

THE HONORABLE ROBERT J BRYAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LIGHTHOUSE RESOURCES INC.;  
LIGHTHOUSE PRODUCTS, LLC; LHR  
INFRASTRUCTURE, LLC; LHR COAL,  
LLC; and MILLENNIUM BULK  
TERMINALS-LONGVIEW, LLC,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as  
Governor of the State of Washington,; MAIA  
BELLON, in her official capacity as Director  
of the Washington Department of Ecology;  
and HILARY S. FRANZ, in her official  
capacity as Commissioner of Public Lands,

Defendants.

No.: 3:18-cv-05005-RJB

STATES OF WYOMING, KANSAS,  
MONTANA, NEBRASKA, NORTH  
DAKOTA, SOUTH DAKOTA, UTAH  
AND OKLAHOMA *AMICUS CURIAE*  
BRIEF IN OPPOSITION TO  
DEFENDANTS MOTION FOR  
SUMMARY JUDGMENT

**I. INTRODUCTION**

The landlocked amici states, the States of Wyoming, Kansas, Nebraska, North Dakota, South Dakota, Utah and Oklahoma submit this brief to the Court for two reasons: (1) to show this Court that Plaintiffs Lighthouse Resources, *et al.*, and Plaintiff-Intervenor BNSF Railway Company have the right to present evidence in support of their allegations of economic discrimination at trial; and (2) to inform the Court of the real world harms imposed on

1 landlocked states as a result of economic discrimination by coastal states. The landlocked  
2 states' motivation is simple and readily-acknowledged: they wish to protect their long-standing  
3 right to engage in commerce to fund vital social programs within their borders, like  
4 Kindergarten through 12<sup>th</sup> grade education. The landlocked states want to ensure that  
5 differently-minded coastal states cannot impose an economic embargo on commodities that  
6 politicians in those coastal states disfavor.

7 In their motions for summary judgment on the Dormant Commerce Clause issue, the  
8 Washington State officials and their coastal state allies seek something very different. They  
9 ask this Court to find that, because Washington does not have a coal industry, this Court must  
10 deny Lighthouse and BNSF the opportunity to present further evidence of improper economic  
11 discrimination at trial. Essentially, the Washington State officials and the coastal states argue  
12 that the Defendant Washington State officials could have made their environmental permitting  
13 decision in exactly the discriminatory and politically-motivated manner that Lighthouse  
14 alleges and, regardless of the evidence Lighthouse can produce at trial, this Court still would  
15 have to grant their motions for summary judgment. All because Washington State does not  
16 produce coal.

17 This cramped and unnatural reading of the Dormant Commerce Clause fails for several  
18 reasons. First, the notion that one can legally discriminate against someone else **because** they  
19 do not share the same attributes offends the most basic understanding of equality and fair play.

20 Second, while Washington State does not have a local coal industry, it does have a  
21 robust energy economy that competes directly with coal and that can benefit from  
22 protectionism. Third, Lighthouse has shown that the Washington State officials had (and have)  
23 every reason to discriminate against coal for political reasons. This broadens the concept of  
24 protectionism, but it is no less of a threat to the landlocked amici states. It is borne of  
25 discriminatory motives, and the logic behind the Dormant Commerce Clause shows that it is  
26 just as unacceptable. And fourth, based on the evidence already presented, Lighthouse has the

1 right to further show at trial that Washington State’s environmental analysis was improperly  
2 directed by political motivations in the context of the *Pike* balancing test. *See Pike v. Bruce*  
3 *Church, Inc.*, 397 U.S. 137, 142 (1970). Once done, this Court should view any supposed  
4 benefits that resulted from this politically-compromised process with skepticism when  
5 considering whether they justify the burden on commerce under the test described in *Pike*. For  
6 these reasons, the landlocked amici states ask this Court to deny the Defendants’ motions for  
7 summary judgment on the Dormant Commerce Clause claim and allow the matter to proceed  
8 to trial.

