WL 3563386, at *4 (W.D. Wash. July 18, 2014) ("Where a plaintiff attempts to introduce rebuttal expert testimony, the concerns about unfair surprise from rebuttal experts more closely resemble those applicable to rebuttal witnesses at trial."). Because neither Mr. Banks nor Mr. Ushimaru was disclosed as an expert by the affirmative expert deadline, State Defendants and WEC did not have an opportunity to designate an expert to rebut their opinions on foreign policy. For that reason alone, their declarations should be stricken.

Second, both declarations contain assertions entirely based on hearsay or facts outside the declarant's personal knowledge, with no showing that they could otherwise be established by admissible evidence. *See* Fed. R. Evid. 602, 801, 802; Fed. R. Civ. P. 56(c)(4); *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 924 (2d Cir. 1985) (a party "cannot rely on inadmissible hearsay in opposing a motion for summary judgment absent a showing that admissible evidence will be available at trial") (citations omitted). For example, Mr. Banks testified that the "U.S. federal government wants to expand coal capacity by increasing the number of private terminals or ports" and that "U.S. allies . . . have asked the Trump Administration to support this expanded export capacity." Dkt. 219 ¶ 20. This both lacks foundation and is textbook hearsay. It is highly doubtful that BNSF could support either claim with admissible evidence, so at minimum those and other assertions Mr. Banks makes based on hearsay or without foundation should be stricken. *See* Dkt. 219 ¶¶ 11, 14, 17, 19, 20.

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As for Mr. Ushimaru's declaration, virtually every fact or opinion he offers is based not on his personal knowledge but on his "interactions" or conversations "with Japanese businesses, government officials, and utilities," most of whom are unidentified. Dkt. 215 ¶ 10; *see, e.g.*, *id.* ¶ 18 ("I consult and my clients agree that coal from other sources, such as Australia, is better suited for older, conventional technology . . . ."); *id.* ¶ 21 ("I consult and my clients agree that the Japanese government considers its limited coal supply options a matter of national security."). Having made no showing that Ushimaru's sweeping assertions—whether about the Japanese energy sector or the views of the Japanese government—could be established in the form of admissible evidence at trial, his declaration, which is replete with hearsay, should be stricken in its entirety. *See* Dkt. 215 ¶¶ 10–25, 27–31.[2]

B. Field Preemption Does Not Apply to Ecology's Section 401 Decision

State action is field-preempted under the Foreign Affairs Doctrine where it (1) "has no serious claim to be addressing a traditional state responsibility, and (2) intrudes on the federal government's foreign affairs power." *Movsesian*, 670 F.3d at 1074. Because BNSF fails to create a genuine issue of material fact as to either prong, summary judgment is warranted.

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[2] Notably, Ushimaru's assertions are at odds with public statements by Japanese officials and businesses. Japan's Prime Minister Shinzo Abe recently wrote an article entitled "Join Japan and act now to save our planet," which describes Japan's goal to evolve into a "hydrogen-based energy society" and asserts that we must "reduce the use of fossil fuels" by "cutting the costs and improving the reliability of renewable energy." Shinzo Abe, *Join Japan and Act Now to Save Our Planet*, Financial Times, Sept. 23, 2018, https://www.ft.com/content/c97b1458-ba5e-11e8-8dfd-2f1cbc7ee27c (last visited Mar. 7, 2019). Additionally, over the past nine months, at least half a dozen Japanese companies have announced divestments from coal mining and funding of coal-fired power plants. Tim Buckley, *IIEFA Japan: ITOCHU Corporation Announces Coal Exit*, Institute for Energy Economies and Financial Analysis, Feb. 15, 2019, http://ieefa.org/japans-itochu-corp-announces-coal-exit/ (last visited Mar. 7, 2019); Press Release: Coal-related business policy, ITOCHU Corporation, Feb. 14, 2019, https://www.itochu.co.jp/en/csr/news/2019/190214.html (last visited Mar. 7, 2019).

