

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:
Application No. 2013-01

TESORO SAVAGE, LLC

VANCOUVER ENERGY DISTRIBUTION
TERMINAL

CASE NO. 15-001

BNSF RAILWAY COMPANY'S
MOTION FOR LEAVE TO FILE
AMICUS BRIEF IN SUPPORT OF
VANCOUVER ENERGY'S
MOTION TO DISMISS RAIL
OPERATION ISSUES AND THE
PORT OF VANCOUVER'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

I. RELIEF REQUESTED

For the reasons discussed below, BNSF Railway Co. ("BNSF") respectfully moves for leave to file the accompanying amicus brief in support of applicant Tesoro-Savage Petroleum Terminal LLC, d/b/a Vancouver Energy's ("Vancouver Energy") motion to dismiss filed on March 29, 2016 and the Port of Vancouver's motion for partial summary judgment filed on March 29, 2016.

II. BNSF'S INTERESTS

The outcome of this proceeding greatly interests BNSF. The proposed Vancouver Energy Terminal (the "Project") involves construction of a terminal facility that can accept crude oil deliveries by rail. These crude oil shipments will be made using BNSF's rail lines, which are part of the interstate rail system subject to the jurisdiction of the Surface Transportation Board ("STB").

Although BNSF is not a party to this proceeding, access to BNSF's system is clearly relevant to the Project. As a rail carrier subject to the jurisdiction of the STB, BNSF has specialized knowledge regarding the Interstate Commerce Commission

Termination Act (“ICCTA”) and related railroad preemption issues raised by the pending motions. The accompanying brief explains BNSF’s position in detail.

III. BNSF’S FAMILIARITY WITH THE ISSUES RAISED

This proceeding raises serious questions regarding the extent to which federal law preempts state and local law, and the extent to which state and local government may directly regulate BNSF’s interstate rail system or indirectly regulate that system by imposing requirements on parties seeking to ship commodities by interstate rail. As a rail carrier operating under the jurisdiction of the STB, BNSF regularly encounters precisely this issue in various jurisdictions, including the State of Washington. In fact, the seminal case addressing the scope of federal preemption under ICCTA involved an effort by King County, Washington, and the City of Auburn, Washington, to impose environmental review and permit requirements on BNSF’s operations in this State. *See City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). The *City of Auburn* case and others like it have provided BNSF with knowledge that is directly relevant to the resolution of the matters currently before EFSEC - knowledge that is not likely held by the parties to this proceeding.

IV. SPECIFIC ISSUES ADDRESSED IN THE AMICUS BRIEF

The accompanying brief provides information about the context for and rationale behind railroad preemption. The brief introduces some of the policy reasons behind ICCTA preemption and the reasons why it is critical to BNSF’s operations. The brief further explains why the federal regulatory scheme affecting railroads is thorough and comprehensive and requires no regulatory supplementation by state agencies such as EFSEC. Last, the brief describes the minimal benefit that would accrue from attempting to use state law to analyze and regulate activities on the interstate rail system given the

speculative nature of any impacts to that system which would arise from the Project, and the significant risk to these proceedings associated with doing so.

V. REASONS FOR FILING THE BRIEF

Additional argument on the issue of ICCTA preemption is needed in this proceeding. First, no other party to this proceeding is a rail carrier, and none are as familiar as BNSF with the railroad preemption questions raised by the pending motion. Second, federal preemption of state environmental law is not a question that arises in the normal course of business for most industries, including the parties to this proceeding. But it is a question that merits careful attention. The accompanying brief draws on BNSF's experience as a rail carrier and provides a perspective that would not otherwise be available to EFSEC in the current pleadings.

VI. CONCLUSION

For the reasons stated above, BNSF respectfully requests that EFSEC grant its motion for leave to file the accompanying brief as an *amicus curiae*.

Dated this 4th day of May, 2016.

TUPPER MACK WELLS PLLC



Matthew D. Wells, WSBA No. 22318
2025 First Avenue, Suite 1100
Seattle, WA 98121
Phone: 206-493-2300
Fax: 206-493-2310
Email: wells@tmw-law.com

Counsel for BNSF Railway Company

CERTIFICATE OF SERVICE

VIA E-MAIL & FIRST CLASS U.S. MAIL:

Energy Facility Site Evaluation Council

PO Box 43172
Olympia, WA 98504-3172
E: efsec@utc.wa.gov

Assistant Attorney General for EFSEC

Ann C. Essko, AAG
WA State Attorney General's Office
Government Operations Division
PO Box 40108
Olympia, WA 98504-0108
anne@atg.wa.gov

Energy Facility Site Evaluation Council

Stephen Posner, Manager
Energy Facility Site Evaluation Council
Utilities & Transportation Commission
P.O. Box 43172
Olympia, WA 98504-3172
E: sposner@utc.wa.gov

VIA E-MAIL:

Clark County Board of Commissioners

Taylor Hallvik
Deputy Prosecuting Attorney
Clark County Board of Commissioners
Civil Division
PO Box 5000
Vancouver, WA 98666-5000
E: taylor.hallvik@clark.wa.gov;
LA: nicole.davis@clark.wa.gov

Counsel for the Environment

Matthew R. Kernutt, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
E: Mattk1@atg.wa.gov
LA: MeaghanK@atg.wa.gov

