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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

**DEFENDANT HILARY
FRANZ'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT
UNDER THE ELEVENTH
AMENDMENT**

NOTE ON MOTION
CALENDAR:

OCTOBER 12, 2018

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I. INTRODUCTION

Plaintiff Lighthouse Resources, Inc., and its subsidiary, Millennium Bulk Terminals-Longview (Millennium) (collectively, Lighthouse) and Intervenor-Plaintiff BNSF agree that whether Commissioner Franz has Eleventh Amendment immunity in this case is a question of law. Plaintiffs also do not dispute that neither the State, nor Congress, has waived the State's sovereign immunity here, and the United States is not a plaintiff. The only issue is whether or not the exception established by *Ex parte Young*, 209 U.S. 123 (1908), applies to Plaintiffs' claims against Commissioner Franz. Based on *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), *Ex parte Young* is inapplicable to the facts of this case.

Relying on inapposite case law, Plaintiffs try to limit the applicability of *Coeur d'Alene Tribe*. However, none of the cases relied upon by Plaintiffs allow their claims to proceed against Commissioner Franz under *Ex parte Young*. While Plaintiffs argue that the relief they seek does not implicate the same sovereign interests that were a stake in *Coeur d'Alene Tribe*, Plaintiffs' requested injunctive and declaratory relief, if granted, could allow Millennium to construct the largest coal terminal in North America on state-owned aquatic lands. Indeed, the leasehold interest that Plaintiffs are attempting to obtain for Millennium's proposed terminal would divest the State of a significant degree of control over the state's bedlands for the entire period of time their proposed terminal is in operation. This, by its nature, is the functional equivalent of a quiet title action, as it would establish a possessory right in state-owned aquatic lands. Control over these sovereign lands was *the* core sovereign interest implicated in *Coeur d'Alene Tribe* and, as such, Plaintiffs' claims against Commissioner Franz are barred under the Eleventh Amendment.

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II. ARGUMENT

A. Commissioner Franz Is Immune From Suit Under the Eleventh Amendment for Her Management Decisions at Issue in This Case Because Those Decisions Directly Involve the Use and Control of Sovereign State-Owned Aquatic Lands.

The question for the Court regarding Commissioner Franz's immunity under the Eleventh Amendment is not whether Plaintiffs' claims against the Commissioner implicate *a* core interest of state sovereignty. The question is whether those claims implicate *the* core interest of state sovereignty that was at issue in *Coeur d'Alene Tribe*, namely the State's control over its aquatic lands. See *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1073-74 (9th Cir. 2014). Indeed, what Lighthouse and BNSF are requesting is a declaration invalidating the Department of Natural Resources' (DNR's) sublease denial and an injunction limiting the Commissioner's discretion in evaluating future use applications. Dkt. 1 at 51-53, ¶¶ A, F, G, H, I, J. BNSF, Dkt. 22-1 at 24-25, ¶¶ 127, 128, 132, 133, 134, 135. This relief, if granted, would "divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Coeur d'Alene Tribe*, 521 U.S. at 283. This action against Commissioner Franz is therefore barred by *Coeur d'Alene Tribe*, because it directly implicates the State's authority to determine the use and control of state-owned aquatic lands.¹

B. Plaintiffs' Law of the Case Arguments Lack Merit Because the Court Explicitly Declined to Rule on Defendant Franz's Eleventh Amendment Immunity During the Rule 12(b)(6) Stage of This Litigation.

Plaintiffs incorrectly assert that the Court already denied Defendant Franz's Eleventh Amendment immunity in its May 30, 2018, ruling from the bench. Dkt. 154 at 8; Dkt. 155 at 4.

¹ Though not material for the purposes of this motion, contrary to BNSF's assertions, the scope of the proposed terminal expansion is not allowed under Northwest Alloys' existing lease. Dkt. 154 at 6; Dkt. 118 at 8, ¶ 63; Dkt. 1-2. Moreover, Wash. Rev. Code § 79.130.030 explicitly requires that any applicant for a lease of state bedlands "shall *first obtain* from the United States army corps of engineers or other federal regulatory agency, a permit to place structures or improvements in the navigable waters . . ." (emphasis added). These requirements are also in Wash. Admin. Code 332-30-122(1)(c).

