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**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
CONSOLIDATED REPLY IN
SUPPORT OF THE PORT OF
VANCOUVER USA'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: PREEMPTION

The Port of Vancouver USA ("Port") does not contend, and did not argue in its Motion for Partial Summary Judgment re: Preemption ("the Port's Motion"), that EFSEC is barred from considering the impacts of the rail and marine aspects of the Vancouver Energy Distribution Terminal ("VEDT"). Rather, the Port seeks an order finding, as a matter of law, that federal law limits the extent of EFSEC's authority, and EFSEC cannot require mitigation or conditions of certification that intrude upon federal laws which exclusively regulate rail and marine traffic. This issue is ripe for determination, and partial summary judgment on this legal issue should be granted.

Responses in opposition to the Port's Motion¹ contained arguments and themes that were substantially similar, if not identical. To avoid repetition, the Port has consolidated its

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¹ The parties' responses are referred to herein as City of Vancouver's Response; DNR's Response; Counsel for the Environment's Response; Columbia Riverkeeper's Response; Tribal Parties' Response; and are inclusive of the remaining parties' joinder into these responses.

1 reply to each of the parties' responses into this consolidated Reply in Support of its Motion
2 for Partial Summary Judgment.

3 This adjudication, involving multiple participants and complex issues, requires a clear
4 understanding of EFSEC's authority to proceed fairly and efficiently. As is apparent from
5 the responses filed to the Port's Motion, all parties acknowledge that EFSEC's authority to
6 require mitigation or conditions of operation in the site certification agreement does not
7 extend to areas of law preempted by federal law and regulations. Yet EFSEC, in its DEIS,
8 has required or recommended mitigation measures that clearly intrude upon areas of law
9 preempted by federal law and regulations. The Port brought this motion to avoid having time
10 in the adjudication hearing spent on evidence and arguments regarding mitigation
11 requirements and measures that EFSEC has no authority to require, or impose as a condition
12 of site certification.

13 **A. The Port Does Not Dispute EFSEC's Authority to Consider the VEDT's**
14 **Rail and Vessel Impacts**

15 Contrary to the responding parties' arguments, the Port does not and has not asserted
16 that EFSEC lacks authority to consider the environmental and other impacts from the
17 proposal's use of rail and marine transportation and traffic. Instead, the Port requests
18 acknowledgement that EFSEC is unable to require mitigation or conditions of certification
19 that intrude upon federal laws which exclusively regulate rail and marine traffic.

20 Contrary to the arguments in the parties' responses, the Port's concerns regarding
21 potential mitigation or conditions of certification are not premature. Indeed, EFSEC has
22 proposed mitigation measures in the DEIS, including reduced vessel speeds, timing of vessel
23 transit, and vessel routes, that are governed solely by federal law. To the extent that EFSEC
24 is precluded from imposing mitigation measures that are preempted under federal law, all
25 parties should acknowledge the limits of EFSEC's authority, for the sake of efficiency during
26 the adjudication hearing. Under the short time frame afforded this complex adjudication,

1 time and effort spent on testimony and argument regarding requirements that are preempted,
2 and would not withstand review, is something the parties cannot afford.

3 **B. Conditions that Impact Columbia River Vessel Traffic Are Preempted by**
4 **Federal Law and Regulations**

5 The federal government's long-standing, and exclusive, role in regulating interstate
6 navigation and commerce preclude EFSEC from imposing mitigation measures that interfere
7 with tank vessel operations associated with the VEDT. The United States Supreme Court
8 recognizes federal preemption of state and local regulation of maritime commerce, both
9 where Congress has acted, and in the absence of federal action on the subject: Under
10 (a) "conflict preemption," pursuant to a provision of Title I of the Ports and Waterways
11 Safety Act of 1972, 33 USCS 1223(a)(1) (PWSA), which authorizes the United States Coast
12 Guard to regulate tanker operation in United States waters; or (b) "field preemption,"
13 pursuant to a provision of Title II of the PWSA, 46 USCS 3703(a), which requires the Coast
14 Guard to issue regulations for the design, construction, alteration, repair, maintenance,
15 operation, equipping, personnel qualifications, and manning of tankers.

16 As the Supreme Court noted in *United States v. Locke*:²

17 While *Ray* explained that Congress, in Title I of the PWSA,
18 preserved state authority to regulate the peculiarities of local
19 waters if there was no conflict with federal regulatory
20 determinations, the Court further held that Congress, in Title II of
21 the PWSA, mandated federal rules on the subjects or matters there
22 specified, demanding uniformity. *Id.*, at 168 ("Title II leaves no
23 room for the States to impose different or stricter design
24 requirements than those which Congress has enacted with the hope
25 of having them internationally adopted or has accepted as the result
26 of international accord. A state law in this area . . . would frustrate
the congressional desire of achieving uniform, international
standards"). . .

