

The Honorable Robert J. Bryan

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 of the State of Washington,

Defendants.

Case No. 3:18-CV-05005-RJB

**BNSF’S OPPOSITION TO
DEFENDANT HILARY FRANZ’S
MOTION FOR SUMMARY
JUDGMENT UNDER THE
ELEVENTH AMENDMENT**

**NOTED ON MOTION CALENDAR:
October 12, 2018**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STANDARD OF REVIEW	1
III. FACTS	1
IV. ISSUE.....	3
V. ARGUMENT	3
A. Franz has no Eleventh Amendment immunity from BNSF’s claims.....	3
1. BNSF’s claims satisfy the <i>Verizon</i> standard and accordingly may proceed under the <i>Ex parte Young</i> doctrine.	3
2. The law of the case doctrine precludes reconsideration of previously decided issues in the same case.....	4
B. If the Court reconsiders Franz’s Eleventh Amendment immunity argument, <i>Idaho v. Coeur d’Alene Tribe of Idaho</i> presents a narrow exception to the <i>Ex parte Young</i> doctrine that does not apply here.	4
VI. CONCLUSION	7

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Migliavacca Realty Co.,
74 Wash. 347 (1913)6

California v. United States Bureau of Land Mgmt.,
277 F. Supp. 3d 1106 (N.D. Cal. 2017)1

Genesis Ins. Co. v. Magma Design Automation, Inc.,
705 F. App'x 505 (9th Cir. 2017).....4

Hood Canal Sand & Gravel, LLC v. Brady,
No. C14-5662 BHS, 2014 WL 5426718 (W.D. Wash. Oct. 22, 2014).....5, 6

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997)4, 5, 6, 7

Lacano Investments, LLC v. Balash,
765 F.3d 1068 (9th Cir. 2014).....5, 6

Los Angeles Cty., Cal. v. Humphries,
562 U.S. 29 (2010)4

Money Mailer, LLC v. Brewer,
No. C15-1215RSL, 2017 WL 3017539 (W.D. Wash. July 17, 2017)4

Premo v. Martin,
119 F.3d 764 (9th Cir. 1997).....1, 4

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland,
535 U.S. 635 (2002)3, 4

Wagner v. Spire Vision,
No. C13-04952 WHA, 2014 WL 889483 (N.D. Cal. Mar. 3, 2014).....1

Ex parte Young,
209 U.S. 123 (1908)3, 4, 5, 7

Rules

WAC 332-30-122(1)(c).....2

Other Authorities

33 C.F.R. § 325.1(d)(8)2

1 Fed. R. Civ. P. 56(a).....1

2 U.S. Const. amend. XI.....1, 3, 4, 7

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

I. INTRODUCTION

As a matter of law, Defendant Hilary Franz enjoys no Eleventh Amendment immunity from BNSF Railway Company's ("BNSF") claims. If a state official violates federal law, as BNSF has alleged Franz has, a federal court can vindicate federal law and order the state official to stop violating it, as BNSF has requested this Court to do. To determine whether a litigant's claim meets this standard, federal courts ask whether the claim alleges an ongoing violation of federal law and whether only prospective relief is sought. Consistent with these principles, this Court correctly denied Franz's prior attempt to invoke Eleventh Amendment immunity. In moving for summary judgment now, Franz presents the same arguments she offered in support of her motion to dismiss, and nothing new which supports a different legal conclusion than this Court has already reached. This Court should deny Franz's motion for summary judgment.

II. STANDARD OF REVIEW

Summary judgment should be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Purely legal issues are suitable for resolution upon summary judgment. *See California v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1116 (N.D. Cal. 2017) (citing *Wagner v. Spire Vision*, No. C13-04952 WHA, 2014 WL 889483, at *4 (N.D. Cal. Mar. 3, 2014)). The Ninth Circuit has said: "The question of Eleventh Amendment immunity is a purely legal issue" *Premo v. Martin*, 119 F.3d 764, 768 (9th Cir. 1997).