1 Plaintiffs misrepresent the explicit decision of the Court, which declined to rule on Defendant
2 Franz's immunity at the 12(b)(6) stage. As the Court stated:

3 In regard to Defendant Franz, the Commissioner of Public Lands, there is a sharp
4 difference about her immunity, and Eleventh Amendment Immunity, as argued
5 here at this 12(b)(6) stage, I think they have made a claim that should stand. She
6 should not be dismissed out of hand. I am sure we will reach that more directly
7 and more completely by motion practice. . . . At this 12(b)(6) stage, it appears to
8 me that the motion to dismiss should be denied without prejudice to the various
9 issues that we have had raised here. . . . I think these issues should be – that are
legal issues should be reached by summary judgment where there is a more
complete showing on individual issues and the Court has a better chance to get
ahold of them, determine what fact issues, if any, there are, and apply the law.
I think trying to do that in this Rule 12(b)(6) stage is just not the right place to
resolve these issues.

10 Verbatim Report of Proceedings (VRP) at 58-60 (May 30, 2018); Dkt. 116.

11 Pursuant to this ruling, Defendant Franz is reasserting her Eleventh Amendment
12 immunity in the present Motion for Summary Judgment, and because the parties agree that her
13 immunity is a question of law,² it is entirely appropriate for the Court to consider Defendant
14 Franz's motion at this time.

15 **C. Plaintiffs Rely on Inapposite Case Law to Support Their Position That Their Claims**
16 **Against Commissioner Franz Can Proceed Under *Ex parte Young*.**

17 Lighthouse cites numerous cases in an attempt to narrow the reach of *Coeur d'Alene*
18 *Tribe* in the present matter. Dkt. 155 at 7-10. However, these cases do not support Plaintiffs'
19 arguments that *Ex parte Young* allows their claims against Commissioner Franz to proceed. For
20 example, *In re Ellett*, 254 F.3d 1135, 1143 (9th Cir. 2001), involved the collection of state
21 income taxes from certain tribes. In differentiating the collection of taxes from the State's control
22 over its aquatic lands, the *In re Ellett* Court recognized that "[i]n *Coeur d'Alene* it was the unique
23 divestiture of the state's broad range of controls over its own lands that made the Young
24 exception to sovereign immunity inapplicable." *Id.* at 1143. The court went on to recognize that
25 the question under *Coeur d'Alene Tribe* is "whether the relief requested would be so much a

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² Dkt. 154 at 5; Dkt. 155 at 5.

1 divestiture of the state’s sovereignty as to render the suit as one against the state itself.” *Id.*
2 Collecting the taxes at issue there did not rise to this level. *Id.*

3 Similar to *In re Ellett*, other cases cited by Lighthouse do not involve the State’s interest
4 in the control over its aquatic lands, but rather involve a state’s interest in its tax revenue or
5 contractual rights under utility contracts. *See* Dkt. 155 at 7 citing *Agua Caliente Band of Cahuilla*
6 *Indians v. Hardin*, 223 F.3d 1041, 1043 (9th Cir. 2000), and *Duke Energy Trading & Mktg., LLC*
7 *v. Davis*, 267 F.3d 1042 (9th Cir. 2001). Indeed, the *Duke Energy* Court specifically
8 distinguished the contracts at issue there from the State’s control over its navigable waters by
9 recognizing that the State’s control of its navigable waters uniquely implicates sovereign
10 interests. Such waters are “infused with a public trust the State itself is bound to respect” and
11 that “these lands are tied in a unique way to sovereignty.” *See Duke Energy*, 267 F.3d at 1054,
12 n.8, citing *Coeur d’Alene Tribe*, 521 U.S. at 283, 286.

13 Lighthouse’s reliance on *Islander East Pipeline Company, LLC v. Connecticut*
14 *Department of Environmental Protection*, 482 F.3d 79 (2d Cir. 2006), is also misplaced, because
15 that case examined a decision to grant or deny a water quality certification, not the establishment
16 of a possessory interest in state-owned aquatic lands, and specifically involved “no infringement
17 of state jurisdiction over its lands.”³ *Id.* at 92. Similarly, the public lands at issue in *Lipscomb v.*
18 *Columbus Municipal Separate School District*, 269 F.3d 494, 498-99 (5th Cir. 2001), did not
19 involve the State’s control of its navigable waters, which by their nature are uniquely tied to
20 State sovereignty. *See, e.g., Coeur d’Alene Tribe*, 521 U.S. at 284.

