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

REPLY IN SUPPORT OF STATE DEFENDANTS MOTION FOR PARTIAL DISMISSAL AND MOTION FOR ABSTENTION

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I. INTRODUCTION

As a matter of law, the Plaintiffs have not stated a preemption claim under the Interstate Commerce Commission Termination Act (ICCTA) or the Ports and Waterways Safety Act (PWSA). Although Plaintiffs try to concoct factual issues to keep their ICCTA claim alive, they fail to address the only factual issue that is relevant here: whether Millennium Bulk Terminals is a rail carrier or will operate its terminal under the auspices of a rail carrier. Plaintiffs point to no facts in their complaints demonstrating that Millennium's project meets this threshold requirement. Their ICCTA claims must therefore be dismissed.

The PWSA claim fares no better. In denying environmental and land use approvals for a large-scale industrial project, the State Defendants are not regulating vessels any more than they are regulating transportation by a rail carrier. But even if they were, Millennium identifies no Coast Guard regulations that conflict with the state decisions being challenged and Millennium concedes that PWSA Title II field preemption does not apply. Thus, the PWSA claim must also be dismissed.

In addition, all claims against Commissioner Franz must be dismissed under the Eleventh Amendment. The relief sought by Plaintiffs against Commissioner Franz strikes at the heart of the State's sovereign control over its submerged lands. In opposing dismissal, Plaintiffs rely on inapposite case law and are confused on the difference between the State making decisions in its proprietary versus regulatory capacity. Because Commissioner Franz is immune from suit, Plaintiffs' claims against her are barred as a matter of law.

Last, the Court should abstain from the remainder of the case because of several simultaneous lawsuits proceeding in state tribunals. The state lawsuits are further along and their resolution will moot or alter the claims in the federal suit. And contrary to Plaintiffs' assertions, there is no presumption against *Pullman* or *Colorado River* abstention in section 1983 cases or in cases involving the Commerce Clause. Because the factors for abstention under either doctrine are met, this case should be stayed while the state cases play out.

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II. ARGUMENT

A. Commissioner Franz is Immune From Suit Under the Eleventh Amendment as Set Forth in *Coeur d'Alene Tribe*. None of the Cases Relied Upon By Plaintiffs Involve the State's Uniquely Sovereign Interest in Its Management Discretion and Control Over the State's Aquatic Lands

The Plaintiffs' claims against Commissioner Franz center on the State's authority and discretion to determine who uses, and for what purposes, state-owned aquatic lands. *See* Dkt. 1, at 12–13, 31–32; Dkt. 1-2, at 1–11; Dkt. 22-1, at 15. The State's control of its navigable waters was *the* sovereign interest implicated in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), where the Coeur d'Alene Tribe sought declaratory and injunctive relief establishing its right to use and occupy Idaho's submerged lands. *Coeur d'Alene Tribe*, 521 U.S. at 265. That same sovereign interest was at issue in *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1073–74 (9th Cir. 2014). Both *Lacano* and *Coeur d'Alene Tribe* stand for the proposition that when an action implicates "the state's control over submerged lands, federal courts lack jurisdiction to hear the case." *Locano*, 765 F.3d at 1074. Because Plaintiffs' requested relief here goes right to the State's control over its submerged lands, their claims against Commissioner Franz are barred.

As Plaintiffs make clear in their complaints, the relief they seek against Commissioner Franz is a declaration invalidating the State's sublease denial, and an injunction limiting the Commissioner's discretion in evaluating future sublease applications. Dkt. 1, at 51–53 ¶¶ A, F, G, H, I, J; Dkt. 22-1, at 24–25 ¶¶ 127, 128, 132, 133, 135. This is an attempt to establish a possessory interest in the State's aquatic lands. While BNSF asserts that a sublessor such as Millennium would take "only a leasehold" to state-owned aquatic lands, Dkt. 74, at 14 n.19, such a leasehold would impair a core state property interest by subverting the State's discretion to determine who uses state property. Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

