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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al.,

Plaintiffs,

and

BNSF RAILWAY COMPANY

Intervenor-Plaintiff,

v.

JAY INSLEE, et al.,

Defendants,

and

WASHINGTON ENVIRONMENTAL
COUNCIL, et al.,

Intervenor-Defendants.

CASE NO. 3:18-cv-05005-RJB

ORDER ON DEFENDANT HILARY
FRANZ’S MOTION FOR
SUMMARY JUDGMENT UNDER
THE ELEVENTH AMENDMENT

THIS MATTER comes before the Court on the Defendants Hilary Franz’s Motion for Summary Judgment under the Eleventh Amendment. Dkt. 151. The Court has considered the motion, briefs filed in support of and opposition thereto, and the remainder of the file herein.

1 This case arises from the Washington State Department of Ecology’s denial of a Clean
2 Water Act (“CWA”) Section 401 Certification (“water quality certificate”) and the Washington
3 Department of Natural Resources’ (“DNR”) denial of a request for approval of a sublease of
4 state-owned aquatic lands for Plaintiffs Lighthouse Resources, Inc., Lighthouse Products, LLC,
5 LHR Infrastructure, LLC, LHR Coal LLC, and Millennium Bulk Terminals-Longview, LLC’s
6 (collectively “Lighthouse”) proposed coal export terminal on and in the Columbia River. Dkt. 1.
7 As is relevant to the pending motion, Lighthouse and Intervenor-Plaintiff BNSF Railway
8 Company maintain that the State’s denials violate the Commerce Clause of the U.S. Constitution,
9 are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), and
10 Lighthouse further argues that the State’s decisions are also preempted by the Ports and
11 Waterways Safety Act (“PWSA”). Dkts. 1 and 22-1.

12 Defendant Franz, who is the Commissioner of DNR and is sued only in her official
13 capacity, moves for summary judgment, arguing that the Eleventh Amendment bars
14 consideration of the claims asserted against her. Dkt. 151. Lighthouse and BNSF oppose the
15 motion. Dkts. 155 and 154. For the reasons provided below, the Eleventh Amendment bars
16 consideration of the claims asserted against Defendant Franz. Accordingly, Defendant Franz’s
17 motion for summary judgment (Dkt. 151) should be granted.

18 I. FACTS AND PENDING MOTION

19 A. FACTS

20 Lighthouse, a coal supply chain company, proposes to build a new coal export facility at the
21 existing Millennium Bulk Terminal in Longview, Washington on and in the Columbia River. At
22 full build out, the proposed terminal would be capable of exporting 44 million metric tons of coal
23 a year, and would include three large docks. BNSF would provide rail transport for the coal to
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1 the terminal. The coal would then be loaded onto ocean going vessels at the proposed terminal's
2 docks in the Columbia River for shipment to Asia.

3 The proposed terminal's docks would be built on state-owned aquatic lands in the
4 Columbia River. The State, through DNR, currently leases the state-owned aquatic land at issue
5 to Northwest Alloys, Inc. ("NW Alloys"). Dkt. 21-1, at 17. Lighthouse wants to sublease these
6 state-owned aquatic lands. Dkt. 1.

7 Lighthouse began the permitting process for the proposed terminal in 2012. In addition
8 to a water quality certification and other permits, Lighthouse was required, by the NW Alloys'
9 lease, to get DNR's approval of a sublease for the state-owned aquatic lands upon which the new
10 docks would be constructed. Dkt. 1-2. On January 2, 2017, Peter Goldmark, the then
11 Commissioner of DNR, denied the request. Dkt. 130-2. The decision provided that the denial
12 was based on the failure to provide requested financial information. *Id.* In October 2017, the
13 Cowlitz County Superior Court ruled that the decision was "arbitrary and capricious" (Dkt. 1, at
14 33) but did not require that the sublease be approved. The Superior Court decision is on appeal
15 to the Washington State Court of Appeals, Division II. Dkt. 21-4.

16 On September 26, 2017, the State denied Lighthouse's application for a water quality
17 certificate. Dkt. 1-1.

18 In August of 2017, Northwest Alloys requested that DNR approve improvements to the
19 site in support of the project. Dkt. 1-2. On October 24, 2017, Defendant Franz, as the
20 Commissioner of DNR, denied the request without prejudice. Dkt. 1-2. The October 24, 2017
21 decision was not appealed administratively or to the Washington State Courts.