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25 ³ Unlike *Islander East Pipeline*, Lighthouse and BNSF have both requested declaratory and injunctive
26 relief limiting the State’s discretion and control over the use of its aquatic lands. *See* Dkt. 1 at 51-53, ¶¶ A, F, G, H,
I, J; Dkt. 22-1 at 24-25, ¶¶ 127, 128, 132, 133, 134, 135.

1 The other cases relied upon by Lighthouse can be similarly distinguished from the present
2 matter by their facts. Dkt. 155 at 8-10.⁴ The only case cited by Lighthouse that even remotely
3 involves the State's control over its aquatic lands is *Hamilton v. Myers*, 281 F.3d 520 (6th Cir.
4 2002). In *Hamilton*, the plaintiffs challenged the removal of their property from, and were
5 asserting riparian rights over, Reelfoot Lake in Tennessee. *Id.* at 526-27. Importantly, the
6 *Hamilton* Court was not called upon to determine whether the plaintiffs had such riparian rights,
7 because this question was already affirmatively answered by the Tennessee Supreme Court.
8 *Id.* at 527.

9 The scope of the public's interest in a state's navigable waters under the public trust
10 doctrine is determined by state law because "each state individually determines the public trust
11 doctrine's limitations within the boundaries of the state." *Wash. State Geoduck Harvest Ass'n v.*
12 *DNR*, 101 P.3d 891, 896 (Wash. 2004). In Washington, unlike Tennessee, "riparian proprietors
13 on the shore of the navigable waters of the state have no special or peculiar rights therein as an
14 incident to their estate. To hold otherwise would be to deny the power of the state to deal with
15 its own property as it may deem best for the public good." *Eisenbach v. Hatfield*, 26 P. 539,
16 543-44 (Wash. 1891).

17 Lighthouse and BNSF have no lease with the State at Millennium's proposed terminal
18 site, and neither are parties to the State's lease with Northwest Alloys. *See* Dkt. 21-1 at 17. In
19 order to obtain their requested declaratory and injunctive relief, Plaintiffs would need to establish
20 a right to use State property for Millennium's proposed terminal. Establishing this possessory
21 interest in state-owned aquatic lands would implicate the exact issue of *Coeur d'Alene Tribe*,
22 namely the State's authority to determine who uses, and for what purposes, state-owned aquatic
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24 ⁴ *E.g.*, *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998) (review of whether a
25 constitutional amendment approved by Colorado voters relating to school trust lands violated the Supremacy
26 Clause); *Elephant Butte Irrig. Dist. of N.M. v. Dep't. of Interior*, 160 F.3d 602 (10th Cir. 1998) (review of retention
of net profits under a land lease); and *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002) (review of distribution of
payments from tobacco settlement).

1 lands. Indeed, when an action implicates “the state’s control over submerged lands, federal
2 courts lack jurisdiction to hear the case.” *Lacano*, 765 F.3d at 1074. Because Plaintiffs’ requested
3 relief in this case goes right to the State’s control over its submerged lands, their claims against
4 Commissioner Franz are barred by the Eleventh Amendment.

5 Both Lighthouse and BNSF attempt to distinguish the Ninth Circuit’s opinion in *Lacano*
6 from the present matter. Dkt. 154 at 9; Dkt. 155 at 7-8. However, like the present case, *Lacano*
7 involved a private party seeking to use and control state aquatic lands. *Lacano*, 765 F.3d
8 at 1073-74. As the *Lacano* Court noted, “[a] federal court cannot summon a State before it in a
9 private action seeking to divest the State of a property interest.” *Lacano*, 765 F.3d at 1073 citing
10 *Coeur d’Alene Tribe*, 521 U.S. at 289. It is a basic tenet of property law that “[t]he power to
11 exclude has traditionally been considered one of the most treasured strands in an owner’s bundle
12 of property rights.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).
13 Lighthouse’s and BNSF’s requested relief would sever this strand of the State’s ownership
14 interest in its aquatic lands by establishing a right to use State property for the purposes of
15 Millennium’s terminal, and removing the Commissioner’s future discretion over such uses. *See*
16 Dkt. 1 at 51-53, ¶¶ A, F, G, H, I, J; Dkt. 22-1 at 24-25, ¶¶ 127, 128, 132, 133, 134, 135. Their
17 claims against Commissioner Franz therefore cannot stand under the Eleventh Amendment.