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Plaintiffs cite several cases in support of their position that *Ex parte Young* should apply in this matter. Dkt. 74, at 13–15; Dkt. 75, at 10–12. However, none of the cases relied upon by Plaintiffs involved the State's management authority over its aquatic lands. Indeed, the State's interest at stake here is not merely an interest in its tax revenue.[1] The State's interest in this case goes directly to *the* sovereign interest addressed in *Coeur d'Alene*: namely the State's control over the use of its aquatic lands. As Justice O'Connor recognized in her concurring opinion, "[w]e have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters." *Coeur d'Alene Tribe*, 521 U.S. at 289. Accordingly, Plaintiffs' claims for relief against Commissioner Franz fall directly within the *Coeur d'Alene* exception to *Ex parte Young*, as they are "so much of a *divestiture* of the state's sovereignty as to render the suit as one *against the state itself*."[2] The Eleventh Amendment bars them.[3]

B. Plaintiffs Fail to Answer the ICCTA Threshold Question of Whether the Activity Being Regulated Constitutes Transportation by a Rail Carrier

The threshold issue in any ICCTA preemption claim is whether the regulated activity falls within the exclusive jurisdiction of the Surface Transportation Board. *Or. Coast Scenic*

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[1] *See Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1043 (9th Cir. 2000); *In re Ellett*, 254 F.3d 1135, 1143 (9th Cir. 2001); *Duke Energy Trading & Mktg., LLC v. Davis*, 267 F.3d 1042 (9th Cir. 2001). The *Duke Energy* court also recognized that, unlike the authority to commandeer certain contracts at issue there, the State's control of its navigable waters uniquely implicates sovereign interests. Such waters are infused with a public trust the State itself is bound to respect. *See Duke Energy*, 267 F.3d at 1054 n.8.

[2] *Agua Caliente Band*, 223 F.3d at 1048. BNSF argues that because State officials are the parties in interest in this case, they cannot assert Eleventh Amendment immunity. Dkt. 74, at 12 n.14. However, for purposes of sovereign immunity, it is well established that a suit against a state official acting in her official capacity is treated as if it is a suit against the state. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984).

[3] Millennium confuses the State's role as a regulator with the State's proprietary role as a landowner. Dkt. 75, at 18. It is the latter under which Commissioner Franz manages the State's sovereign interests in its aquatic lands. *See, e.g.*, Wash. Rev. Code 79.105.020. Plaintiffs' arguments here are similar to the arguments in *Hood Canal Sand & Gravel, LLC v. Brady*, No. C14-5662 BHS, 2014 WL 5426718, at *4 (W.D. Wash. Oct. 22, 2014). Like Millennium, Hood Canal Sand and Gravel asserted its right to lease state-owned aquatic lands, and sought to limit the State's management discretion under the guise of merely seeking an order requiring compliance with federal and state law. *Hood Canal Sand & Gravel*, 2014 WL 5426718, at *4. Hood Canal Sand and Gravel's declaratory and injunctive relief would have had the effect of "prevent[ing] the State's officers from exercising their authority over the bedlands." *Id.* Accordingly, their action against the Commissioner was barred under the Eleventh Amendment. *Id.* at 5.

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R.R., LLC v. Or. Dep't of State Lands, 841 F.3d 1069, 1072–73 (9th Cir. 2016). Federal courts and the Board have held over and over that the Board's jurisdiction, and therefore ICCTA preemption, extends only to transportation-related activities conducted by a rail carrier or under the auspices of a rail carrier.[4] Parties agree that Millennium is not a rail carrier, and no one argues that the terminal will be operated under the auspices of a rail carrier. The inquiry stops here; the ICCTA preemption claims must be dismissed.

Plaintiffs ignore this threshold question and close their eyes to the substantial body of case law mandating that the threshold question be answered in favor of dismissal. Indeed, of the twelve cases cited *supra* in footnote 4, the only decision that Plaintiffs even try to distinguish is *Valero*. Dkt. 74, at 19–20; Dkt. 75, at 15. But their attempts to distinguish *Valero* fail.

Valero, like Millennium, applied for permits to build a transloading facility to offload product from trains. *Valero Ref. Co.*, S.T.B. No. FD 36036 (2016), 2016 WL 5904757, at *1; Dkt. 1, at 33 ¶ 161; Dkt. 1, at 37 ¶ 179. The City of Benicia, like Cowlitz County and the Department of Ecology, completed an environmental impact statement (EIS) finding that there would be several negative environmental impacts arising from the project, including impacts related to rail. *Valero*, 2016 WL 5904757, at *1; Dkt. 1-3, at 8. The City, like the County and Ecology, denied permits for the project based in part on the rail impacts identified in the EIS. *Valero*, 2016 WL 5904757, at *2; Dkt. 1-3, at 49–52; Dkt. 1-1, at 5–11. Valero, like