22 B. PENDING MOTION

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1 In her motion for summary judgment, Defendant Franz argues that she is immune from suit
2 under the Eleventh Amendment for her management decisions regarding the state-owned aquatic
3 lands at issue here. Dkt. 151. She maintains that the Plaintiff and Intervenor-Plaintiff's
4 requested relief implicates Washington's sovereign interest in controlling its own aquatic lands
5 and so is barred by the Eleventh Amendment under the U.S. Supreme Court case *Idaho v. Coeur*
6 *d'Alene Tribe*, 521 U.S. 261 (1997). *Id.*

7 Lighthouse and BNSF both respond and argue that Defendant Franz is not immune from suit
8 under the Eleventh Amendment. Dkts. 155 and 154. They assert that *Coeur d'Alene Tribe's*
9 narrow exception to the *Ex Parte Young*, 209 U.S. 123 (1908) doctrine does not apply here. *Id.*
10 BNSF further asserts that the law of the case doctrine precludes reconsideration of this issue,
11 which it maintains the Court has already decided. Dkt. 154.

12 In reply, Defendant Franz argues that the Court has not already decided this issue. Dkt. 160.
13 She points out that the motion to dismiss based on sovereign immunity was denied without
14 prejudice and so the law of the case doctrine does not preclude a decision on this question. Dkt.
15 160. Defendant Franz maintains that the leasehold interest that Lighthouse seeks in state-owned
16 aquatic lands would divest the state of the control, occupancy, and use of its own land and so the
17 claims are barred by the Eleventh Amendment. *Id.*

18 This opinion will first address whether the case of the law doctrine precludes consideration of
19 the question at issue in this motion. It will then consider whether Defendant Franz is entitled to
20 Eleventh Amendment immunity.

21 II. DISCUSSION

22 A. LAW OF THE CASE

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1 “The law-of-the-case doctrine generally provides that when a court decides upon a rule of
2 law, that decision should continue to govern the same issues in subsequent stages in the same
3 case.” *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018)(*internal*
4 *citations omitted*). Where an issue in a case has been decided by a higher court, lower courts are
5 precluded from reconsidering the issue. *Id.* A court may also decline to reconsider an issue that
6 has been previously decided and “is binding on the parties – for example, where the district court
7 has previously entered a final decree or judgment.” *Id.* “The law of the case doctrine does not,
8 however, bar a court from reconsidering its own orders before judgment is entered or the court is
9 otherwise divested of jurisdiction over the order.” *Id.*

10 The law of the case doctrine does not apply here. The Court may consider whether
11 Defendants Franz is entitled to Eleventh Amendment immunity. The Court denied the motions
12 to dismiss based on Eleventh Amendment immunity without prejudice. Dkt. 117, at 59. No final
13 decree or judgment has been entered. The Court is not otherwise divested of jurisdiction to
14 consider the question. The law of the case doctrine does not bar the undersigned from
15 considering Defendant Franz’s motion for summary judgment based on Eleventh Amendment
16 immunity.

17 **B. STANDARD ON MOTIONS FOR SUMMARY JUDGMENT**

18 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
19 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
20 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party is
21 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
22 showing on an essential element of a claim in the case on which the nonmoving party has the
23 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
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1 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
2 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
3 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
4 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56 (d). Conversely, a genuine dispute over a
5 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
6 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
7 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
8 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

9 The determination of the existence of a material fact is often a close question. The court
10 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
11 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
12 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
13 of the nonmoving party only when the facts specifically attested by that party contradict facts
14 specifically attested by the moving party. The nonmoving party may not merely state that it will
15 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
16 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
17 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not
18 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

19 **C. ELEVENTH AMENDMENT IMMUNITY**

20 The Eleventh Amendment provides: “[t]he Judicial power of the United States shall not
21 be construed to extend to any suit in law or equity, commenced or prosecuted against one of the
22 United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”
23 “The Eleventh Amendment has been authoritatively construed to deprive federal courts of
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1 jurisdiction over suits by private parties against unconsenting States.” *Seven Up Pete Venture v.*
2 *Schweitzer*, 523 F.3d 948, 953 (9th Cir. 2008).

3 There is no dispute that the State of Washington (via Defendant Franz - who is sued in
4 her official capacity) has not consented to a suit related to the decisions regarding the sub-lease
5 and proposed improvements to the aquatic lands at issue in this case. Lighthouse and BNSF’s
6 claims are barred by the Eleventh Amendment, unless an exception applies.