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1. The Section 401 decision addresses traditional state responsibilities

The first step in the field-preemption analysis is to determine whether the challenged state action has a "serious claim to be addressing a traditional state responsibility." *Movsesian*, 670 F.3d at 1074. BNSF correctly notes that this determination looks beyond the "'general subject area' of the action" to ascertain the state's "real purpose." Dkt. 214 at 15 (quoting *Movsesian*, 670 F.3d at 1072). But BNSF mistakenly assumes that this "real purpose" inquiry requires courts to consider extrinsic evidence of legislative motive.[3] Under Ninth Circuit precedent, however, courts determine the state's "real purpose" using the traditional methods of statutory interpretation—namely, the law's "text," "legislative history," official "findings," and "scope." *Movsesian*, 670 F.3d 1074 & n.3. *Compare id.* at 1075 (field-preempting state law creating cause of action for insurance claims by Armenian Genocide victims because "the text and legislative history . . . leave no doubt that the law cannot be fairly categorized as a garden variety insurance regulation") (internal quotation marks omitted), *with Gingery v. City of Glendale*, 831 F.3d 1222, 1230 (9th Cir. 2016) (city monument to Korean "comfort women" not field-preempted because city's "self-stated purposes" were "entirely consistent with a local government's traditional function of communicating its views and values to its citizenry"). As the Ninth Circuit explained in a foundational Foreign Affairs Doctrine case, "The motive of the legislature is not subject to judicial scrutiny, so long as the legislature acts within its constitutional authority." *Allen v. Markham*, 156 F.2d 653, 660 (9th Cir. 1946), *aff'd in part sub nom. Clark v. Allen*, 331 U.S. 503 (citing *Amy v. Watertown*, 130 U.S. 301, 319 (1889)).[4]

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[3] BNSF spills much ink impugning Defendants' subjective views on coal. Without a shred of evidence, BNSF alleges that "Governor Inslee and Ecology Director Bellon are opposed to any country anywhere in the world burning coal as an energy resource," and "they are intent on doing what they can to achieve their goal." Dkt. 214 at 2–3. Those accusations have no support in the record and are directly rebutted by the testimony of Director Bellon. *See, e.g.*, Bellon Decl. ¶ 4.

[4] In an as-applied challenge, the Supreme Court in *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), struck down a statute similar to the one it had facially upheld in *Clark*—the first and only time the Court has invalidated a law under foreign affairs field preemption. *Id.*;

1 The protracted *Von Saher* litigation illustrates the irrelevance of subjective motive to
2 the field preemption analysis. First, the California legislature enacted a law allowing suits for
3 recovery of "Holocaust-era artwork" stolen by the Nazis from "any museum or gallery,"
4 including those outside the state. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592
5 F.3d 954, 958–59 (*Von Saher I*) (9th Cir. 2010) (quoting Cal. Civ. Proc. Code § 354.3). In *Von*
6 *Saher I*, the Ninth Circuit held the law unconstitutional under foreign affairs field preemption.
7 The majority concluded that the law did not address a traditional state responsibility because
8 California's "real purpose" was to "create[] a world-wide forum for the resolution of Holocaust
9 restitution claims." *Id.* at 965. Consistent with a "traditional statutory 'field' preemption
10 analysis," *id.* at 963, the majority discerned that "real purpose" solely from the law's text,
11 legislative history, and "scope." *Id.* at 964–65.

12 Six weeks after the *Von Saher I* court struck down the original Holocaust-era art
13 statute, the California legislature enacted a new law. *Von Saher v. Norton Simon Museum of*
14 *Art at Pasadena*, 754 F.3d 712, 718–19 (9th Cir. 2014) (*Von Saher II*) (citing Cal. Civ. Proc.
15 Code § 338(c)(3)(A)). The new law both extended the statute of limitations from three to six
16 years for all claims to recover fine art from a museum or gallery and provided that such claims
17 did not accrue until "the actual discovery of both the identity and the whereabouts of the
18 artwork." *Id.* at 719. Because the new statute was "explicitly retroactive," the *Von Saher I*
19 plaintiff filed an amended complaint, which the district court again dismissed under foreign
20 affairs conflict preemption. *Id.* The Ninth Circuit reversed. The *Von Saher II* court noted that,
21 in contrast to the original statute, the new law was not "Holocaust-specific" but rather a "state
22 statute of general applicability." *Id.* at 723. Although the museum defendant relied on conflict
23

24 *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003). The *Zschernig* Court held the
Oregon law to be field-preempted not because of legislative motive, but rather because in
25 actual "practice" the law "affects international relations in a persistent and subtle way." *Id.* at
440. The Court rejected the "invitation to re-examine our ruling in Clark v. Allen," which
26 remains good law. *Id.* at 432.