## 9 **II. BACKGROUND**

10 Lighthouse operates an integrated coal production, transportation, and export business.  
11 As part of the business, Lighthouse owns and leases coal mining rights in Wyoming and  
12 Montana. It proposes to transport this coal by rail through an export facility in Longview,  
13 Washington, for shipment to Asia.

14 In 2012, Lighthouse began the Washington State permitting process for the export  
15 facility. Governor Inslee took office in January 2013. He has a long-documented opposition to  
16 fossil fuels, coal in particular, and their export through Washington State. Governor Inslee has  
17 reiterated his opposition to coal and fossil fuels numerous times since he took office, most  
18 recently when announcing himself as a candidate for President of the United States. The focus  
19 of his platform, which he says sets him apart from the other candidates, is his goal of “100%  
20 clean energy.”<sup>1</sup> In short, coal has no place in Governor Inslee’s view of the world, and it stands  
21 directly in the path of his political aspirations.

22 Lighthouse alleges that Governor Inslee and two officials he appointed have improperly  
23 prevented proper permitting of the export facility due to political opposition to coal. ECF\_262.

24  
25 <sup>1</sup> “Inslee wants 100 percent clean energy in Washington by 2045,” *The Spokesman-Review*, Dec.  
26 10, 2018, available at <http://www.spokesman.com/stories/2018/dec/10/inslee-wants-100-percent-clean-energy-in-washingto/>.

1 Specifically, Lighthouse alleges that the Washington State officials modified the scope,  
 2 contents, and conclusions of the state environmental impact statement that was meant to inform  
 3 the permitting process. For example, the environmental impact statement includes activity  
 4 outside Washington's state boundaries and, hence, not within the state reviewing agencies'  
 5 jurisdiction. Lighthouse also alleges that the Washington State officials omitted or ignored  
 6 facts in the environmental impact statement favorable to the export facility. In addition,  
 7 Lighthouse alleges that the officials failed to follow the law and treated Lighthouse's permit  
 8 applications differently than those for projects not involving coal. Finally, Lighthouse alleges  
 9 that the Washington State officials used their official positions to influence the administrative  
 10 process to ensure the denial of multiple permits and applications necessary for the export  
 11 facility.

12 With regard to Lighthouse's Dormant Commerce Clause claim, Lighthouse has put  
 13 forth sufficient evidence to support its argument of improper political influence and economic  
 14 discrimination to proceed to trial. The landlocked amici states urge this Court to allow  
 15 Lighthouse that opportunity because the Dormant Commerce Clause must protect states from  
 16 discriminatory actions by other states.

### 17 **III. ARGUMENT**

#### 18 **A. The landlocked amici states support Plaintiffs' Dormant Commerce Clause** 19 **arguments.**

20 The States of this Union are not separable economic units. *Or. Waste Sys. v. Dep't of*  
 21 *Env'tl. Quality*, 511 U.S. 93, 98-99 (1994) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336  
 22 U.S. 525, 537-38 (1949)). "The essence of our federal system is that within the realm of  
 23 authority left open to them under the Constitution, the States must be equally free to engage in  
 24 any activity that their citizens choose for the common weal." *Dep't of Revenue v. Davis*, 553  
 25 U.S. 328, 338 (2008) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546  
 26 (1985)). The discriminatory actions of the Washington State officials interfere with the

1 legitimate economic interests of the landlocked amici states. In effect, the Washington State  
2 officials are trying to impose their personal policy choices on the landlocked amici states. The  
3 officials seek to deprive the citizens of the landlocked amici states of their “equally free” right  
4 to engage in an economic activity they have determined is in their “common weal.” As  
5 Lighthouse has shown and will further show at trial, this discriminatory behavior violates the  
6 Dormant Commerce Clause. ECF\_262. The landlocked amici states support this effort.

7 **1. This Court should not accept the argument that coastal states may openly**  
8 **discriminate against a commodity simply because they do not possess it.**

9 The requirements of Rule 56 of the Federal Rules of Civil Procedure are  
10 straightforward. This Court can only grant the Defendants’ motions for summary judgment if  
11 there is not a single genuine dispute over any material fact. Fed. R. Civ. P. 56. So, necessarily,  
12 the Washington State officials and the coastal states argue that Lighthouse and BNSF are  
13 completely incapable of presenting **any** meaningful evidence of discrimination at trial. As  
14 Lighthouse recently made clear, that position lacks merit. ECF\_262 at 22-26.