[4] *Or. Coast Scenic R.R.*, 841 F. 3d at 1073–74; *N.Y. & Atlantic Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 71–75 (2d Cir. 2011) (no jurisdiction over transloading facility that was not operated by a rail carrier or on behalf of a rail carrier); *Hi-Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308–09 (3d Cir. 2004) (no jurisdiction over solid waste disposal facility leasing land from railroad but not operating facility on behalf of railroad); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1332–37 (11th Cir. 2001) (no jurisdiction over zoning decision that prohibited facility on land leased by the railroad); *CFNR Operating Co. v. City of Am. Canyon*, 282 F. Supp. 2d 1114, 1118–19 (N.D. Cal. 2003) (no ICCTA preemption when rail carrier simply carries goods to bulk transfer operator); *Wash. & Idaho Ry.*, S.T.B. No. FD 36017 (2017), 2017 WL 1037370, at *5; *Valero Ref. Co.*, S.T.B. No. FD 36036 (2016), 2016 WL 5904757, at *3; *SEA-3 Inc.*, S.T.B. No. FD 35853 (2015), 2015 WL 1215490, at *4; *City of Alexandria, Va.*, S.T.B. No. FD 35157 (2009), 2009 WL 381800, at *1; *Town of Babylon & Pinelawn Cemetery*, S.T.B. No. FD 35057 (2008), 2008 WL 275697, at *4; *Town of Milford, Mass.*, S.T.B. No. FD 34444 (2004), 2004 WL 1802301, at *2–3; *Hi Tech Trans, LLC*, S.T.B. No. FD 34192 (2003), 2003 WL 21952163, at *3.

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Millennium and BNSF, argued that the City was preempted from relying on rail impacts as a basis for permit denial. *Valero*, 2016 WL 5904757, at *2; Dkt. 1, at 43–44 ¶¶ 216–19; Dkt. 22-1, at 17 ¶¶ 74–78. The Board disagreed because Valero, like Millennium, is not a rail carrier and was not performing functions on behalf of a rail carrier. *Valero*, 2016 WL 5904757, at *3; Dkt. 22-1, at 9 ¶ 45. The Board reached that decision even while noting that the City may have been preempted had it required mitigation for the same rail impacts that partially formed the basis for permit denial. *Valero*, 2016 WL 5904757, at *4. The same result must be reached here.

Rather than addressing the State Defendants' on-point case law, Plaintiffs cite decisions where the activity being regulated clearly constituted activity by a rail carrier or under the auspices of a rail carrier.[5] The Surface Transportation Board had exclusive jurisdiction over the activities, and Plaintiffs' case law is therefore inapposite.

Plaintiffs bypass the threshold question and go straight to the issue of whether the state or local regulation poses an unreasonable burden on railroading. Dkt. 74, at 16; Dkt. 75, at 14. However, that aspect of the analysis would only come into play if Millennium were engaged in transportation by a rail carrier, which it is not. But even if that aspect of the analysis was relevant the ICCTA claims would still fail as a matter of law. As did the City of Benicia in *Valero*, the Department of Ecology denied a permit to Millennium based only in part on rail impacts.[6] Ecology, like the City, did not attempt to mitigate for those impacts by, for example,

[5] *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1027–28 (9th Cir. 1998) (involving BNSF's reopening of the Stampede Pass rail line); *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096 (9th Cir. 2010) (attempt to directly limit the amount of emissions from idling trains and impose reporting requirements on railyard operators); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 242 (3rd Cir. 2007) (involved operation of a transloading facility by a railroad through a contracted agent); *CSX Transp.*, S.T.B. No. FD 34662 (2005), 2005 WL 1024490, at *1 (direct ban on transportation of certain hazardous commodities by rail); *Bos. & Me. Corp. & Springfield Terminal R.R. Co.*, S.T.B. No. FD 35749 (2013), 2013 WL 3788140, at *1 (direct ban on freight rail transportation to warehouse), *distinguished by Valero*, 2016 WL 5904757, at *3 (distinguishing *Boston & Maine* as involving a regulation that would have "stopped a rail carrier from operating its existing common carrier rail service over the line in question.").