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1 preemption exclusively, *id.* at 720, the opposite outcomes in *Von Saher I* and *Von Saher II*
2 confirm that foreign affairs preemption does not turn on the subjective motives of state
3 officials. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("[T]here is an element of
4 futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If
5 the law is struck down for this reason, rather than because of its facial content or effect, it
6 would presumably be valid as soon as the legislature or relevant governing body repassed it for
7 different reasons.").

8 The irrelevance of subjective motive to the Foreign Affairs Doctrine comports with
9 constitutional jurisprudence generally, as well as the law of statutory preemption from which
10 the Doctrine's framework derives. It is "a familiar principle of constitutional law that this
11 Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit
12 legislative motive." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 652 (1994) (quoting
13 *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). The Supreme Court has recognized very
14 few exceptions to the general rule against consideration of a state actor's subjective motivation.
15 *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (invalidating law under
16 Establishment Clause based on state's lack of secular purpose); *Hunter v. Underwood*, 471
17 U.S. 222, 233 (1985) (invalidating state law under Equal Protection Clause based on racially
18 discriminatory motive and impact).

19 Preemption cases are not among the exceptions. *See, e.g.*, *Pac. Gas & Elec. Co. v.*
20 *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (rejecting statutory
21 preemption challenge to state law based on its "avowed economic purpose" and refusing to
22 "become embroiled in attempting to ascertain California's true motive" for enacting it). The
23 preemption analysis focuses on whether the challenged state law actually conflicts or intrudes
24 upon an exclusive federal power, "[w]hatever the purpose or purposes of the state law." *Gade*
25 *v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105–07 (1992). "The key question" is not
26 why state officials acted but whether their "regulation sufficiently interferes with federal

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regulation that it should be deemed pre-empted." *Id.* Those principles apply with equal force in the context of foreign affairs preemption, which focuses on the text, official findings, and scope of the challenged state action. *See Garamendi*, 539 U.S. at 420 n.11 (analogizing foreign affairs preemption to its statutory counterpart).

a. The text of Ecology's Section 401 decision and the EIS findings reflect traditional state environmental concerns

The text of the Ecology's Section 401 decision and the unchallenged findings of the EIS entirely reflect traditional state prerogatives. Ecology denied the Section 401 certification based on Lighthouse's failure to provide reasonable assurances that its project would meet state water quality standards. Dkt.1-1 (Ecology's Section 401 Certification Denial Order); *see also* 40 C.F.R. § 121.2(a)(3) (states must deny Section 401 certification if applicant fails to demonstrate reasonable assurances). Ecology also relied on findings in the EIS that the project would result in nine areas of significant, unavoidable adverse impacts and denied Section 401 certification under its substantive SEPA authority. *See* RCW 43.21C.060; *see also Polygon Corp. v. City of Seattle*, 578 P.2d 1309, 1312 (Wash. 1978).

The EIS detailed the harms that Washingtonians would face if Millennium were built, and it demonstrated how Ecology's Section 401 decision protected people in Cowlitz County and throughout Washington.[5] For instance, the EIS found that increased diesel particulate matter associated with the Millennium project would result in increased cancer risk rates, and that these impacts "would constitute a disproportionately high and adverse effect on minority and low-income populations and would be unavoidable and significant." Dkt. 229-1 at 19 ("maximum modeled cancer risk increase in the City of Longview would be 50 cancers per million in the Highlands neighborhood, a low-income and minority community"). Moreover,

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[5] The Cowlitz County Hearing Examiner's decision denying shorelines permits for the Millennium project also relied on the EIS's findings. Dkt. 1-3. Cowlitz County can hardly be accused of having an anti-coal agenda when it has previously submitted an amicus brief in support of Plaintiffs in these proceedings. Dkt. 61.

