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,

WASHINGTON ENVIRONMENTAL COUNCIL, *et al*.,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS LIGHTHOUSE RESOURCES, INC., *ET AL*.'S OPPOSITION TO DEFENDANT HILARY FRANZ'S MOTION FOR SUMMARY JUDGMENT UNDER THE ELEVENTH AMENDMENT

NOTED ON MOTION CALENDAR: October 12, 2018

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INTRODUCTION

For a second time—frequently using the same words—Defendant Franz argues that she is not subject to suit under the *Ex parte Young* doctrine. She is just as wrong now as she was in May when the Court denied her first motion. The "unique, narrow exception" to *Ex parte Young* on which she relies applies only when a plaintiff tries to strip a state of title to its sovereign lands. All Lighthouse wants is for Defendant Franz's decisions to comply with the U.S. Constitution and federal law.

BACKGROUND

Lighthouse Resources Inc. and several of its subsidiaries (collectively, Lighthouse) sued Defendant Franz, current Commissioner of the Washington Department of Natural Resources (DNR), because her Department has issued two denials related to the construction and operation of the proposed Millennium Bulk Terminals-Longview coal export facility.[1] Lighthouse alleges that DNR violated the U.S. Constitution's dormant Commerce Clause, as well as the ICC Termination Act and the Ports and Waterways Safety Act.[2] To remedy these violations, Lighthouse asks the Court to vacate DNR's illegal decisions and prohibit DNR from violating federal law in its future consideration of Lighthouse's permit requests.[3]

Defendant Franz initially responded to Lighthouse's Complaint by moving to "dismiss all claims brought against [her] under Eleventh Amendment immunity."[4] The Court denied that motion after full briefing and argument.[5] The present motion—although captioned as a

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[1] *See* Dkt. 151, Def. Hilary Franz's Mtn. for Summ. J. Under the Eleventh Amend. (Mot.) at 2.

[2] *See* Dkt. 1, Compl. for Declaratory and Injunctive Relief at 31-33, 36, 45-51.

[3] *Id*. at 51-52; *see* Mot. at 3 ("Lighthouse is requesting a declaration invalidating DNR's sublease denial and an injunction limiting the Commissioner's discretion in evaluating future use applications.").

[4] *See* Dkt. 62, Defendants' Mtn. for Partial Dismissal Under Eleventh Amend. and Mtn. for Abstention at 24.

[5] Dkt. 116.

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request for summary judgment—raises exactly the same Eleventh Amendment immunity arguments and again asks the Court to "dismiss all claims against Defendant Franz."[6]

ARGUMENT

A moving party is entitled to summary judgment if it can show "that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law."[7] Here, the parties do not dispute the relevant facts. Defendant Franz's motion for summary judgment should be denied because her claim to sovereign immunity fails as a matter of law.

A. The relief sought in *Coeur d'Alene* went far beyond what Lighthouse seeks here.

Defendant Franz does not dispute that *Ex parte Young* normally authorizes a federal court to hear claims against state officials "when the 'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[8] Nor does she argue that Lighthouse's claims against her fall outside of the *Ex parte Young* rule. Instead, Defendant Franz contends that Lighthouse's claims "cannot proceed" because "they involve certain management decisions over the State's bedlands."[9] She draws this "exception" to *Ex parte Young* from the U.S. Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*.[10]

To understand why Defendant Franz is wrong to rely on *Coeur d'Alene*, it helps to understand exactly what was at stake in that case. Citing the provisions of an 1873 Executive

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[6] Mot. at 4.

[7] Fed. R. Civ. P. 56(a).

[8] Mot. at 7 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

[9] *Id.*

[10] 521 U.S. 261 (1997).

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Order establishing its reservation, the Coeur d'Alene Indian Tribe sought a declaration in federal court that it was entitled to "exclusive use and occupancy" of certain state-owned lands submerged beneath Lake Coeur d'Alene, "as well as a declaration of invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use or affect in any way" those submerged lands.[11] On top of that, the Tribe sought an injunction that would have prohibited Idaho officials "from regulating, permitting, or taking any action" that disturbed the Tribe's ownership rights.[12] This "far-reaching and invasive relief" would effectively have meant not just a transfer of title to the Tribe, but that "the lands in question [were] not even within the regulatory jurisdiction of the State."[13]

Most plaintiffs—including Lighthouse—are not even ***capable*** of seeking the same sort of relief as the Coeur d'Alene Tribe. The Court's decision in *Coeur d'Alene* grew out of what was essentially a territorial dispute between two sovereigns. As Defendant Franz points out, Idaho's claim to sovereignty over its submerged lands had deep roots in English and American law.[14] But the Coeur d'Alene Tribe saw the same lands as "just as necessary, perhaps even more so, to its own dignity and ancient right."[15] The Tribe's requested relief accordingly would have "divest[ed] the State of its sovereign control over submerged lands" by transferring both ownership and sovereignty to the Tribe.[16] In those "particular and special circumstances," the Court found *Ex parte Young* inapplicable.[17]

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[11] *Id*. at 265.
[12] *Id*.
[13] *Id*. at 282.
[14] *Coeur d'Alene*, 521 U.S. at 283-86; *see* Mot. at 7-8.
[15] *Coeur d'Alene*, 521 U.S. at 287.
[16] *Id*. at 283.
[17] *Id*. at 287.