[6] Notwithstanding its attempt to now distance itself from its decision, Dkt. 61, Cowlitz County, which is not a party to this case, denied a permit on the same basis. Dkt. 1-3, at 14–26. In contrast, the former

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imposing train lengths on BNSF or requiring that BNSF only deliver goods during certain hours of the day. If it had, such action would likely have been preempted. *Valero*, 2016 WL 5904757, at *4. And contrary to Plaintiffs' arguments, Ecology has not ordered BNSF to run fewer trains on their lines. Rather, Ecology denied a permit to a non-rail-carrier based on environmental impacts. Such action is not preempted by ICCTA. *Supra*, n.4.

BNSF tries to avoid Rule 12(b)(6) dismissal stage by arguing that ICCTA preemption analysis is, in all instances, fact-bound. Dkt. 74, at 21–22. Yet none of the cases cited by BNSF involve the threshold question of whether the regulated activity is transportation by a rail carrier or under the auspices of a rail carrier.[7] Plaintiffs' complaints include no factual allegations nor do Plaintiffs argue that Millennium is a rail carrier or will operate its terminal under the auspices of a rail carrier. Thus, dismissal at this stage is warranted.

Last, BNSF claims that this case is not actually about the State Defendants' denial of permits for Millennium's terminal but is instead about "future rail transport-dependent projects where politically disfavored commodities are involved." Dkt. 74, at 19, 21 (BNSF challenges actions and inactions "not isolated" to the terminal). BNSF does not identify in its complaint any alleged future decisions that the State Defendants may or may not make on projects that may or may not get proposed and that may or may not involve rail transport. And with good reason, because such a claim would be quintessentially non-justiciable. *See, e.g.*, *Texas v. United States*, 523 U.S. 296, 300 (1998) (claim is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all).

Commissioner of the Department of Natural Resources denied a sublease for the project based primarily on the company's inability to demonstrate financial viability. Dkt. 64-1, at 10.

[7] *CSX Transp.*, 2005 WL 1024490, at *1 (direct ban on rail transport); *N.Y. Susquehanna*, 500 F.3d at 242 (operation of transloading facility by railroad's agent); *Dakota, Minn. & E. R.R. Corp. v. S. Dakota*, 236 F. Supp. 2d 989, 997 (D. S.D. 2002) (amendment of eminent domain laws as applied to railroads); *Bos. & Me. Corp. & Town of Ayer*, S.T.B. No. FD 33971 (2001), 2001 WL 458685, at *1, *distinguished by Fla. E. Coast Ry.*, 266 F.3d at 1331 n.5 (Town of Ayer sought to restrict a rail carrier's construction of an unloading facility); *Borough of Riverdale*, S.T.B. No. FD 33466 (1999), 1999 WL 715272, at *1 (railroad's operation of a truck terminal and corn processing plant).

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At any rate, a cursory review of BNSF's complaint demonstrates that this case is very much about the State Defendants' denial of necessary approvals for Millennium's proposal. Dkt. 22-1, at 8–16 ¶¶ 43–73; Dkt. 22-1, at 20–25 ¶¶ 92–135. As Millennium itself acknowledges, this case is an "as-applied" and "constitutional challenge to state permitting decisions." Dkt. 75, at 20–21. Plaintiffs' allegations that State Defendants made their decisions based on an animus towards coal export does not alter the nature of this case, and BNSF's ad hoc attempt to now recast the case as something else cannot prevent dismissal of the ICCTA preemption claims.

C. Denial of a Permit Based Partly on Vessel Impacts Is Not the "Regulation of Vessels" and Is Not Preempted Under the Ports and Waterways Safety Act

The PWSA applies only where state or local regulations might be preempted under Title I or Title II of the Act. *United States v. Locke*, 529 U.S. 89, 109–11 (2000). Here, the Department of Ecology denied a water quality certification for the project based on Millennium's inability to demonstrate compliance with water quality standards and on numerous environmental impacts identified in the EIS.[8] This does not regulate vessels, so the PWSA is not implicated. *See Portland Pipe Line Co. v. City of S. Portland*, 288 F. Supp. 3d 321, 437 (D. Me. 2017) (upholding ordinance that banned loading of crude oil into tankers and construction of structures for that purpose, noting that the PWSA is "agnostic" about the number of transfer facilities that get built).

Citing no authority, Millennium argues that denying a permit in part based on vessel impacts is the "regulation" of vessels because it limits the number of vessels on the Columbia River. Dkt. 75, at 17. Not true. While the State potentially could limit vessel transits in the Columbia River by promulgating vessel traffic regulations, that is not what it did here.