III. FACTS¹

In October 2010, Northwest Alloys requested approval from the Washington Department of Natural Resources ("DNR") to sublease aquatic lands to Millennium.² In January 2017, DNR denied the sublease.³ Northwest Alloys and Millennium then appealed DNR's denial to Cowlitz County Superior Court.⁴ Despite being held to administrative findings that DNR had "legitimate

¹ While the Eleventh Amendment immunity issue here is purely legal, BNSF corrects some inaccuracies and mischaracterizations of the facts that Franz recites in her opening brief.

² Dkt. 1 ¶ 152.

³ *Id.* ¶ 155.

⁴ Dkt. 21-1.

1 dollar concerns”⁵ surrounding the sublease approval decision, the Superior Court held that
 2 DNR’s denial was arbitrary and capricious for two reasons.⁶ First, the Superior Court concluded
 3 that nothing in the documents DNR had requested from Millennium would help determine
 4 whether Millennium could perform financially as a subtenant.⁷ Second, the court concluded that
 5 DNR could not base its denial on “business reputation” concerns about Millennium in January
 6 2017 when two years earlier DNR had expressed no such concerns and nothing about
 7 Millennium’s business reputation had changed in the interim.⁸

8 Separate from its request to sublease aquatic lands to Millennium, in August 2017
 9 Northwest Alloys sought DNR’s consent to make certain improvements to the existing terminal
 10 site.⁹ The proposed improvements are part of Millennium’s plan to build a coal export facility
 11 on the site.¹⁰ Because Northwest Alloys’ current lease allows coal transloading, and because the
 12 coal export facility would remain subject to numerous federal and state environmental review
 13 and permitting requirements, DNR approval should have been straightforward. Instead, on
 14 October 24, 2017, Franz denied Northwest Alloys’ request to add facilities for Millennium’s
 15 proposed terminal expansion.¹¹ To support her denial, Franz adopted Ecology’s rationale for
 16 denying Millennium’s request for a Clean Water Act section 401 water quality certification,
 17 including Ecology’s reliance on alleged environmental effects of associated rail transportation.¹²

18
 19 ⁵ The Cowlitz County Superior Court did not “determine” this independently, as Franz suggests. *See* Mot. at 2.

⁶ Dkt. 21-2 ¶ 15.

⁷ *Id.* ¶ 11.

⁸ Dkt. 21-2 ¶¶ 2-10.

⁹ Dkt. 1-2 at 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* As Franz notes, her denial of permission to improve the terminal site was “without prejudice.” Mot. at 2-3. Indeed, the decision anticipates that Millennium would return later. *See* Dkt. 1-2. However, it is disingenuous of her to suggest that Millennium had failed to acquire other permits, some of which are subjects of her co-defendants’ illegal actions in this case. *Id.* For example, Franz suggests that State law required Millennium to have a Section 401 water quality certification in hand *before* DNR could approve terminal improvements. But the administrative code provision Franz cites suggests the opposite: that a conditioned approval is allowed pending approval of other permits: “All necessary federal, state and local permits shall be acquired by those proposing to use aquatic lands. Copies of permits must be furnished to the department prior to authorizing the use of aquatic lands. *When evidence of interest in aquatic land is necessary for application for a permit, an authorization instrument may be issued prior to permit approval but conditioned on receiving the permit.*” WAC 332-30-122(1)(c) (emphasis added); *compare* 33 C.F.R. § 325.1(d)(8) (indicating that evidence of interest in property is required for Department of Army permits, including those issued under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act).

1 On January 3, 2018, Lighthouse sued Commissioner Franz, seeking to vindicate federal
 2 law against her denials.¹³ BNSF subsequently intervened, seeking the same.¹⁴ Lighthouse and
 3 BNSF request a declaration invalidating the DNR’s sublease denial and an injunction to prevent
 4 Franz from illegally interfering with the project’s future applications.¹⁵

5 IV. ISSUE

6 Can Franz assert Eleventh Amendment immunity when her actions violate federal law,
 7 BNSF seeks only prospective relief, and BNSF’s suit does not amount to a quiet title action?