15 Specifically, the Washington State officials and their coastal state allies argue they  
16 cannot offend the Dormant Commerce Clause because they lack a coal industry. ECF\_227;  
17 ECF\_237. Put another way, they argue that the Defendant Washington State officials lack the  
18 incentive to discriminate without a local industry to protect. As discussed below, Washington  
19 State absolutely has a local industry to protect, and the Washington State officials have  
20 abundant incentive to prejudice coal interests.

21 But first, consider where the coastal states’ logic leads. If Washington State banned  
22 genetically-modified corn, it would then lack a genetically-modified corn industry. According  
23 to the Washington State officials and the coastal states, the State could then subsequently ban  
24 the transport of genetically-modified corn through Washington State by landlocked states  
25 without offending the Dormant Commerce Clause. As the Washington State officials and their  
26

1 allies say in their briefs: how can they possibly discriminate against an industry they do not  
2 possess?

3 This simplistic view of the Dormant Commerce Clause betrays exactly what  
4 Lighthouse is aggrieved by, and it alone shows why a trial is necessary. The Defendants' logic  
5 flies directly in the face of the entire concept of the Dormant Commerce Clause, which was  
6 borne of the belief that members of our federated union cannot discriminate against the  
7 economic interests of the other members of said union. *See, e.g., Or. Waste Sys., Inc. v. Dep't*  
8 *of Env'tl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) ("Discrimination" in Dormant  
9 Commerce Clause cases refers to "differential treatment of in-state and out-of-state economic  
10 interests that benefits the former and burdens the latter."). But, according to the coastal states,  
11 they have found a loophole.

12 In today's political environment, the "war on coal" and the "keep it in the ground"  
13 movements are well known. Governor Inslee is a self-proclaimed leader in this arena. These  
14 political movements are by no means unique. A vocal representative of one of the coastal states  
15 involved in this litigation already has called for, among other things: (1) a nationwide transition  
16 to 100% renewable energy by 2030; (2) a move away from non-organic farming; and (3) an  
17 end to air travel. How long will it be until a coastal state or a coalition of coastal states like the  
18 one in this case form an economic blockade based on another cause celebre, like banning  
19 genetically-modified grain? Or non-organic food? Or meat? The rhetoric from leading officials  
20 in these states shows that these are not empty hypotheticals. The logic advanced by the coastal  
21 states in this litigation, which would apply equally to these other scenarios, shows how slippery  
22 the slope may become.

23 The Washington State officials claim that they simply acted to protect the environment,  
24 in a manner allegedly unrelated to, but undeniably fully in accord with, Governor Inslee's  
25 "100% clean energy" platform. In so doing, the Defendants attempt to cloak themselves in a  
26 supposedly impenetrable justification of environmental protection. The coalition of amici

1 coastal states concur by arguing that no environmentally-based decision can be challenged at  
2 trial under the Dormant Commerce Clause so long as the state that engaged in economic  
3 discrimination lacks the industry they chose to discriminate against. This logic is inconsistent  
4 with the entire reason the Dormant Commerce Clause exists. *See Minn. v. Clover Leaf*  
5 *Creamery Co.*, 449 U.S. 456, 471 (1981) (“If a state [decision] purporting to promote  
6 environmental purposes is in reality ‘simple economic protectionism,’ [a] “virtually per se rule  
7 of invalidity” applies).

8 And yet, the Defendants and their allies ask this Court to take the extreme step of  
9 denying Lighthouse the opportunity at trial to expand upon the evidence they have already  
10 provided. On the other side, Lighthouse, BNSF, Wyoming, and other landlocked amici states  
11 merely ask this Court to allow this dispute to benefit from the disinfectant qualities of an  
12 evidentiary proceeding.