Silently conceding that Title II field preemption does not apply, Millennium argues that Ecology's denial of its permit is conflict preempted by Title I. Dkt. 75, at 16–17. In doing so,

[8] Cowlitz County, which is not a party to this case, also cited vessel impacts as one of the multiple environmental impacts justifying permit denial. Dkt. 1-3, at 26–28.

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Millennium does not and could not argue that the Coast Guard has promulgated vessel traffic regulations for the Columbia River, which would be the starting point for any conflict preemption analysis. *Locke*, 529 U.S. at 110 ("relevant inquiry for Title I preemption is whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all."). Unless and until the Coast Guard adopts a regulation, any state regulation "need not give way under the Supremacy Clause." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 172 (1978).

Despite the lack of Coast Guard regulations, Millennium argues that denying a water quality permit based partly on vessel impacts to the Columbia River is impermissible because such a decision does not relate to the "peculiarities" of the Columbia River. Dkt. 75, at 17. Actually, concerns about vessel traffic impacts in the Columbia River are based on marine accident transportation modeling and existing vessel traffic in the Columbia River. Dkt. 1-1, at 11. Thus, even if Ecology's denial of the permit did constitute "regulation of vessels," which it does not, Millennium's PWSA claim must still be dismissed as a matter of law.

D. The Court Should Abstain From Deciding the Remainder of the Case

There is no special presumption against abstention in this case. Federal courts abstain under non-*Colorado River* doctrines, such as *Pullman*, when their obligation to exercise jurisdiction gives way to "weightier considerations of constitutional adjudication and state-federal relations." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). *Colorado River* deferral applies when these weightier considerations are absent, but still there are "circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration" *Colo. River*, 424 U.S. at 818. Here, the "weightier considerations of constitutional adjudication and state-federal relations" allow for *Pullman* abstention. In addition, the applicable *Colorado River* factors strongly support a stay. *See* Dkt. 62, at 28–32. Several of these factors—the state court's adequacy, the spin-off character of this case, certainty that all issues can be resolved in state

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court, avoidance of piecemeal litigation, and greater advancement of the parallel state cases—weigh especially heavily. There are, therefore, compelling reasons for this Court to stay, in deference to state court proceedings, allowing for a later return to determine whether the constitutional claims have been altered or mooted.

1. There Is No Presumption Against Abstention Peculiar to This Case

In arguing against *Pullman* abstention, Plaintiffs wrongly cite *Younger* abstention cases. *See Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 883, 888 (9th Cir. 2011) (*Pullman* serves different objectives and may be appropriate when *Younger* is not). Whereas *Younger* abstention aims to avoid interference with state functions, *Pullman* defers to state court interpretations of state law, largely to avoid premature constitutional adjudication. *Potrero Hills Landfill*, 657 F.3d at 883, 889. Consequently, *Younger* abstention requires dismissal whereas *Pullman* allows for a stay, so that the federal court can later determine whether the plaintiff's constitutional claims have been mooted or altered. To take one example, Plaintiffs cite a *Younger* abstention case, *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979), and claim it creates a presumption against abstention for section 1983 claims. Dkt. 75, at 18.[9] Not so. *Pullman* was at issue in *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985), where the court rejected this argument, holding that there is "no *per se* civil rights exception to the abstention doctrine," and that *Pullman* abstention was proper in that section 1983 case. *Pearl Inv. Co.*, 774 F.2d at 1463 (quoting *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983)).

Plaintiffs then argue that "invocation of the Constitution's Commerce Clause presents special reasons to avoid abstention," resting on another *Younger* abstention case, *Harper v.*

[9] Plaintiffs cite a string of cases. *See* Dkt. 75, at 18 n.79. None supports Plaintiffs' conclusion. *United Parcel Serv., Inc. v. Cal. Pub. Utils. Comm'n*, 77 F.3d 1178 (9th Cir. 1996) doesn't address the subject. *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985) stands for exactly the opposite proposition. *Myer v. County of Orange*, 925 F.2d 1470 (9th Cir. 1991) (unpublished) did not concern any recognized abstention doctrine. And *Martinez v. Newport Beach City*, 125 F.3d 777 (9th Cir. 1997), *overruled by Green v. City of Tucson*, 255 F.3d 1086 (9th Cir. 2001), cited later, Dkt. 75, at 19 n.81, makes the very point we make here—that the *Tovar* concern about 1983 suits is unique to *Younger* abstention suits.