8 V. ARGUMENT

9 A. Franz has no Eleventh Amendment immunity from BNSF’s claims.

10 1. BNSF’s claims satisfy the *Verizon* standard and accordingly may 11 proceed under the *Ex parte Young* doctrine.

12 Generally, the Eleventh Amendment affords States and their officials immunity from
 13 suit in federal court. U.S. Const. amend. XI. Notwithstanding the Eleventh Amendment, the *Ex*
 14 *parte Young* doctrine allows suits to proceed against state officials in federal court to vindicate
 15 federal law. The doctrine rests on the premise that a state official who violates federal law does
 16 not act under State authority and is “stripped of [her] official or representative character and is
 17 subjected in [her] person to the consequences of [her] individual conduct.” *Ex parte Young*, 209
 18 U.S. 123, 160 (1908). To determine whether *Ex parte Young* applies, “a court need only conduct
 19 a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law
 20 and seeks relief properly characterized as prospective.” *Verizon Maryland, Inc. v. Pub. Serv.*
 21 *Comm’n of Maryland*, 535 U.S. 635, 645 (2002) (internal marks and citation omitted).

22 BNSF’s complaint meets the *Verizon* standard, because it alleges Franz is violating
 23 federal law and seeks prospective relief only – declaratory judgments and injunctions – to end
 24 those violations which are part of the ongoing effort by Franz and her co-defendants to use all
 25

27 ¹³ Dkt. 1.

28 ¹⁴ Dkt. 47; Dkt. 121.

¹⁵ Dkt. 1 at 51-53; Dkt. 121 at 24-25.

1 means at their disposal to stop United States coal exports through Washington to Asia.¹⁶ BNSF
 2 prevailed on the Eleventh Amendment issue at the motion to dismiss stage when this Court held:
 3 “[T]he Eleventh Amendment Immunity should not prevent proceeding on the suit against the
 4 [C]ommissioner of [P]ublic [L]ands.”¹⁷ Now, Franz has filed a new motion but failed to add
 5 anything to it that would call into question this Court’s earlier decision.

6 **2. The law of the case doctrine precludes reconsideration of previously**
 7 **decided issues in the same case.**

8 Though its application is discretionary, the law of the case doctrine precludes a court
 9 from reconsidering issues it has previously decided, either explicitly or by necessary implication,
 10 in the same case. *Genesis Ins. Co. v. Magma Design Automation, Inc.*, 705 F. App’x 505, 506-
 11 07 (9th Cir. 2017). As this Court previously has observed, the law of the case doctrine “is a
 12 judicial invention designed to aid in the efficient operation of court affairs.” *Money Mailer, LLC*
 13 *v. Brewer*, No. C15-1215RSL, 2017 WL 3017539, at *3, n2 (W.D. Wash. July 17, 2017)
 14 (citation omitted). Here, because the issue of Eleventh Amendment immunity is a purely legal
 15 issue, *Premo*, 119 F.3d at 768, which courts determine by examining the complaint only,
 16 *Verizon*, 535 U.S. at 645, and this Court has already resolved the issue in BNSF’s favor,¹⁸ this
 17 Court should apply the law of the case doctrine’s principles, bar Franz’s re-litigation of the
 18 Eleventh Amendment immunity issue, and deny her motion for summary judgment.

19 **B. If the Court reconsiders Franz’s Eleventh Amendment immunity**
 20 **argument, *Idaho v. Coeur d’Alene Tribe of Idaho* presents a narrow**
 21 **exception to the *Ex parte Young* doctrine that does not apply here.**

22 If the Court reconsiders Franz’s Eleventh Amendment immunity argument, it should
 23 reject her attempt to squeeze BNSF’s claims into a narrow exception to the *Ex parte Young*
 24 doctrine that does not apply here. In *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997),
 25 the United States Supreme Court identified the central dispute as one of land ownership – i.e.,
 26 who owned certain submerged lands, the Coeur d’Alene tribe or the State of Idaho? *See id.* at

27 ¹⁶ Dkt. 121 ¶¶ 91-135; *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 31 (2010) (characterizing declaratory
 judgments and injunctions as prospective relief).