18 Similar to the plaintiffs in *Hood Canal Sand & Gravel, LLC v. Brady*, No. C14-5662
19 BHS, 2014 WL 5426718, at *4 (W.D. Wash. Oct. 22, 2014), Lighthouse and BNSF are seeking
20 to establish their right to use state bedlands for the purpose of a terminal. Contrary to their
21 assertions, however, *Hood Canal Sand and Gravel* is directly on point. Dkt. 154 at 9, n.19.
22 Dkt. 155 at 11. Indeed, the plaintiffs in *Hood Canal Sand and Gravel* were not merely seeking
23 to invalidate an easement that the State granted to the Navy; they were seeking to establish a
24 right to construct a pier on state-owned bedlands. *Id.* at *1; *4. In dismissing their claims under
25 the Eleventh Amendment, the court recognized the applicability of *Coeur d’Alene Tribe*, because
26 “Hood Canal’s requested relief would therefore prevent the State’s officers from exercising their

1 authority over the bedlands. Indeed, Hood Canal’s suit implicates the exact issues of
2 *Coeur d’Alene* itself, namely . . . the state’s control over submerged lands.” *Hood Canal Sand &*
3 *Gravel*, 2014 WL 5426718, at *4 (internal citations omitted).

4 **D. The Leasehold Interest That Millennium Seeks in State-Owned Aquatic Lands**
5 **Would Divest the State of Control Over the Use and Occupancy of Such Lands.**
6 **Plaintiffs’ Claims Against Commissioner Franz are Therefore Barred Under the**
7 **Eleventh Amendment as Established in *Coeur d’Alene Tribe*.**

8 Lighthouse disputes that it is seeking a “possessory interest” in state-owned aquatic lands
9 in this case, while BNSF concedes that Millennium, as a sublessor, would take “only a leasehold”
10 to the State’s property. Dkt. 155 at 8, n. 27; Dkt. 154 at 10. Both Lighthouse and Millennium dispute
11 that any such interest would be the same as “title” to those lands. Dkt. 155 at 8; Dkt. 154 at 10,
12 n. 21. These arguments ignore the basic fact that a leasehold *is* a possessory interest in real property.
13 As the Washington State Supreme Court long ago stated, “[a] lease carries a present interest and
14 estate in the property involved for the period specified therein, . . . It gives exclusive possession of
15 the property, which may be asserted against everyone, including the lessor.” *Conaway v. Time Oil*
16 *Co.*, 210 P.2d 1012, 1017 (Wash. 1949).

17 Plaintiffs’ requested declaratory and injunctive relief against Commissioner Franz, if
18 granted, could result in Millennium’s exclusive use and occupancy of state-owned bedlands for the
19 entire period of time their leasehold interest is in place. This is the functional equivalent of a quiet
20 title in the state’s bedlands. Plaintiffs’ claims against Defendant Franz are therefore, in effect,
21 claims against the State itself, which are barred in this Court under the Eleventh Amendment as
22 established in *Coeur d’Alene Tribe*.

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III. CONCLUSION

The Eleventh Amendment bars all of the Plaintiffs' claims against Defendant Franz. Accordingly, Commissioner Franz respectfully requests the Court grant this motion and enter an order dismissing all such claims.

DATED this 12th day of October, 2018.

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s/ Edward D. Callow

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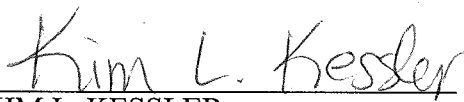
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 12, 2018, I caused the foregoing document to be
3 electronically filed with the Clerk of the Court using the CM/ECF system, which will send
4 notification of such filing to all counsel of record.

5 DATED this 12th day of October, 2018.

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10 Natural Resources Division
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