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B. The circumstances in this case do not fit within *Coeur d'Alene*'s "unique, narrow exception" to *Ex parte Young*.

1. The Ninth Circuit has only applied *Coeur d'Alene* to claims that are the functional equivalent of quiet title actions.

Lighthouse's request for relief in this case bears no resemblance to the "far-reaching and invasive relief" sought by the Tribe in *Coeur d'Alene*. Defendant Franz correctly acknowledges that Lighthouse seeks to vacate DNR decisions that it contends were contrary to federal law, and to enjoin future federal law violations.[18] She characterizes that request for relief as "an attempt to establish a possessory interest in the State's aquatic lands," which she says "goes directly to *the* sovereign interest addressed in *Coeur d'Alene Tribe*."[19] That is not enough to thread the *Coeur d'Alene* needle.

As the Ninth Circuit has explained, "it was the unique divestiture of the state's broad range of controls over its own lands that made the *Young* exception to sovereign immunity inapplicable" in *Coeur d'Alene*.[20] Such "divestiture" requires—at a bare minimum—that the plaintiff be seeking title to the state's lands. It is not enough that the case involve "a core state sovereignty area,"[21] or that the plaintiff seeks "prohibitory relief" to prevent a State from violating federal law.[22] Defendant Franz relies heavily on *Lacano Investments, LLC v. Balash*,[23] the only published case in which the Ninth Circuit has applied the *Coeur d'Alene*

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[18] Mot. at 10 (citing Dkt. 1, Compl. at 51-53, ¶¶ A, F, G, H, I, J).

[19] *Id*. (emphasis in original).

[20] *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000).

[21] *Duke Energy Trading and Mktg., LLC v. Davis*, 267 F.3d 1042, 1053-55 (9th Cir. 2001) (finding *Coeur d'Alene* inapplicable even though the plaintiff sought "prohibitory relief" that "implicate[d] the State's sovereignty interest in the gubernatorial exercise of emergency powers").

[22] *In re Ellett*, 254 F.3d 1135, 1143-44 (9th Cir. 2001) (observing that prohibitory relief "necessarily presents less offense to state sovereignty").

[23] 765 F.3d 1068 (9th Cir. 2014).

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exception to *Ex parte Young*. But even though that case that involved "precisely the same sovereignty interests as in *Coeur d'Alene* itself," the Ninth Circuit still demanded that the relief sought be "close to the functional equivalent of [a] quiet title" action.[24]

Granting the State immunity for any actions taken in its "proprietary role as landowner," as Defendant Franz demands,[25] would not be consistent with the Ninth Circuit's narrow reading of *Coeur d'Alene*. Indeed, Defendant Franz's argument "would allow the *Coeur d'Alene* exception to swallow the *Ex parte Young* rule."[26] Even if Lighthouse were seeking a "possessory interest" in DNR lands, as Defendant Franz claims, that is not the same as title to those lands.[27] And Lighthouse cannot conceivably claim any sort of sovereign interest in state-owned submerged lands. Lighthouse's requested relief accordingly does not fit within the Ninth Circuit's interpretation of *Coeur d'Alene* as a "unique, narrow exception" to *Ex parte Young*.[28]

2. Other circuits have consistently declined to employ the *Coeur d'Alene* exception in cases involving state-owned lands.

Ignoring the Ninth Circuit's consistent reasoning, Defendant Franz tries to expand *Coeur d'Alene*'s "unique, narrow exception" to every case that "implicates" Washington's "control over" state-owned lands.[29] The Ninth Circuit's decisions in *Agua Caliente*, *In re*

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[24] *Id*. at 1073-74. The plaintiffs in *Lacano* "allege[d] they [were] 'fee simple owners' of the streambeds beneath the navigable waters" owned by the State of Alaska. *Id*. at 1073.

[25] Mot. at 9.

[26] *Cardenas v. Anzai*, 311 F.3d 929, 938 (9th Cir. 2002).

[27] Lighthouse does not concede that its Complaint seeks a "possessory interest" in the State of Washington's submerged lands. Rather, its request for an injunction against Defendant Franz is directly comparable to the "prohibitory relief" at issue in *In re Ellett*. For present purposes, however, the point is that Lighthouse's requested relief does not fit within the *Coeur d'Alene* exception even under Defendant Franz's characterization of it.

[28] *Agua Caliente*, 223 F.3d at 1048.

[29] Mot. at 9.

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Ellett, and *Duke Energy* "do not apply," she says, because they did not "involve[] the State's management authority over its aquatic lands."[30] That distinction does not hold up under scrutiny. In fact, when other Courts of Appeals have faced similar arguments in cases that ***did*** involve state-owned lands, they have repeatedly refused to apply *Coeur d'Alene*.