Title II requires the Coast Guard to impose national regulations
governing the general seaworthiness of tankers and their crews.
435 U.S. at 160. Under *Ray*'s interpretation of the Title II PWSA
provision now found at 46 U.S.C. § 3703(a), only the Federal

² 529 U.S. 89, 99-100 (2000).

1 Government may regulate the 'design, construction, alteration,
2 repair, maintenance, operation, equipping, personnel qualification,
3 and manning' of tanker vessels.³

4 The *Locke* court, of course, held that legislation enacted by the State of Washington
5 "in an area where the federal interest has been manifest since the beginning of our Republic"
6 was preempted.⁴

7 Here, field preemption under Title II PWSA applies to the mitigation measures
8 required or recommended by EFSEC in the DEIS, or imposed on the VEDT as a condition of
9 site certification.

10 The parties' responses argued that the Port failed to identify a specific regulation at
11 issue that is preempted by federal law.⁵ That argument both misses the point, and is
12 mistaken. The Port is not claiming a particular statute or regulation enacted under state law
13 is in conflict with the broad powers of Congress and the Coast Guard to regulate vessel
14 traffic. Instead, the Port seeks the recognition by the Council of the boundaries of the
15 Council's authority regarding mitigation, and an order curtailing testimony and argument
16 regarding proposed restrictions and mitigation measures that are preempted by federal law.

17 To illustrate its point, the Port has identified two specific mitigation measures that
18 EFSEC has already identified in the DEIS, described in the following pages, that are within
19 the ambit of federal law "field preemption" regarding control of vessel traffic and vessel
20 safety under Title II of PWSA. Because EFSEC lacks the authority to require mitigation
21 measures or conditions of site certification that are preempted by federal law, testimony and
22 arguments regarding such requirements should be excluded from the adjudication hearing.

23 EFSEC identified the following mitigation measure in Section 3.6.5 of the DEIS:
24 "Reduce vessel transit speeds in areas that are more susceptible to wake stranding of juvenile

25 ³ *Id.* at 110-11, discussing the Supreme Court decision *Ray v. Atlantic Richfield Co.*, 435
26 U.S. 151, (1978).

⁴ *Id.* at 99.

⁵ *See, e.g.*, City of Vancouver's Response, pg. 16; DNR's Response, pg. 12; Counsel for the
Environment's Response, pg. 3; Columbia Riverkeeper's Response, pg. 16.

1 fish due to shoreline geomorphology.” Vessel speed is clearly within federal regulation
2 found in the Ports and Waterways Safety Act: “Title II of the PWSA covers ‘design,
3 construction, alteration, repair, maintenance, operation, equipping, personnel qualification,
4 and manning’ of tanker vessels. Congress has left no room for state regulation of these
5 matters.”⁶

6 Title II requires the Coast Guard to issue regulations for navigation and vessel safety
7 and for enhanced protection of the marine environment.⁷ The Coast Guard’s broad authority
8 includes the authority to preempt state law.⁸ “There is also delegated to Coast Guard district
9 commanders and captains of ports the authority to exercise the Secretary’s powers under
10 § 1221 (3) to direct the anchoring, mooring, and movements of vessels; temporarily to
11 establish traffic routing schemes; and to specify vessel size and speed limitations and
12 operating conditions.”⁹

13 Moreover, the Coast Guard’s decision *not* to impose a regulation can also be
14 preemptive of a state law.¹⁰ EFSEC’s proposed mitigation regarding vessel speed is outside
15 the bounds of its authority.

16 Similarly, in DEIS Section 3.13.5, EFSEC identified additional mitigation measures
17 regarding vessel timing restrictions and travel routes. Such timing and route restrictions are

18 ⁶ *United States v. Locke*, 529 U.S. 89, 111 (2000)

19 ⁷ *Id.* citing 46 U.S.C. § 3703(a).

20 ⁸ *Capital Cities Cable, Inc. v. Crisp*, 467, U.S. 691, 699 (1984). The Columbia Riverkeeper
21 Response takes issue with the Port’s citation to this case, *see* its Response at pg. 15 fn. 9, but
22 the analogy the Port used is appropriate. In an examination of the preemptive effect of
23 federal regulations, the court in *Capital Cities Cable* found that the power delegated to the
24 FCC gave it the authority to regulate signals carried by cable television systems. Since the
25 FCC resolved to preempt an area of cable television regulation, all conflicting state
26 regulations were precluded. Similarly here, the power delegated to the Coast Guard gave it
the authority to regulate vessel traffic, navigations, operations, etc. Since the Coast Guard
promulgated regulations on these topics, all conflicting regulations are precluded.