28 ¹⁷ Verbatim Report of Proceedings (“VRP”), at 59 (May 30, 2018); Dkt. 116.

¹⁸ VRP at 59-60 (May 30, 2018).

1 264. The tribe’s requested relief included: (1) a declaration establishing its entitlement to
 2 exclusive use of the land; (2) a declaration invalidating “all Idaho statutes, ordinances,
 3 regulations, customs or usages which purport to regulate, authorize, use, or affect in any way
 4 the submerged lands”; and (3) a preliminary and permanent injunction prohibiting Idaho from
 5 violating the tribe’s “rights of exclusive use and occupancy, quiet enjoyment, and other
 6 ownership interest in the submerged lands.” *Id.* at 265. Given the nature of the tribe’s requested
 7 relief, the Supreme Court concluded that it was “close to the functional equivalent of quiet title
 8 in that *substantially all benefits of ownership and control* would shift from the State to the
 9 Tribe.” *Id.* at 282 (emphasis added). The Supreme Court highlighted that the case was “unusual”
 10 in that exact respect. *Id.* Even more unusual than the typical stakes of a quiet title action, the
 11 tribe sought relief that would have also removed the lands from the state’s regulatory jurisdiction
 12 entirely. *Id.* at 281. “Under th[o]se particular and special circumstances” the Court held that *Ex*
 13 *parte Young* did not apply. *Id.* at 287.

14 The Ninth Circuit has confirmed that *Coeur d’Alene* applies in limited circumstances,
 15 none of which exists here. In *Lacano Investments, LLC v. Balash*, land patent owners sued
 16 Alaskan public officials and requested declaratory and injunctive relief. 765 F.3d 1068 (9th Cir.
 17 2014). Specifically, the land patent owners sought a declaratory judgment that the state officials’
 18 navigability determinations, which implied that the officials asserted state ownership of the
 19 submerged lands subject to land patents, violated a federal statute. *Id.* at 1070-71. The land
 20 patent owners also sought an injunction to prohibit the Alaskan officials from asserting
 21 ownership of the submerged lands. *Id.* Just as the Supreme Court in *Coeur d’Alene* examined
 22 whether that suit amounted to a quiet title action over state lands, the Ninth Circuit in *Lacano*
 23 did the same: “The approach we take instead is functional: we compare the relief sought by
 24 Plaintiffs to a quiet title action, and dismiss because it was close to the functional equivalent of
 25 such an action.” *Lacano*, 765 F.3d at 1074 (internal marks and citation omitted).¹⁹

26 _____
 27 ¹⁹ Franz also mistakenly relies on *Hood Canal Sand & Gravel, LLC v. Brady*, No. C14-5662 BHS, 2014 WL
 28 5426718, at *3 (W.D. Wash. Oct. 22, 2014), to support her claim that the “unique and narrow exception” from
Coeur d’Alene applies. (citation omitted). But, again, in *Hood Canal Sand & Gravel*, the court held that the
 plaintiffs’ suit was the functional equivalent of a quiet title action since it was asking the court to declare an

1 Here, Franz urges this Court to expand *Coeur d'Alene* to include suits beyond those that
 2 are functional equivalents of quiet title actions. Franz asserts that BNSF's requested declaratory
 3 and injunctive relief would prevent her "from exercising her management authority over state-
 4 owned aquatic lands" and would "establish a right for Lighthouse to use and occupy such lands
 5 for the purposes of a coal terminal."²⁰ But this mischaracterizes the effect of BNSF's requested
 6 relief. BNSF has only requested a declaration invalidating Franz's sublease denial and an
 7 injunction to prevent her from illegally interfering with the project's future applications. BNSF
 8 has not asked this Court to order approval of an aquatic lands sublease or terminal
 9 improvements. Nor has BNSF asked this Court to exempt the lands implicated from Franz's
 10 management authority; they would remain subject to the State's ownership and general
 11 permitting requirements if this Court granted the relief requested.²¹ The requested relief, then,
 12 does not impair the State's "core sovereign interests" of ownership and control over aquatic
 13 lands.