7 Lighthouse and BNSF contend that the exception announced in *Ex parte Young* applies.
8 Dkts. 154 and 155. The *Ex parte Young* exception to the Eleventh Amendment generally allows
9 federal courts to “order prospective relief . . . as well as measures ancillary to appropriate
10 prospective relief” against a state (or officers sued in their official capacities), *Frew ex rel. Frew*
11 *v. Hawkins*, 540 U.S. 431, 437 (2004)(*internal quotation marks and citations omitted*), “insofar
12 as they s[seek] to preclude continuing violations of federal law,” *Idaho v. Coeur d’Alene Tribe of*
13 *Idaho*, 521 U.S. 261 (1997). The *Ex parte Young* exception does not allow federal courts to
14 “award retrospective relief, for instance, money damages or its equivalent, if the State invokes its
15 immunity.” *Frew*, at 437.

16 The State argues that an exception to the *Ex parte Young* exception applies – that of the
17 one announced in *Coeur d’Alene Tribe*. In *Coeur d’Alene Tribe*, the U.S. Supreme Court
18 considered whether a federal court was barred by the Eleventh Amendment from hearing a
19 Tribe’s claims asserted against the state of Idaho for an interest in submerged aquatic lands
20 which were within the original boundaries of the Coeur d’Alene Reservation as defined by
21 federal law. The Tribe sought “a declaratory judgment to establish its entitlement to the
22 exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as
23 a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages
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1 which purport to regulate, authorize uses or affect in any way the submerged lands.” *Id.* at 265.
2 The Tribe also sought a preliminary and permanent injunction “prohibiting defendants from
3 regulating, permitting, or taking any action in violation of the Tribe’s rights of exclusive use and
4 occupancy, quiet enjoyment, and other ownership interest in the submerged lands.” *Id.* The
5 Court found that the relief sought by the Tribe was “close to the functional equivalent of [a] quiet
6 title [action] in that substantially all benefits of ownership and control would shift from the State
7 to the Tribe.” *Id.*, at 282. The Court noted that the “lands underlying navigable waters have
8 historically been considered sovereign lands. State ownership in them has been considered an
9 essential attribute of sovereignty.” *Id.*, at 283. In holding that the Eleventh Amendment barred
10 the Tribe’s suit against Idaho, it noted that “navigable waters uniquely implicate sovereign
11 interest.” *Id.*, at 284.

12 “*Coeur d’Alene* provides only a unique and narrow exception to *Young*, and does not bar
13 all claims that affect state powers, or even important state sovereignty interests.” *Lacano*
14 *Investments, LLC v. Balash*, 765 F.3d 1068, 1074 (9th Cir. 2014)(*internal citations omitted*).
15 “[W]hen an action implicates the exact issues of *Coeur d’Alene* itself, namely navigability of
16 waters or the state’s control over submerged lands, federal courts lack jurisdiction to hear the
17 case.” *Id.* In order to determine if the *Coeur d’Alene* exception applies, courts in the Ninth
18 Circuit apply the “functional approach” and compare the relief sought by plaintiffs to a quiet title
19 action. *Id.*

20 In applying the “functional approach,” a review of the relief that Lighthouse and BNSF
21 seek is necessary. In addition to costs and attorneys’ fees, Lighthouse seeks the following relief:

22 A. A declaration that Defendants’ denial of MBT Longview’s requested sublease
23 for the Millennium Bulk Terminal was an unconstitutional violation of the
24 dormant commerce clause.

1 B. A declaration that Defendants' denial of MBT Longview's requested CWA
2 section 401 certification was an unconstitutional violation of the dormant
commerce clause. . .

3 C. A declaration that Defendants' denial of MBT Longview's requested CWA
4 section 401 certification was preempted by ICCTA and the PWSA.

5 D. A declaration that any environmental reviews of the proposed coal export
6 facility at the Millennium Bulk Terminal - or any future coal export terminal that
7 Lighthouse or its subsidiaries propose - may not be used to deny or unreasonably
condition a permit beyond the standards applied to other non-coal terminal
8 projects, including denying or unreasonably conditioning a permit based on the
effects of transporting coal to and from the Terminal by rail and vessel traffic in
interstate or foreign commerce.

9 E. A declaration that potential environmental effects within the jurisdiction of the
10 federal government cannot be the basis of a conclusion that the environmental
effects of the Millennium Bulk Terminal - or any future coal export terminal that
Lighthouse or its subsidiaries propose - project are unmitigable.

11 F. A declaration that any decision by any state or local entity relying on the
12 Defendants' denial of the sublease or the Defendants' denial of the CWA section
401 certification, including the denial of MBT Longview's requested shoreline
13 permit, is an unconstitutional violation of the dormant commerce clause and/or is
preempted by ICCTA and the PWSA.