⁹ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 170-171 (1978) *citing* 33 CFR
§ 160.35 (1976).

¹⁰ *Ark. Elec. Coop. Corp. v. Ark. Public Serv. Comm’n*, 461 U.S. 375, 384 (1983) (“A federal
decision to forgo regulation in a given area may imply an authoritative federal determination
that the area is best left unregulated, and in that event would have as much preemptive force
as a decision to regulate.”)

1 clearly within PWSA authority and the Coast Guard's mandated regulations for navigation
2 and vessel safety.

3 The issues that are raised in this adjudication related to conditions which may be
4 imposed in a site certification agreement to control vessel traffic and enhance vessel safety
5 are preempted by federal law. The Port requests that EFSEC recognize the boundaries of its
6 authority regarding mitigation as a matter of law, and curtail testimony and/or argument
7 during the adjudication hearing regarding restrictions and mitigation measures that are
8 preempted by federal law.

9 **1. The City of Vancouver's Response**¹¹

10 The City of Vancouver focuses on the authority vested in EFSEC by Washington
11 State laws and regulations. In that way, the City presents responses to arguments the Port did
12 not make, and does not rebut the arguments the Port does make. The Port did not assert that
13 EFSEC lacked the authority to evaluate proposal impacts. Nor did the Port argue that the
14 State has no role in protecting the Columbia River; clearly it does. The Port's Motion is
15 based on federal preemption, and the proper focus is on the authority of federal law.

16 As explained above, the preemption arguments are not premature and are made in an
17 effort to promote efficiency.

18 Local police powers are subject to the Interstate Commerce Commission Termination
19 Act ("ICCTA") preemption.¹² "[T]he pivotal question is not the nature of the state
20 regulation, but the language and congressional intent of the specific federal statute."¹³ In the
21 *City of Auburn* case, it was a local environmental regulation, which is an exercise of the
22 traditional police powers of the state, that the Supreme Court found to be preempted under

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24 ¹¹ Because the City of Vancouver and the Columbia Riverkeeper raise issues in their
25 responses that were not common to the other parties' responses, the Port provides its reply to
26 those issues in these separate sections.

¹² *City of Auburn*, 154 F.3d at 1031.

¹³ *Id.*

1 ICCTA. The Court found no evidence that Congress intended any role under ICCTA for
2 local regulation of railroads.¹⁴

3 The Port, consistent with SEPA, did not prepare an environmental impact statement
4 prior to entering into a lease with the joint venture that will own and operate the VEDT.
5 Columbia Riverkeeper unsuccessfully challenged the Port's actions, and the Court of
6 Appeals affirmed the Port's decision to enter into a lease agreement with Tesoro-Savage
7 relating to the construction of the VEDT without an EIS, because EFSEC's review would
8 satisfy SEPA.¹⁵ The Port remains committed to the completion of the EFSEC process, and
9 this motion does not seek to deny EFSEC its authority to review and consider "the true
10 environmental safety cost," as the City contends.¹⁶ Rather, the Port asks that the Council
11 acknowledge that its authority to impose mitigation measures or conditions on certification is
12 limited by federal law, and to limit argument testimony accordingly, to achieve a sound
13 result that comports with the law and will withstand review.

14 In its conclusion, the City argues for the first time, and without any citation to
15 supporting authority, that the intervenor parties' due process rights and the appearance of
16 fairness doctrine would be violated if the Port's Motion was granted.¹⁷ The City's argument
17 is unpersuasive, both because it has no authority for this proposition, and also because it is
18 fundamentally flawed.

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20 _____
21 ¹⁴ *Id. see also N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir.
22 2007) ("We do not hold that local regulations may not give state and local officials
23 any discretion at all, for that would be impractical. Standard building, electrical, and fire
24 codes no doubt give local officials some discretion. *See, e.g.*, Int'l Fire Code § 304.2 (2000)
25 ('Storage of combustible rubbish shall not produce conditions that will create a nuisance or a
26 hazard to the public health, safety, or welfare. '); *id.* §§ 401.2 & 404 (giving local code
official discretion to determine if fire safety plan is adequate). But such regulations may not
(1) be so open-ended as to all but ensure delay and disagreement, or (2) actually be used
unreasonably to delay or interfere with rail carriage.").

¹⁵ *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn. App. 800, 357 P.3d 710
(2015), *review pending on other grounds*, 2016 Wash. LEXIS 469 (2016).