14 Instead, BNSF's requested relief is aimed at vindicating its rights under federal law.
 15 BNSF has alleged that Franz, acting under color of state law, continues to violate federal law by
 16 unreasonably withholding a sublease and approval of requested terminal improvements with
 17 pretext and as part of a coordinated effort with her co-defendants to stop coal exports from the
 18 United States to Asia through Washington.²² To vindicate those violations of federal law, BNSF
 19 has asked for prospective relief that includes (1) a request for "[a] declaration that Defendants'
 20 denial of MBT Longview's requested sublease for the Millennium Bulk Terminal violates the
 21 dormant commerce clause"; (2) "[a]n order vacating any and all of the Defendants'
 22 unconstitutional and illegal decisions regarding the Project"; and (3) "[a]n injunction ordering
 23 the Defendants to apply the same review standards to the Project—or any future coal export
 24 _____

25 easement invalid. *Id.* at *4. Unlike the plaintiffs in *Hood Canal Sand & Gravel*, neither the Plaintiffs nor BNSF
 are asking this court to, in effect, quiet title.

26 ²⁰ Mot. at 1.

27 ²¹ A sublessor, unlike any of the parties in *Coeur d'Alene* or *Lacano*, takes only a leasehold, not title or its
 functional equivalent, to real property subject to whatever lease conditions apply. *Allen v. Migliavacca Realty*
Co., 74 Wash. 347, 351 (1913) ("That a tenant is usually estopped to deny his landlord's title . . . is law so
 familiar as to require no citation of authority.")

28 ²² See Dkt. 121.

1 terminal that Plaintiffs or BNSF propose—that are applied to other non-coal terminal
2 proposals.”²³ Rather than impairing any core sovereignty interests, this requested relief simply
3 asks this Court to vacate Franz’s illegal decisions as violative of federal law and to order her to
4 process any future requests without discriminating against the commodity at issue and without
5 relying on purported rail impacts in a way that violates ICCTA. *Coeur d’Alene* does not apply
6 here, and *Ex parte Young* prevents Franz from invoking Eleventh Amendment immunity to
7 shield her violations of federal law from suit in federal court.

8
9 **VI. CONCLUSION**

10 For the foregoing reasons, the Court should deny Franz’s motion for summary judgment.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 ²³ *Id.* ¶¶128, 132, and 133.

1 DATED October 9, 2018

3 ORRICK, HERRINGTON & SUTCLIFFE LLP

5 By: /s/ Robert M. McKenna
6 /s/ Adam N. Tabor
7 Robert M. McKenna (WSBA No. 18327)
8 rmckenna@orrick.com
9 Adam N. Tabor (WSBA No. 50912)
10 atabor@orrick.com

11 701 Fifth Avenue, Suite 5600
12 Seattle, WA 98104-7097
13 Telephone: 206-839-4300
14 Facsimile: 206-839-4301

11 K&L GATES LLP

13 By: /s/James M. Lynch
14 James M. Lynch (WSBA No. 29492)
15 jim.lynch@klgates.com

16 925 4th Ave., Suite 2900
17 Seattle, WA 98104-1158
18 Telephone: 206-623-7580
19 Facsimile: 206-623-7022

17 By: /s/Barry M. Hartman
18 Barry M. Hartman (*pro hac pending*)
19 barry.hartman@klgates.com

20 1601 K. Street, NW
21 Washington DC 20006
22 Telephone: 202-778-9000
23 Facsimile: 202-778-9100

CERTIFICATE OF SERVICE

I hereby certify that on the date below, 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 the filing to all counsel of record.

DATED: October 9, 2018

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Robert M. McKenna
Robert M. McKenna (WSBA No. 18327)
rmckenna@orrick.com

701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Telephone: 206-839-4300
Facsimile: 206-839-4301