14 G. An order vacating any and all of the Defendants' unconstitutional and illegal
15 decisions regarding the Millennium Bulk Terminal, as well as any federal, state,
or local decisions relying on Defendants' unconstitutional or illegal actions.

16 H. An injunction ordering the Defendants to apply the same review standards to
17 the Millennium Bulk Terminal - or any future coal export terminal that
Lighthouse or its subsidiaries propose - that are applied to other non-coal terminal
18 proposals.

19 I. An injunction ordering the Defendants not to deny MBT Longview's requested
CWA section 401 certification or any other permit or approval for the Millennium
20 Bulk Terminal on the basis of rail or vessel traffic, or any other potential
environmental effects within the jurisdiction of the United States.

21 J. An injunction ordering the Defendants to continue processing any and all
22 current and future MBT Longview permit applications.

23 Dkt. 1, at 51-52. Similarly, in addition to attorneys' fees and costs, BNSF seeks the following
24 relief:

1 A declaration that ICCTA preempts any decision by any state or local entity
2 relying on the Defendants' denial of the sublease or the Defendants' denial of the
3 CWA section 401 certification, including the denial of MBT Longview's
4 requested shoreline permit, when such denials are based on the purported rail-
5 related impacts of a proposed project.

6 A declaration that Defendants' denial of MBT Longview's requested sublease for
7 the Millennium Bulk Terminal violates the dormant commerce clause.

8 A declaration that Defendants' denial of MBT Longview's requested CWA
9 section 401 certification violates the dormant commerce clause.

10 A declaration that any environmental reviews of the proposed coal export facility
11 at the Millennium Bulk Terminal - or any future coal export terminal that
12 Plaintiffs or BNSF may propose - may not be used to deny or unreasonably
13 condition a permit beyond the standards applied to other non-coal terminal
14 projects, including denying or unreasonably conditioning a permit based on the
15 effects of transporting coal to and from the Terminal by rail traffic in interstate or
16 foreign commerce.

17 A declaration that potential environmental effects within the jurisdiction of the
18 federal government cannot be the basis of a conclusion that the Project's
19 environmental effects - or any future coal export terminal that Plaintiffs or BNSF
20 propose - are not mitigatable.

21 An order vacating any and all of the Defendants' unconstitutional and illegal
22 decisions regarding the Project, as well as any federal, state, or local decisions
23 relying on Defendants' unconstitutional or illegal actions.

24 An injunction ordering the Defendants to apply the same review standards to the
Project - or any future coal export terminal that Plaintiffs or BNSF propose—that
are applied to other non-coal terminal proposals.

An injunction ordering the Defendants not to deny MBT Longview's requested
CWA section 401 certification or any other permit or approval for the Terminal
on the basis of rail traffic, or any other potential environmental effects within the
jurisdiction of the United States.

An injunction ordering the Defendants to continue processing any and all current
and future MBT Longview permit applications.

Dkt. 22-1, at 24-25.

Defendant Franz's Motion for Summary Judgment under the Eleventh Amendment (Dkt.
151) should be granted. The relief Lighthouse and BNSF seek directly implicate Washington's

1 core sovereign interests – control of its aquatic lands. Under RCW § 79.105.060 (20), “[s]tate
2 owned aquatic lands” are “all tide lands, shorelands, harbor areas, the beds of navigable
3 waterways owned by the state.” By eliminating a large majority of the grounds upon which a
4 decision about a sub-lease or improvement applications in the future may be made, Lighthouse
5 and BNSF’s requested relief functionally hamstring Washington’s authority to determine the
6 use and control of its own aquatic lands. The relief, if granted, is “close to the functional
7 equivalent of [a] quiet title [action] in that substantially all benefits of ownership and control
8 would shift” from Washington to a private company for the life of the sub-lease. *Coeur d’Alene*,
9 at 282. It would force the state to accept structures on its’ own land. It would functionally
10 prevent Washington State’s officers from exercising their authority over Washington’s sovereign
11 lands. The gravamen of the Complaints and requested relief here (related to the State’s decision
12 to deny the subleases and deny, without prejudice, the request for improvements on state owned
13 aquatic lands) is to divest the state of “sovereignty over territory within its boundaries.” *Verizon*
14 *Maryland, Inc. v. Pub. Serv. Comm’n of Maryland*, 535 U.S. 635, 649 (2002)(*Kennedy*
15 *concurring*). The sweeping relief sought by Lighthouse and BNSF implicate the exact issues of
16 *Coeur d’Alene* itself - the state’s control over its own submerged lands. *Lacano*, at 1074.
17 Accordingly, this Court lacks jurisdiction to hear the claims asserted against Defendant Franz
18 under the Eleventh Amendment to the U.S. Constitution. *Id.*