Millennium's significant, adverse, and unmitigatable impacts would not be limited to Cowlitz County: for example, the EIS found that the project would increase the train accident rate by 22 percent in Cowlitz County and Washington State. Dkt. 229-1 at 36.

b. BNSF identifies no relevant evidence undermining the asserted bases for Ecology's Section 401 decision

BNSF spends the bulk of its brief misrepresenting State Defendants' policy views as "anti-coal," and struggling to link those distortions to Ecology's Section 401 decision. After receiving over a million pages of written discovery and conducting 16 depositions (including of Ecology Director Maia Bellon and a 30(b)(6) deponent representing Governor Inslee's office), BNSF has no more evidence to support its anti-coal conspiracy theory than when it filed its complaint in intervention more than a year ago. As Director Bellon states in her declaration, she denied Lighthouse's Section 401 certification for the reasons the official administrative record reflects: because of (1) its "failure to demonstrate reasonable assurance of compliance with our state water quality standards," and (2) Millennium's "significant, adverse, unavoidable, environmental impacts identified in the [EIS]." Declaration of Maia Bellon ¶ 2 ("Bellon Decl."). Even if BNSF's unsupported claims regarding State officials' subjective motivation were at all relevant—and they are not, *see supra* at 12–15—BNSF has failed to back up its allegations of anti-coal pretext with any actual evidence.

BNSF offers an "anti-coal" conspiracy theory based on little more than state officials acknowledgment of the negative environmental and public health impacts associated with coal combustion. Dkt. 214 at 10-12. Though months of discovery turned up nothing more to substantiate BNSF's conspiracy theory, BNSF argues that there remains a question as to Ecology's "real purpose" because (1) Cowlitz County and Ecology did a lifecycle greenhouse gas emission analysis in the EIS; (2) Ecology used substantive authority under the State Environmental Policy Act ("SEPA") as one basis to deny Section 401 certification; (3) Ecology denied the Section 401 certification with prejudice after the EIS found that the

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project would have several significant, adverse impacts that could not be mitigated; and (4) Director Bellon stated that Ecology would not spend additional time processing an application for a project that could not obtain necessary approvals based on the unchallenged EIS findings. None of those undermines the reasoned basis for Ecology's Section 401 decision evident from the denial order and the EIS findings.

First, Ecology conducted a lifecycle greenhouse gas analysis to fully understand and disclose Millennium's impacts, guided by federal NEPA case law indicating that such analysis was necessary. Bellon Decl. ¶ 5; *see, e.g.*, *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550 (8th Cir. 2003) ("[I]t would be irresponsible for the Board to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.").

Second, Ecology exercised its discretionary substantive SEPA authority because Millennium "would have numerous significant, adverse, unavoidable environmental impacts"—indeed, more such impacts than any other proposed project Defendant Bellon had ever encountered in her tenure as Director. Bellon Decl. ¶ 6.

Third, and similarly, Ecology denied the Section 401 certification with prejudice because of those significant adverse and unavoidable environmental impacts, and because Lighthouse "failed to demonstrate compliance" with state "water quality standards." Bellon Decl. ¶ 6. As Director Bellon testified, "I could not in good conscience approve the certification request given" the risks Millennium would pose to "state water quality" and "the health, safety and welfare" of Washingtonians. Bellon Decl. ¶ 4.

Fourth, having determined that Ecology could not certify Millennium under Section 401 due to its environmental harms, Director Bellon determined that her staff should not spend further time and resources helping Lighthouse prepare additional applications. Bellon Decl. ¶ 7. That decision—like all those above—had nothing to do with some secret "anti-coal" agenda, but was a reasonable exercise of administrative and managerial judgment. *Id.*

In sum, the detailed administrative record supporting Ecology's Section 401 decision reflect exclusively environmental concerns within the province of the State. BNSF's extrinsic evidence of legislative motive is irrelevant to the field-preemption inquiry. And even if it were relevant, BNSF's "anti-coal" conspiracy theory remains entirely speculative and unsupported. BNSF fails to establish that Ecology's Section 401 decision "has no serious claim to be addressing a traditional state responsibility." *Movsesian*, 670 F.3d at 1074.