¹⁶ City of Vancouver's Response, pg 12, line 1.

¹⁷ City of Vancouver's Response, pg 17, line 16 – pg 18, line 2.

1 To obtain relief on a procedural due process claim, a party must establish the
2 existence of “(1) a liberty or property interest protected by the Constitution; (2) a deprivation
3 of the interest by the government; [and] (3) lack of process.”¹⁸ The Due Process Clause
4 forbids the governmental deprivation of substantive rights without constitutionally adequate
5 procedure.¹⁹ Not every procedural requirement ordained by state law, however, creates a
6 substantive property interest entitled to constitutional protection.²⁰ Rather, only those “rules
7 or understandings” that support legitimate claims of entitlement give rise to protected
8 property interests.²¹

9 The City has no protectable property interest giving rise to due process rights because
10 “a statute that grants the reviewing body unfettered discretion to approve or deny an
11 application does not create a property right.”²² The City cannot point to any statutory
12 language that “impose[s] particularized standards . . . that significantly constrain” EFSEC’s
13 discretion to issue the site certification agreement and would create a protected property
14 interest in the site certification agreement’s denial.²³ Even if the City did have a cognizable
15 property interest, it cannot assert that it has been denied due process, because it is
16 participating in this adjudication, which provides them with notice and an opportunity to be
17 heard—all the process that is due.²⁴

18 There is no basis for asserting that EFSEC’s compliance with limitations imposed on
19 it by federal law would violate the appearance of fairness doctrine. The Washington State
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21 ¹⁸ *Shanks v. Dressel*, 540 F.3d 1082, 1090-1091 (9th Cir. 2008), quoting *Portman v. County*
of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993).

22 ¹⁹ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d
494 (1985).

23 ²⁰ See *Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir. 1986); see also *Town of Castle*
Rock v. Gonzales, 545 U.S. 748, 764, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005); *Hayward v.*
Henderson, 623 F.2d 596, 597 (9th Cir. 1980).

24 ²¹ *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

²² *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).

²³ *Shanks*, 540 F.3d at 1091, citing *Fidelity Fin. Corp. v. Fed. Home Loan Bank of San*
Francisco, 792 F.2d 1432, 1436 (9th Cir. 1986).

²⁴ *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995).

1 Supreme Court has applied the appearance of fairness doctrine to administrative tribunals
2 acting in a quasi-judicial capacity in two circumstances: (1) when an agency has employed
3 procedures that created the appearance of unfairness, and (2) when one or more acting
4 members of the decision-making bodies have apparent conflicts of interest creating an
5 appearance of unfairness or partiality.²⁵

6 The test of fairness . . . in public hearings conducted by law on
7 matters of public interest, vague though it may be, is whether a
8 fair-minded person in attendance at all of the meetings on a given
9 issue, could, at the conclusion thereof, in good conscience say that
10 everyone had been heard who, in all fairness, should have been
heard and that the legislative body required by law to hold the
hearings gave reasonable faith and credit to all matters presented,
according to the weight and force they were in reason entitled to
receive.²⁶

11 EFSEC's recognition that it cannot impose mitigation measures or conditions on certification
12 that are preempted by federal law will satisfy this test of fairness, and the City has failed to
13 offer any support for a contrary conclusion.

14 **2. Columbia Riverkeeper's Response**

15 The Columbia Riverkeeper's Response places a focus on whether the Port's Motion
16 is ripe. Although no proposed mitigation measures have been developed for the site
17 certification agreement, they have been required or recommended by EFSEC in the DEIS.
18 Thus, we know some of the mitigation measures and we also know that some of them
19 regarding vessel and rail safety, transportation and operation are preempted under federal
20 law. It is neither practical nor advisable to go forward with discussion and argument
21 regarding mitigation conditions than EFSEC has no authority to impose. The Port's Motion
22 is not premature.

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25 ²⁵ *Hoquiam v. Public Employment Relations Com*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982),
citing *Smith v. Skagit Cy.*, 75 Wn.2d 715, 453 P.2d 832 (1969) and *Buell v. Bremerton*, 80
26 Wn.2d 518, 495 P.2d 1358 (1972).

²⁶ *Smith v. Skagit County*, 75 Wn.2d at 741.

1 Columbia Riverkeeper also devotes significant effort outlining EFSEC's authority
2 under state law. EFSEC's authority under state law has not been challenged by any party.

3 As argued above, EFSEC should not base its decision to condition a site certification
4 agreement or whether to make a recommendation to the Governor based upon specific issues
5 that are controlled by federal law.