19 This ruling does not mean that Washington may not be held accountable for the decisions
20 at issue in this motion. There is an available state forum for Lighthouse and BNSF to challenge
21 the decisions at issue here. At this stage, they have been successful – the Cowlitz County
22 Superior Court ruled the decision to deny the sublease was “arbitrary and capricious.”
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1 Lighthouse and BNSF maintain that this suit against Defendant Franz may go forward
2 under *Ex parte Young* as applied in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S.
3 635 (2002). Dkts. 154 and 155.

4 In *Verizon*, the Supreme Court held that “[i]n determining whether the doctrine of *Ex*
5 *parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a
6 ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law
7 and seeks relief properly characterized as prospective.’” 535 U.S. at 645 (*quoting Idaho v.*
8 *Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O’Connor, J., joined by Scalia and
9 Thomas, JJ., concurring in part and concurring in judgment)). Their reliance on *Verizon* is
10 misplaced. The Court in *Verizon* was not addressing a State’s decisions related to the state-
11 owned aquatic lands, which the Court has held “implicates special sovereignty interest.” *Coeur*
12 *d’Alene Tribe*, at 281. Moreover, the question of which test applies was squarely addressed in
13 *Lacano* and the Ninth Circuit held that the “functional approach” test (the one used above)
14 applies. *Lacano*, at 1074.

15 Lighthouse and BNSF point to other cases and argue that other courts in other circuits
16 have not applied *Coeur d’Alene Tribe*. Dkts. 154 and 155. None of the cases cited involve a
17 state’s denial of a lease or sub-lease, or control of state-owned aquatic lands. For example, they
18 point to *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental*
19 *Protection*, 482 F.3d 79 (2nd Cir. 2006). In that case, the Second Circuit considered whether
20 Connecticut voluntarily waived its Eleventh Amendment sovereign immunity by participating in
21 its optional “federally deputized role” as a regulator under the federal Natural Gas Act (NGA)
22 and Clean Water Act. Section 19(d) of the NGA, provides “an expedited direct cause of action
23 in the federal appellate courts to challenge a state administrative agency's order, action, or failure
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1 to act with respect to a permit application required under federal law in order to proceed with a
2 natural gas facility project.” *Islander E. Pipeline*, at 83–84. In concluding that the state had
3 voluntarily waived its immunity from suit, the Second Circuit noted that “by going forward with
4 its federally deputized role . . . , Connecticut has now knowingly waived its immunity from [the
5 NGA’s] Section 19(d) suit in order to receive the benefits of participating in the NGA and CWA
6 regulatory scheme.” *Islander E. Pipeline*, at 91.

7 *Islander E. Pipeline* does not apply here. There is no showing that the Washington
8 waived its Eleventh Amendment rights.

9 D. CONCLUSION

10 The law of case doctrine does not prevent this Court from determining whether the State
11 of Washington by way of Defendant Franz (as a state officer sued in her official capacity) is
12 entitled to Eleventh Amendment immunity. This Court does not have jurisdiction to consider the
13 claims asserted against Defendant Franz under the Eleventh Amendment. All claims and
14 requested relief sought against her are predicated on decisions which implicate Washington’s
15 uniquely sovereign interest in its own submerged land. The relief sought, if granted, would
16 divest Washington State of control over its sovereign lands. The result, then, is the “functional
17 equivalent of a quiet title” action. Review of the Washington’s decisions related to the sub-lease
18 and application for improvements to the property, by this Court, is barred by *Coeur d’Alene*
19 *Tribe*. Defendant Franz’s motion for summary judgment (Dkt. 151) should be granted.

20 III. ORDER

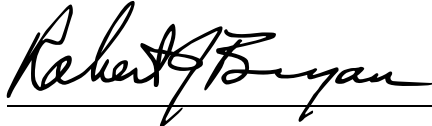
21 Therefore, it is hereby **ORDERED** that:

- 22 • Defendant Hilary Franz’s Motion for Summary Judgment under the Eleventh
23 Amendment (Dkt. 151) **IS GRANTED**; and

1 • The claims asserted against Defendant Hilary Franz **ARE DISMISSED**.

2 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
3 to any party appearing *pro se* at said party’s last known address.

4 Dated this 23rd day of October, 2018.

5 

6 ROBERT J. BRYAN
7 United States District Judge