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Public Service Commission of West Virginia, 396 F.3d 348 (4th Cir. 2005). Dkt. 75, at 19. This misreads *Harper*, which focused narrowly on a state law that 'by its very nature served to impede interstate commerce.' *Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 663–64 (7th Cir. 2007). There is no rule that merely invoking the commerce clause creates a presumption against abstention. *See, e.g.*, *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989) (mere assertion of a substantial constitutional challenge to state action does not compel the exercise of federal jurisdiction); *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1 (1987) (abstaining under *Younger* to avoid unnecessary determination of federal constitutional questions, including commerce clause claims).

Plaintiffs argue that abstention would deprive them of a federal forum for their constitutional claims. Dkt. 75, at 18. Neither *Pullman* nor *Colorado River* abstention would do that.[10] Resolution of the underlying state claims may moot or alter those claims; but that is a matter for the federal court to determine, after state court resolution of the state law claims.

2. State Defendants Showed That *Pullman* Criteria Are Satisfied; and Plaintiffs' Cited Authorities Are Not to the Contrary

Plaintiffs challenge four state and local decisions made within the State's proprietary or regulatory capacity, which touch upon a sensitive area of social policy. Plaintiffs argue that the Ninth Circuit held, in *Fireman's Fund Insurance Co. v. City of Lodi, California*, 302 F.3d 928 (9th Cir. 2002), that state enforcement of its environmental laws is not an area of sensitive social policy. Dkt. 75, at 21. Not so. It held that, where what was contemplated was a partnership between local and federal government in addressing the complex and costly problems associated with hazardous waste remediation, particular questions about the contours of that partnership were not best left to the state. *Fireman's Fund Ins.*, 302 F.3d at 940. The case did not address whether the state's enforcement of its environmental laws is or is not a

[10] *Pullman* anticipates a return to federal court and, in *Colorado River* cases, the Ninth Circuit requires a stay rather than dismissal, ensuring a federal forum if necessary. *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1166 (9th Cir. 2017).

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sensitive area of social policy.[11]

The second *Pullman* element—that the constitutional issues may be avoided or altered depending on the state proceedings—is also met. Plaintiffs' foreign and interstate commerce clause claims rest on a list of actions by the State, alleged to be contrary to state law. *See* Dkt. 1, at 45–47 ¶¶ 224–39 (alleged state law violations underlying foreign commerce clause claim); Dkt. 22-1, at 21–22 ¶¶ 99-109 (same); Dkt. 1, at 47–48 ¶¶ 240–48 (alleged state law violations underlying interstate commerce clause claim); Dkt. 22-1, at 22–23 ¶¶ 110–18 (same); Dkt. 22-1, at 23–24 ¶¶ 119–26 (alleged state law violations underlying foreign affairs doctrine claim). These actions are the basis for each of the constitutional claims. Plaintiffs seek to invalidate these actions in state court while also seeking their invalidation in this Court. If the state court grants this relief, then this Court will no longer need to consider the constitutional claims. Indeed, only state court can grant full relief because it is the only court reviewing the County's denial of Millennium's shoreline permits.

Plaintiffs respond that their constitutional claims are not the same as the claims pending in state court. Dkt. 75, at 22.[12] No matter that the state court might give them all the relief they ask for, they just want to litigate the constitutional issues. But this is precisely what abstention doctrines are designed to prevent—avoidable litigation of constitutional issues. Moreover, this Court could not adjudicate the constitutional claims without considering matters central to the state cases, because Plaintiffs' case here is entangled with characterizations of the state actions as unreasonable and illegal under state law. *See* Dkt. 1, at 45–47. This risks conflict with state court adjudications. And, if State and County prevail in state court as to the reasonableness and

[11] Proposed Amici Wyoming et al. simply assert that no sensitive area of social policy is involved because "a Commerce Clause challenge to the propriety of an administrative process is not a 'sensitive area of social policy.' " Dkt. 78-2, at 11. The assertion is not an argument, nor is it compelling.

[12] Plaintiffs assert wrongly that *Hannum v. Washington State Department of Licensing*, No. C06-5346RJB, 2006 WL 2104400 (W.D. Wash. July 26, 2006) held that *Pullman* abstention will be refused where the federal claims require proof of different elements than the state claims. Dkt. 75, at 22. But that case was fact-specific, finding that "it does not appear that the federal constitutional questions in this case would be mooted or narrowed by a definitive ruling on the state law issues." *Hannum*, 2006 WL 2104400, at *3.