City of Vancouver

E. Bronson Potter
Karen L. Reed
City of Vancouver
PO Box 1995
Vancouver, WA 98668-1995
E: Bronson.potter@cityofvancouver.us
karen.reed@cityofvancouver.us
LA: tammy.zurn@cityofvancouver.us

City of Vancouver

Susan Drummond
Counsel for the City of Vancouver
Law Office of Susan Elizabeth Drummond
5400 Carillon Pt., Bldg. 5000
Kirkland, WA 98033-7357
E: susan@susandrummond.com

Columbia Waterfront LLC

Linda R. Larson
Marten Law, PLLC
1191 Second Avenue, Suite 2200
Seattle, WA 98101
E: llarson@martenlaw.com
LA: eherlihv@martenlaw.com

Columbia Waterfront LLC

Daniel Timmons
Marten Law, PLLC
1001 SW Fifth Avenue, Suite 2150
Portland, OR 97204
E: dtimmons@martenlaw.com

Columbia Riverkeeper, et al; Climate Solutions; ForestEthics; Friends of the

Columbia Gorge; Fruit Valley Neighborhood Association; Sierra Club; Spokane Riverkeeper, and Washington Environmental Council

Kristen L. Boyles
Janette K. Brimmer
Anna Sewell
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
E: kboyles@earthjustice.org;
jbrimmer@earthjustice.org;
asewell@earthjustice.org;
LA: epowell@earthjustice.org

David Bricklin
Bryan Telegin
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
E: bricklin@bnd-law.com
telegin@bnd-law.com
LA: cahill@bnd-law.com
miller@bnd-law.com

International Longshore Warehouse Union Local 4

Cager Clabaugh
Jared Smith
International Longshore Warehouse Union
Local 4
1205 Ingalls Road
Vancouver WA 98660
E: cagerclabaugh@aol.com;
mithared@yahoo.com

City of Washougal

Donald L. English
Scott Russon
John Karpinski
English & Marshall, PLLC
12204 SE Mill Plain, Suite 200
Vancouver, WA 98684
E: English@elmbv.com;
russon@elmbv.com; karpid@comcast.net

City of Spokane

Nancy Isserlis, City Attorney
Michael J. Piccolo, Asst City Attorney
Office of the City Attorney
5th Floor Municipal Building
W. 808 Spokane Falls Blvd.
Spokane, WA 99201-3326
E: mpiccolo@spokanecity.org;
nisserlis@spokanecity.org
LA: rimus@spokanecity.org

Port of Vancouver, USA

David F. Bartz, Jr.
Alicia L. ("Lisa") Lowe
Schwabe, Williamson & Wyatt, P.C.
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204-3795
E: dbartz@schwabe.com;
alowe@schwabe.com

Port of Vancouver, USA

Connie Sue Martin
Schwabe, Williamson & Wyatt, P.C.
1420 - 5th Avenue, Suite 3400
Seattle, WA 98101
E: csmartin@schwabe.com
LA: bbratton@schwabe.com

Confederated Tribes of the Umatilla Indian Reservation

Brent H. Hall
Office of Legal Counsel
Confederated Tribes of the Umatilla
Indian Reservation
46411 Timine Way
Pendleton, OR 97801
E: brenthall@ctuir.org

Columbia River Inter-Tribal Fish Commission (CRITFC)

Julie A. Carter
Robert C. Lothrop
CRITFC
700 NE Multnomah Street, Suite 1200
Portland, OR 97213
E: carj@critfc.org; lotr@critfc.org

Confederated Tribes and Bands of the Yakama Nation

Joe Sexton
Amber Penn-Roco
Galanda Broadman PLLC
8606 – 35th Avenue NE, Suite L1
PO Box 15146
Seattle, WA 98115
E: joe@galandabroadman.com
amber@galandabroadman.com
LA: molly@galandabroadman.com

WA State Department of Natural Resources

Robert W. Ferguson, AG
Terence A. Pruitt, AAG
Natural Resources Division
PO Box 40100
Olympia, WA 98504-0100
E: terryp@atg.wa.gov;
resolyef@atg.wa.gov; kims2@atg.wa.gov

Department of Commerce

Brian Bonlender, Director
Department of Commerce
1011 Plum Street SE
Olympia, WA 98504-2525
E: brian.bonlender@commerce.wa.gov

Department of Ecology

Maia D. Bellon, Director
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
E: maia.bellon@ecy.wa.gov

Utilities & Transportation Commission

David Danner
Utilities & Transportation Commission
PO Box 47250
Olympia, WA 98504-7250
E: ddanner@utc.wa.gov

Department of Transportation

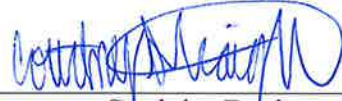
Megan White
Department of Transportation
PO Box 47300
Olympia, WA 98504-7300
E: whitem@wsdot.wa.gov

WA Department of Fish and Wildlife

Jim Unsworth, Director
Director of Fish and Wildlife
600 Capitol Way N
Olympia, WA 98501-1091
E: director@dfw.wa.gov

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by authorized method of service pursuant to WAC 463-30-120(3).

EXECUTED at Seattle, Washington on this 4th day of May, 2016.



Courtney Straight, Declarant

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