2. The Section 401 decision does not intrude on federal foreign affairs powers because any effects on other nations are "incidental" and "indirect"

State action that has only an incidental or indirect effect on foreign affairs does not intrude on the field of the federal government's foreign affairs power. *Gingery*, 831 F.3d at 1230–31 (city's installation of Korean "Comfort Women" monument did not intrude on federal foreign affairs power even though various Japanese officials had expressed disapproval of the monument); *cf. Movsesian*, 670 F.3d 1076–77 (statute expressing sympathy for Armenian Genocide victims had "more than some incidental or indirect effect" on foreign affairs, particularly since Turkey retaliated against France for similar law).

To support this necessary element of its field-preemption claim, BNSF relies primarily on the First Circuit's decision in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Dkt. 214 at 21–22. Yet Ecology's denial of a single permit is a far cry from the Massachusetts law at issue in *Natsios*, which, with limited exceptions, prohibited all state agencies from contracting with any company doing business with Burma. 181 F.3d at 45-47. The court held that the law was in conflict with a federal statute and an Executive Order addressing relations with Burma and, therefore, presented "a threat of embarrassment to the country's conduct of foreign relations regarding Burma." *Id*. at 55. The First Circuit also found it significant that the Massachusetts law generated protests from a number of U.S. trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations. *Id*. at 47.

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None of the circumstances are present here. In *Natsios*, federal executive policy was apparent through an Executive Order that imposed trade sanctions on Burma and declared a national emergency to deal with the threat to U.S. national security and foreign policy. *Natsios*, 181 F.3d at 48 (citing Exec. Order 13,047, 62 Fed. Reg. 28,301 (May 20, 1997)). Here, BNSF asks the Court to find that Ecology's decision to deny a single certification for one proposed coal terminal is in conflict with the President's generalized strategy to achieve "American energy dominance," even though the President's National Security Strategy mentions neither the Millennium terminal nor West Coast coal exports.

Although the instant case and *Natsios* could hardly be more dissimilar, BNSF argues that factors discussed by the *Natsios* court weigh in BNSF's favor. Dkt. 214 at 21. They do not. The *Natsios* court found that Massachusetts' anti-Burma law had more than an indirect or incidental effect on foreign relations because (1) the design and intent of the law was to affect the affairs of a foreign country; (2) Massachusetts's purchasing power put it in a position to effectuate that design and intent; (3) the effects of the law could be magnified if Massachusetts proved to be a bellwether for other governments; (4) the law had resulted in serious protests from other countries, ASEAN, and the European Union; and (5) the Massachusetts law diverged from the federal law in at least five ways, which raised the prospect of embarrassment for the country. *Natsios*, 181 F.3d at 53. First, as discussed above, Ecology's valid use of its Section 401 authority was neither designed nor intended to affect the affairs of a foreign country. Second, as discussed below, it has not had that effect. Third, states must decide whether to issue, condition, or deny Section 401 certifications based on applicable water quality standards and project-specific factors, not on the decisions of other jurisdictions; BNSF's "bellwether" argument is unpersuasive in this context. Fourth, unlike in *Natsios* where several countries explicitly protested Massachusetts' anti-Burma law, no country has objected to Ecology's action. Finally, Ecology's decision was made pursuant to, not in conflict with, federal law and there is no threat of embarrassment to the country.

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Moreover, BNSF's assertion that "[t]he Terminal appears to be the last real hope for implementing express federal foreign policy of coal export from the Powder River Basin to Asia," Dkt. 214 at 9, is both incorrect and in direct conflict with Lighthouse's own representations and the findings of the unchallenged EIS. In fact, Lighthouse already exports Powder River Basin Coal to Asian countries through the Westshore Terminal in British Columbia, Canada. *See* Dkt. 1 ¶ 50. Lighthouse has admitted that the purpose of proposed West Coast coal export facilities is to maximize its profits, not to provide Asian allies with coal—indeed, the EIS Market Study noted that existing terminals have physical capacity to satisfy Lighthouse's export needs. Dkt. 213-2 at 2–12, 5–8 (documenting planned expansions and new terminals). Other Western U.S. coal mines export coal to Asian markets from terminals as far away as Mexico, Dkt. 213-13 at 20 (Schwartz Rebuttal Rep.), and there is coal terminal capacity on the East and Gulf coasts, Dkt. 213-2 at 2–11, 2–17 (EIS Market Study). Even assuming that BNSF is correct that some companies in Japan would prefer to buy coal from Millennium if it were built, the Foreign Affairs Doctrine requires far more to field-preempt a state action.