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legality of their decisions, this will affect this Court's approach to the issues before it.

The third element is met because there is an unresolved issue of law, central to the state court proceedings, whose resolution might moot or alter the constitutional issues. Specifically, Plaintiffs argue that Ecology cannot rely on the State Environmental Policy Act and non-water environmental impacts to deny a water quality certification. Dkt. 64-5, at 5–6. This is an unresolved matter of state law. The three Pullman factors are met, and this Court should therefore abstain from any claims that are not dismissed.

3. The *Colorado River* Factors Also Weigh in Favor of Abstention

If Plaintiffs were to prevail in the state cases, the state actions they challenge here would be invalidated and there would be no further relief for this Court to grant. *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976) (resolution of state law questions could eliminate the need for federal adjudication). Moreover, Plaintiffs' constitutional claims are unavoidably "entangled in a skein of state law that must be untangled before the federal case can proceed," *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88 (1975), including such questions as whether Defendants unreasonably denied and refused to process the permits and sublease at issue here. Dkt. 1, at 45–47. This risks duplicative adjudication and conflicting decisions, which a federal stay could remedy. *Montanore* is especially on point. There, the issue before the state and federal courts was not precisely the same, yet "Montanore's decision to file two separate actions in two different courts resulted in piecemeal litigation of its singular goal." *Montanore Minerals Corp.*, 867 F.3d at 1167. Similarly, Plaintiffs filed these separate actions in pursuit of a singular goal—namely, to invalidate state and local decisions denying approval for its proposed export terminal. Piecemeal litigation will result unless the federal case is stayed.[13]

[13] Plaintiffs also cite *United States v. Morros*, 268 F.3d 695 (9th Cir. 2001), for the proposition that avoidance of piecemeal litigation is an issue only when there is evidence of a strong federal policy that all claims should be tried in the state courts. Dkt. 75, at 26. That is a sufficient condition, but it is not the rule. *See R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 979–80 (9th Cir. 2011); *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990). Moreover, *Morros*, initiated by a federal government agency against a state agency because

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Each state case was filed earlier and is substantially more advanced than this case; three already have decisions on the merits, Dkts. 64-2, 64-9, and 64-11; Millennium cites no case law for its assertion that a state case must be "multiple years and many dispositive decisions" ahead of the federal case, Dkt. 75, at 27; and Plaintiffs raised their constitutional claims in state court, even if only to reserve them, and had the opportunity to argue them there.

E. Cowlitz County Filed an Amicus Brief Merely Because the County Disagrees With the Defendants' Description of the County's Shoreline Permit Decision

Cowlitz County does not address the legal issues raised in the State Defendants' motion. Rather, the County appears to take umbrage at how the Defendants describe the shoreline permit denial as the "County's" denial. Dkt. 61, at 2–4. County staff apparently wish to distance themselves from the decision of their hearing examiner because they disagree with that decision. However, the County has opted to delegate final decision-making authority on shoreline permit applications to its hearing examiner. Cowlitz Cty. Code § 19.20.050. *See also* Cowlitz Cty. Code § 2.05.060C (County hearing examiner's decision is final and conclusive). If County staff and the elected commissioners now regret that decision, their option is to change the County code to allow for a different decision-making process. *Compare* Orting Mun. Code § 15-10-3 (allowing for appeals of hearing examiner decisions to full city council).

Under the current Cowlitz County code, the hearing examiner stands in the shoes of the County. Thus, the shoreline permit denial is, in fact, the County's decision rather than the decision of any of the State Defendants.

III. CONCLUSION

Plaintiffs have not pointed to a single fact that would defeat the State Defendants' motion to dismiss the ICCTA and PWSA claims as a matter of law. Plaintiffs have also failed to show how their claims against Commissioner Franz are not barred in their entirety. After

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of a dispute over the latter's interpretation of a federal law, "is patently distinguishable from [an] action where a group of private plaintiffs are challenging the decision of a state agency interpreting state law." *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786, 791 n.11 (N.D. W. Va. 2007).

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dismissing all claims against Commissioner Franz and dismissing the ICCTA and PWSA preemption claims, this Court should stay the remainder of the case in accordance with the *Pullman* and *Colorado River* abstention doctrines.

DATED this 15th day of May 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018, 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 15th day of May 2018.

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