13 **2. Washington State has ample incentive to act in a discriminatory and**  
14 **protectionist manner.**

15 The coastal states’ argument also fails as a factual matter. By limiting the discussion to  
16 coal, they believe they have found a loophole to avoid trial. But that argument rests entirely  
17 on how the Washington State officials and the coastal states chose to define the industries in  
18 question. One could just as easily define the relevant industry here as fuel sources for the  
19 stationary production of electricity, which Washington State possesses in multiple forms,  
20 including hydroelectric power. Viewed in that light, the discrimination by the Washington  
21 State officials is certainly protectionist. The fact that the parties disagree on such a fundamental  
22 point confirms the need for a trial.

23 Alternatively, the question of protectionism can be viewed on a larger scale. The  
24 ongoing national dispute over energy sources is unquestionably political in nature. In past  
25 years, utilities sought out the most cost-efficient fuels to power their electricity-generating  
26 facilities. More often than not, the most cost-efficient fuel was coal. But, increasingly, power

1 producers, under political pressure, are opting for more expensive fuel sources that are viewed  
2 more favorably in their individual states. More and more, in the world of electricity generation,  
3 so-called social factors drive the choice in fuel sources rather than cost-effectiveness. This  
4 creates a business environment less affected by economic protectionism and more affected by  
5 politicians. When Governor Inslee calls for “100% clean energy,” his officials are less  
6 motivated to prop up local industry and much more motivated to ensure that their chosen  
7 sources of fuel “prevail” over those sources Governor Inslee and his officials disfavor. That  
8 may not look the same as old-school protectionism, but it is borne of similar discriminatory  
9 motives. And the logic behind the Dormant Commerce Clause says it is just as unacceptable.  
10 *See, e.g., Or. Waste Sys., Inc.*, 511 U.S. at 99.

11 Governor Inslee and his officials oppose energy sources that emit air pollutants as part  
12 of his “100% clean energy” platform, with coal at the top of the list of disfavored fuel sources.  
13 They favor energy sources without air emissions, like hydroelectric power, an energy source  
14 that is abundant in Washington State. Governor Inslee has called for the State to eliminate coal  
15 as an energy source by 2025.<sup>2</sup> Denying coal companies the ability to export coal  
16 unquestionably advances Governor Inslee’s agenda and provides competitive advantages to  
17 non-coal sources of energy, thereby further advancing his agenda. Improperly influencing a  
18 permitting decision to disadvantage the coal industry might not, as a technical matter, “protect”  
19 a particular corporation in Washington State, but it unquestionably gives an advantage to  
20 energy sources other than coal, which is precisely Governor Inslee’s larger purpose. Allowing  
21 the Washington State officials to escape trial based solely on a lack of a domestic coal industry,  
22 when the State has a robust energy industry, and where the Washington State officials have  
23 every incentive to discriminate against coal, would ignore the goals embodied in the Dormant  
24 Commerce Clause on a technicality that misses the true issue at play.

25 \_\_\_\_\_  
26 <sup>2</sup> “Gov. Inslee’s new climate plan nixes coal power by 2025,” Dec. 10, 2018, MYNorthwest.com,  
available at <http://mynorthwest.com/1213183/inslee-climate-change-plan-coal-power/>.

1           **3. Lighthouse must have the opportunity to demonstrate at trial that the**  
 2           **actions of the Defendants do not survive the *Pike* balancing test.**

3           Irrespective of the arguments above, Lighthouse can also prevail at trial by showing  
 4 that the burdens imposed by the permitting decision on commerce are “clearly excessive in  
 5 relation to the putative local benefits.” *Pike*, 397 U.S. at 142. Based on the evidence already  
 6 provided, Lighthouse has the legal right to show at trial that the permitting process was  
 7 improperly influenced by political and discriminatory motives. *See* ECF\_262 at 26-44. At trial,  
 8 this Court should reject any supposed benefits that resulted from this politically-compromised  
 9 process. If the permitting process was as compromised as Lighthouse alleges and intends to  
 10 show at trial, any remaining “benefit” from the permit denial, if indeed there is one, cannot not  
 11 justify the burden on commerce. *See id.* That would be an issue to resolve at trial, something  
 12 the Washington State officials seek to avoid.