C. No Equitable Cause of Action is Available to BNSF

Finally, BNSF has no cause of action to claim foreign affairs preemption of a regulatory decision to which it was not a party. In its Complaint, BNSF pleaded its foreign affairs claim under 42 U.S.C. § 1983, Dkt. 121 ¶ 126, which requires a plaintiff to "assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Because the Foreign Affairs Doctrine confers no such individual right, BNSF has shifted tactics in its brief, arguing that it has an "equitable cause of action" to challenge Ecology's Section 401 decision under foreign affairs preemption. Dkt. 214 at 23.

BNSF is mistaken. In a foreign affairs "preemption case, the availability of [an equitable] cause of action hinges on the plaintiff's being subject to an enforcement or other regulatory action." *Gingery*, 831 F.3d at 1233 (Korman, J., concurring); *see also id.* at 1231

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1 n.9 (majority opinion) (noting the Judge Korman "may very well be correct" that plaintiffs lack
2 a cause of action for foreign affairs preemption but declining to "address this issue of first
3 impression for our Court" that was "not raised by either party to the district court or before
4 us"). It is undisputed that Ecology's 401 decision did not subject BNSF to an enforcement or
5 other regulatory action. Whatever equitable cause of action Lighthouse may have had under
6 the Foreign Affairs Doctrine, it did not pleaded one—and as a third party to the Section 401
7 decision, BNSF has none.

8 BNSF argues that it has an equitable cause of action under the Foreign Affairs Doctrine
9 because it is "an interested party in this case" that would be "directly affected by its outcome,"
10 noting that the Court permitted it to intervene. Dkt. 214 at 22–23. BNSF misses the point.
11 The Court found that BNSF had a protectable interest and Article III standing for the purposes
12 of intervention. Dkt. 47 at 5, 10. That ruling does not bear on whether BNSF has an equitable
13 cause of action under the Foreign Affairs Doctrine, which is entirely separate from the issue of
14 Rule 24(a) intervention or Article III standing. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control*
15 *Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) ("[T]he absence of a valid (as opposed to
16 arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's
17 statutory or constitutional *power* to adjudicate the case.") (quotation marks and citation
18 omitted).

19 Instead, the availability of an equitable cause of action depends on a party's
20 "prudential" standing. *See Gingery*, 831 F.3d at 1233 (Korman, J., concurring). That is, the
21 question is whether a plaintiff's claimed right is "within the zone of interests to be protected or
22 regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing*
23 *Serv. Organizations., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (*Data Processing*). Although the
24 zone of interests test applies principally in cases challenging regulatory actions under the
25 Administrative Procedure Act, 5 U.S.C. § 702, it also applies in such challenges based on an
26 implied right of action in a statute or the constitution. *See Clarke v. Sec. Indus. Ass'n*, 479

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U.S. 388, 400 n.16 (1987). An equitable cause of action for foreign affairs preemption is available to BNSF only if it falls "within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." *Clarke*, 479 U.S. at 396 (quoting *Data Processing*, 397 U.S. at 153).

BNSF's asserted economic interests in Millennium are not within the zone of interests protected by the Foreign Affairs Doctrine. As explained in State Defendants' Motion, Dkt. 208 at 19–20, "the foreign affairs power, like the Supremacy Clause, creates no individual rights." *Gerling Glob. Reinsurance Corp. v. Garamendi*, 400 F.3d 803, 810 (9th Cir. 2005) (Graber, J., concurring in the result). The "executive Power" vested in Article II is a structural one "recogniz[ing] the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 610–611 (1952) (Frankfurter, J., concurring)). Those constitutional provisions do not give BNSF an equitable cause of action for foreign affairs preemption.

III. CONCLUSION

For the foregoing reasons, State Defendants and WEC respectfully request that the Court grant them summary judgment and deny BNSF's cross-motion for summary judgment on BNSF's Foreign Affairs Doctrine claim.

DATED this 8th day of March 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 8th day of March 2019.

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