In *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, for example, the State of Connecticut refused to permit a pipeline company to discharge into the Long Island Sound.[31] When the company challenged the State's compliance with federal law, Connecticut invoked the *Coeur d'Alene* exception, arguing that the lawsuit infringed on its jurisdiction over the state-owned "land underlying the Long Island Sound."[32] The Second Circuit rejected any analogy to *Coeur d'Alene*, reasoning that "the grant or denial of a [water quality certificate] does not involve an issue of land ownership."[33] It reached this conclusion even though the pipeline company was seeking to exercise its federal eminent domain authority to obtain a right of way over the state's land[34]—a "possessory interest" at least as significant as the one at issue in the present case.

Other Courts of Appeals have reached similar conclusions in other cases involving state-owned lands. The Fifth Circuit rejected application of *Coeur d'Alene* to a suit involving state-owned school trust lands because the plaintiff's "suit is not to quiet title, nor would the granting of relief strip the State of any of its jurisdiction or authority to regulate the land"[35] The Sixth Circuit held that where plaintiffs were not "seeking entitlement to the exclusive use

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[30] *Id*. at 10.
[31] 482 F.3d 79, 83-86 (2d Cir. 2006).
[32] *Id*. at 92.
[33] *Id*.
[34] *See id*.
[35] *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 501-02 (5th Cir. 2001).

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and occupancy of [a] lake," an effort to "enjoin Tennessee officials from committing continuing violations of federal law" did "not begin to approach the far-reaching and invasive relief sought by the Tribe" in *Coeur d'Alene*.[36] And the Tenth Circuit concluded that *Coeur d'Alene* did not apply to a suit that would dictate state management of public lands because "the plaintiffs' requested relief cannot seriously be compared to a quiet title action, in which all or substantially all ownership interests in the lands would be stripped from the state"[37] In short, *Coeur d'Alene* does not "extend to every situation where a state property interest is at issue"[38]

Despite facing various claims related to state management of public lands, all of these appellate courts have effectively endorsed the Ninth Circuit's conclusion that *Coeur d'Alene* does not "bar all claims that affect state powers, or even important state sovereignty interests."[39] "[T]he question posed by *Coeur d'Alene* is not," as Defendant Franz seems to think, "whether a suit implicates a core area of [state] sovereignty."[40] Rather, *Coeur d'Alene*'s "unique, narrow exception" to *Ex parte Young* applies only where the relief requested would work a substantial "*divestiture* of the state's sovereignty"[41]—namely, where the relief requested would at least be "close to the functional equivalent" of a quiet title action.[42]

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[36] *Hamilton v. Myers*, 281 F.3d 520, 528 (6th Cir. 2002); *see also id.* at 526 ("This case is distinguishable from *Coeur d'Alene* because the Hamiltons' claims do not rise to the level of a functional equivalent of a quiet title action implicating special sovereignty interests.").

[37] *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 632-33 (10th Cir. 1998).

[38] *Elephant Butte Irrigation Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 612-13 (10th Cir. 1998)

[39] *Agua Caliente*, 223 F.3d at 1048.

[40] *Id.*; *see* Mot. at 9-10.

[41] *Agua Caliente*, 223 F.3d at 1048.

[42] *Lacano*, 765 F.3d at 1074.

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In the face of this unbroken line of appellate authority, Defendant Franz compares this case to an unpublished decision from this district, *Hood Canal Sand and Gravel, LLC v. Brady*.[43] Consistent with controlling authority, the decision in *Hood Canal* acknowledges that *Coeur d'Alene*'s exception to *Ex parte Young* is limited to circumstances where "a plaintiff's suit is the 'functional equivalent of a quiet title action.'"[44] Unlike this case, however, *Hood Canal* involved a third-party's attempt to invalidate an easement issued by the State to the U.S. Navy.[45] The decision does not say whether the court considered that situation equivalent to a quiet title action. Assuming that *Hood Canal* was correctly decided, an attempt to prevent a state from granting an easement to the federal government is a far cry from this case, which simply asks that Defendant Franz comply with federal law in administering an existing lease.

CONCLUSION

In *Coeur d'Alene*, the Supreme Court created a "unique, narrow exception" to *Ex parte Young* where an Indian tribe essentially sought both ownership of and sovereignty over state-owned lands. Lighthouse seeks neither of those things. Under a long line of precedent in the Ninth Circuit and other Courts of Appeals, that means *Coeur d'Alene* does not apply. Defendant Franz's motion should therefore be denied, again.

Dated this 9th day of October, 2018.

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[43] No. C14-5662 BHS, 2014 WL 5426718 (W.D. Wash. Oct. 22, 2014); *see* Mot. at 9 ("Plaintiffs' arguments are similar to the arguments in *Hood Canal* . . . .").

[44] *Hood Canal*, 2014 WL 5426718, at *3 (quoting *Coeur d'Alene*, 521 U.S. at 281).

[45] *Id*. at *1.

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