6 **C. Federal Law Preempts Regulation with the Effect of Regulating Rail**
7 **Transportation**

8 Congress and the courts long have recognized a need to regulate railroad operations
9 at the federal level.²⁷ "Congress' authority under the Commerce Clause to regulate the
10 railroads is well established and the Supreme Court repeatedly has recognized the preclusive
11 effect of federal legislation in this area."²⁸ The ICCTA preempts state and local actions that,
12 by their nature, could be used to deny a rail carrier's ability to conduct rail operations.²⁹ The
13 Surface Transportation Board ("STB") has exclusive jurisdiction over rail carrier operations
14 along interstate rail lines. The Federal Rail Safety Act ("FRSA") regulates rail safety and
15 transportation.³⁰

16 Although all parties agree that the Port and Tesoro-Savage are not rail carriers, the
17 question of preemption does not end there. EFSEC is precluded from any action that would
18 have the effect of managing or controlling rail transportation.

19 National rather than local control of interstate railroad transportation has long been
20 the policy of Congress, and transportation is interpreted broadly.³¹ For example, in the *City*
21 *of Chicago* case, railroads with lines terminating at different terminals in Chicago arranged
22 for a transfer service to carry their passengers between stations. The City enacted an

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24 ²⁷ *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998).

25 ²⁸ *Id.* (internal citations omitted).

26 ²⁹ *City of Auburn*, 154 F.3d at 1029-31.

³⁰ 49 U.S.C. § § 20101 *et. seq.*

³¹ *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co. et al.*, 357 U.S. 77,
87 (1985).

1 ordinance requiring the transfer service to first obtain a certificate of convenience and
2 necessity and the approval of city council prior to transporting any rail passengers. The
3 Supreme Court held that the City had no power to decide whether the transfer service could
4 operate a motor vehicle service between terminals for the railroads because the service was
5 an integral part of interstate railroad transportation authorized and subject to regulation under
6 the Interstate Commerce Act.³² “The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887),
7 which, as amended, still governs federal regulation of railroads, has been recognized as
8 ‘among the most pervasive and comprehensive of federal regulatory schemes.’”³³

9 The STB’s jurisdiction applies to those facilities that are part of a railroad’s ability to
10 provide transportation services.³⁴ The STB distinguishes between manufacturing, which is
11 not sufficiently related to transportation by rail for its jurisdiction to apply, and transloading,
12 which is sufficiently related to transportation by rail to apply its jurisdiction: “In addition, the
13 Court of Appeals for the Second Circuit has held that transloading activities fall within the
14 Termination Act’s definition of ‘transportation.’ Thus we hold that transloading operations
15 are ‘transportation’ under the Termination Act.”³⁵ Here, EFSEC is proposing to require
16 conditions that would impact a rail carrier both directly and indirectly. The STB’s
17 jurisdiction and federal preemption applies.

18 Many rail-related mitigation measures recommended or proposed in the DEIS clearly
19 attempt to regulate BNSF operations, infrastructure, and real property along rail lines as
20 addressed in Tesoro-Savage’s Motion to Dismiss.³⁶ Such mitigation measures are preempted
21 by the STB under ICCTA. All indirect regulation of BNSF rail operations, through

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24 ³² *Id.* at 88-89; *see also* 49 U.S. C. § 10102(9).

25 ³³ *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) citing *Chicago &*
N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318, (1981).

26 ³⁴ *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 247-48 (3d Cir. 2007)

³⁵ *Id.*

³⁶ Tesoro-Savage’s Motion to Dismiss, pg. 3

1 conditions imposed during SEPA and Site Certification review of Vancouver Energy's
2 proposed facility, are also preempted under ICCTA.

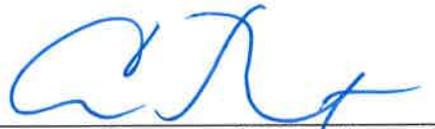
3 **D. Conclusion**

4 Federal law limits the extent of EFSEC's authority, and EFSEC cannot require
5 mitigation or conditions of certification that intrude upon federal laws which exclusively
6 regulate rail and marine traffic. This issue is ripe for determination, and the Port's Motion
7 for Partial Summary Judgment re: Preemption should be granted.

8 Dated this 5th day of May, 2016.

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1 **CERTIFICATE OF SERVICE**

2 The undersigned declares under penalty of perjury, under the laws of the State of
3 Washington, that the following is true and correct:

4 That on the 5th day of May 2016, I arranged for service of the foregoing
5 CONSOLIDATED REPLY IN SUPPORT OF THE PORT OF VANCOUVER USA'S
6 MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PREEMPTION to the parties to
7 this action as follows:

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 Barbara Bratton