13           Based on the evidence submitted, Lighthouse and BNSF have the legal right to make  
 14 their case at trial. The Defendants and their allies ask this Court to deny Lighthouse and BNSF  
 15 that opportunity. There is a simple and sensible path available for this Court. Allow Lighthouse  
 16 and BNSF to make their case at trial, and let the chips fall where they may. Wyoming and the  
 17 other landlocked states urge this Court to provide Lighthouse and BNSF this basic opportunity.

18           **B. Empowering coastal states to discriminate against landlocked states will cause**  
 19           **significant harm.**

20           This case is not the intellectual exercise that the Washington State officials and their  
 21 coastal state allies try to portray. The landlocked amici states are currently suffering real-world  
 22 economic harm due to the discrimination at issue. And a decision by this Court to empower  
 23 the coastal states to discriminate at will against industries that do not operate within their  
 24 borders will cause significantly more harm.

25           The harm caused to Wyoming is one example of how this type of economic  
 26 discrimination can detrimentally affect a landlocked state. During the 2007 to 2016 timeframe,  
 coal mines in Wyoming collectively generated close to \$5,000,000,000 in severance and ad

1 valorem taxes to the State. ECF\_81-1 at ¶7. In addition, coal mining on Wyoming-owned land  
2 provided over \$61,000,000 in revenue in fiscal year 2017 alone, which funds K through 12  
3 education. ECF\_81-2 at ¶4. While these sums may not impress California or New York, in a  
4 State of 600,000 citizens, they are absolutely critical to provide basic social services.

5 Wyoming tax revenues from coal mining benefit state programs, cities, counties, public  
6 schools, and institutions of higher learning. *See* Wyo. Stat. Ann. §§ 39-13-111; 39-14-801.  
7 The tax revenue also pays for water and highway infrastructure projects and funds the State's  
8 revenue accounts, including its permanent mineral trust fund, permanent trust fund reserve  
9 account, general fund, and budget reserve accounts. *Id.*

10 It is beyond dispute that domestic demand for coal is decreasing. To continue to fund  
11 the programs discussed above, Wyoming is taking active steps to develop its natural resource  
12 revenue base by working with overseas partners to develop markets for coal. For example, on  
13 July 25, 2016, Wyoming entered into a five-year Memorandum of Understanding (MOU) with  
14 the Japan Coal Energy Center. *See* ECF\_81-3. The MOU contemplates the parties' cooperation  
15 in the "facilitation of coal exports and sales, which may include the development of new USA  
16 coal export and Japanese coal import terminals, public support to existing export facilities  
17 together with establishing sales contracts for Wyoming coal[.]". *Id.* at § 4(d). A blockade by  
18 the coastal states directly threatens Wyoming's efforts to further develop these types of efforts.

19 Like Wyoming, Montana has a significant interest in being able to export coal, which  
20 is abundant in eastern Montana. Coal is one of the few natural resources available as a reliable  
21 source of revenue for the State, Native American tribes, and the State's many subdivisions.  
22 ECF\_78-1 at 8-9. While coal is abundant in Montana and is the only mineral that is routinely  
23 marketed through sales contracts of many years' duration, "coal in Montana is subject to  
24 regional and national demands for development that could affect the economy and  
25 environment of a larger portion of the state than any other mineral development has done."  
26 Mont. Code Ann. § 15-35-101(1)(a-b), (d). Accordingly, restrictions on coal exports like the

1 one at issue here hinder Montana’s efforts to maximize returns from this tax.

2 As in Wyoming, Montana relies on coal-related tax revenue to provide critical services.  
3 Montana’s Constitution requires the deposit of 50% of the coal severance tax revenue into a  
4 permanent Coal Severance Tax Trust. ECF\_78-1 at 9. The intent of this requirement is to  
5 provide jobs, improve infrastructure, promote economic growth, and “enhance the quality of  
6 life and protect the health, safety, and welfare of Montana citizens.” *See* Mont. Code Ann. §  
7 90-6-702. The Coal Severance Tax is the second-highest source of natural resource tax revenue  
8 in Montana. It provided between \$53,000,000 and \$59,000,000 in tax revenue between 2013  
9 and 2016. ECF\_78-1 at 9. Furthermore, Montana levies a flat tax of five percent against the  
10 value of the reported gross proceeds for most coal mines, which is then distributed  
11 proportionately to the State and to those taxing jurisdictions in which production occurs. Mont.  
12 Code Ann. Title 15, Ch. 23, Part 7. In many counties, this tax redistribution is the primary  
13 source of funding for county obligations. ECF\_78-1 at 10.

14 When other components of Montana’s economy suffer, coal tax revenue provides a  
15 reliable source of funds for the continuing maintenance and modernization of Montana  
16 infrastructure, economic development and schools. *Id.* Like Wyoming, Montana’s responsible  
17 resource development opportunities are limited. The domestic market for Montana coal has  
18 been in decline for years, with plants in the various states either retiring, planning retirement,  
19 or converting to natural gas. *Id.* Accordingly, preventing Montana from being able to export  
20 coal to foreign markets is causing and will continue to cause the State significant harm.

21 As Lighthouse showed in its response brief, the lack of the coal export facility in  
22 question could cost Wyoming, Montana, Colorado, and Utah “over 3,900 jobs annually” and  
23 “\$18 billion in gross domestic product.” ECF\_262 at 3, 27. And it is not just coal interests that  
24 are put at risk by discrimination by coastal states. The list of commodities that the coastal states  
25 could choose to target is nearly endless. Kansas, which does not produce coal, provides a useful  
26 example. In 2017, foreign exports of agricultural products from Kansas totaled

1 \$3,630,000,000. Ex. A at ¶4. Among the top destinations for Kansas’s corn, wheat, and other  
2 products were Japan and South Korea, markets accessed via the west coast. *Id.*.

3 Unsurprisingly, the situation is much the same in Nebraska. In 2017, Nebraska’s  
4 exports of agricultural products totaled \$6,400,000,000. Ex. B at ¶4. Nebraska exports more  
5 than \$1,000,000,000 in beef and \$1,000,000,000 in corn. *Id.*. Three of Nebraska’s top export  
6 destinations are Japan, South Korea, and China. *Id.*. Access to west coast export terminals is  
7 critical to Nebraska’s ability to deliver food, feed, and fuel to its customers. *Id.* at ¶5.

8 In short, without the ability to export agricultural products through a coastal state, states  
9 like Kansas and Nebraska would suffer significant harm. Ex. A; Ex. B. And with high profile  
10 individuals already proposing bans on things as fundamental as air travel, a ban on genetically-  
11 modified corn or non-organic wheat is all too easy to imagine.

12 **IV. CONCLUSION**

13 The Washington State officials ask this Court to find that there is not a single issue of  
14 material fact in dispute regarding Lighthouse’s Dormant Commerce Clause claim. Lighthouse  
15 and BNSF have already refuted that position. The landlocked amici states ask this Court to  
16 deny the Defendants’ pending motions for summary judgment and to allow this case to proceed  
17 to trial.

18 If this Court does not do so, and accepts the argument that the Dormant Commerce  
19 Clause does not protect landlocked states from politically-based discrimination by coastal  
20 states, the economic picture for the so-called “flyover states” is bleak indeed. Such a decision  
21 would create a nation where the coastal states can impose their political will on the landlocked  
22 states. That situation is untenable, and the Dormant Commerce Clause exists to prevent it.

23 //

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1 DATED: March 11, 2019

2 BULLIVANT HOUSER BAILEY PC

3  
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11 *Attorneys for the State of Wyoming*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2019, the foregoing was served by the Clerk of the U.S. District Court for the Western District of Washington, through the Court’s CM/ECF system, which sent a notice of electronic filing to all counsel of record.

/s/ Michael A. Guadagno  
Michael A. Guadagno, WSBA #34633

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