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 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) seek to use state-owned aquatic lands on the Columbia River near Longview, Washington, to construct and operate a large coal export terminal. These lands are part of a site that is currently under a lease between the State and Northwest Alloys, Inc. (Northwest Alloys). Northwest Alloys, who is not a party to this case, applied to the State Department of Natural Resources (DNR) for consent to a sublease that would allow Millennium to operate a coal export terminal on the site. DNR denied the sublease request pursuant to Section 9.1 of the Lease because of Millennium's failure to provide financial information and other business documents demonstrating that it was capable of performing as a subtenant. DNR also denied Northwest Alloys' request to construct improvements on the site based, in part, on Northwest Alloys' failure to obtain all necessary state and federal permits for the construction of those new improvements. Northwest Alloys and Millennium appealed the sublease denial, and that matter is currently pending before the Washington State Court of Appeals. DNR's denial of the request to construct improvements was not appealed.

Lighthouse subsequently brought this case against Defendants Inslee, Bellon, and Franz, alleging numerous causes of action regarding the various State denials for Lighthouse's proposed coal export terminal. As it relates to Commissioner Franz, Lighthouse and Plaintiff-Intervenor BNSF are requesting declaratory and injunctive relief that would prevent Defendant Franz from exercising her management authority over state-owned aquatic lands, and that would establish a right for Lighthouse to use and occupy such lands for the purposes of a coal terminal. Determining who uses state-owned aquatic lands, and for what purposes, is the core sovereign interest that was at issue in the exception to *Ex parte Young* created by the Supreme Court in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Accordingly, Plaintiffs' claims against Commissioner Franz are barred by the Eleventh Amendment, and Defendant Franz respectfully requests the Court enter an order dismissing all such claims.



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## II. FACTS IN SUPPORT OF MOTION

The State of Washington, through DNR, leases state-owned aquatic lands[1] on the Columbia River in Cowlitz County to Northwest Alloys, Inc. Dkt. 21-1 at 17. Under the terms of its lease with the State, Northwest Alloys is allowed three 220-foot ship docks on state property. Dkt. 21-1 at 18.

Northwest Alloys requested a sublease from DNR to allow its proposed subtenant, Millennium, to use state-owned aquatic lands for a proposed coal terminal. Dkt. 1 at 11, ¶ 54; Dkt. 1 at 32, ¶ 152. By letter dated January 5, 2017, former Commissioner of Public Lands Peter Goldmark, on behalf of DNR, denied the requested sublease. Dkt. 21-1 at 10-12. Commissioner Goldmark based the denial, in part, on Millennium's failure to provide certain financial and other business information demonstrating its viability to perform as a subtenant. *Id.* Section 9.1 of the Lease explicitly allows DNR to request this information regarding any proposed subtenant. Dkt. 21-1 at 32-33.

Northwest Alloys and Millennium subsequently appealed the sublease denial to the Cowlitz County Superior Court. Dkt. 21-1 at 2. By order dated November 29, 2017, the superior court reversed DNR's decision denying the sublease. Dkt. 21-2 at 2-10. Although it determined that DNR had "legitimate dollar concerns" regarding Millennium's ability to perform as a subtenant, Dkt. 21-2 at p. 6, ¶ 9, the superior court nevertheless directed DNR to reconsider its decision. Dkt. 21-3 at 2-5. DNR appealed the superior court's orders, Dkt. 21-4, and that appeal is currently pending before the Washington State Court of Appeals under Docket No. 51677-2-II.

On October 24, 2017, Commissioner of Public Lands Hilary Franz,[2] acting on behalf of DNR, denied without prejudice Northwest Alloys' request to construct the dock and additional facilities associated with Millennium's proposed terminal expansion on state-owned aquatic

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[1] "State-owned aquatic lands" are "all tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways owned by the state and administered by the department. . ." Wash. Rev. Code § 79.105.060(20).

[2] Commissioner of Public Lands Hilary S. Franz was elected in 2016, replacing former Commissioner Goldmark. *See* http://www.dnr.wa.gov/commissioner.



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lands. Dkt. 1-2. DNR's denial was based, in part, on Millennium's failure to acquire all necessary permits and approvals for their proposed construction, including a Section 401 Certification from Ecology, as well as a federal permit for dredging and constructing improvements in navigable waters under Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403). Dkt. 1-2 at 10. These approvals are required under state law before DNR can authorize the use of the bed of a navigable water.[3] Dkt 1-2 at 10; Wash. Admin. Code 332-30-122(1)(c); Wash. Rev. Code § 79.130.030. This second DNR decision was not appealed.

On January 3, 2018, Lighthouse initiated the present suit against Governor Inslee, Ecology Director Bellon, and Commissioner of Public Lands Franz. Dkt. 1. As it relates to Commissioner Franz, Lighthouse is requesting a declaration invalidating the 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, which subsequently intervened as a Plaintiff, is similarly seeking a declaration invalidating the DNR's sublease denial and an injunction limiting the Commissioner's discretion in evaluating future use applications. Dkt. 22-1 at 24-25, ¶¶ 127, 128, 132, 133, 134, 135. Both Lighthouse and BNSF assert that the Prayer for Relief in their Complaints against Commissioner Franz "speaks for itself." Declaration of Edward D. Callow in Support of Defendant Hilary Franz's Motion for Summary Judgment Under the Eleventh Amendment (Callow Decl.) Exs. 1 and 2.

## III. ISSUE

Does the Eleventh Amendment bar Plaintiffs' claims against Commissioner of Public Lands Hilary Franz because those claims challenge the State's management decisions regarding the use and occupancy of sovereign state-owned aquatic lands?

[3] "Beds of navigable waters" are "those lands lying waterward of and below the line of navigability on rivers and lakes not subject to tidal flow, or extreme low tide mark in navigable tidal waters, or the outer harbor line where harbor area has been created." Wash. Rev. Code § 79.105.060(2).

## IV. ARGUMENT

### A. Summary Judgment Standard.

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). An absolute immunity, such as the Eleventh Amendment, "defeats a suit at the outset." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). Because Defendant Franz's Eleventh Amendment immunity is apparent on the face of Plaintiffs' complaints, and is based on undisputed material facts, the Court should grant this motion and dismiss all claims against Defendant Franz.

### B. Commissioner Franz Is Immune From Suit Under the Eleventh Amendment for Her Management Decisions Regarding State-Owned Aquatic Lands.

Under the Eleventh Amendment, "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Eleventh Amendment immunizes states from suit in federal court regardless of the relief sought, barring suits for equitable relief as well as suits for damages. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993); *Cory v. White*, 457 U.S. 85, 90-91 (1982); *see also Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 48 n.19 (1994). For purposes of sovereign immunity, a suit against a state official acting in his or her official capacity is treated as if it is a suit against the state itself. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984).

In determining whether Eleventh Amendment immunity applies, the Court must "'examine each *claim* in a case to see if the court's jurisdiction over that claim is barred . . . .'"

*Kruse v. State of Hawai'i*, 68 F.3d 331, 334 (9th Cir. 1995) (quoting *Pennhurst*, 465 U.S. at 120-21). Accordingly, the Eleventh Amendment can bar some claims in an action, while allowing others to proceed. *Kruse*, 68 F.3d at 335. In the present matter, Plaintiffs' claims against Commissioner Franz go right to the heart of the State's sovereign interest in the management of its aquatic lands. As discussed below, under *Coeur d'Alene Tribe*, these claims are therefore barred by the Eleventh Amendment.

There are a few exceptions to Eleventh Amendment immunity, none of which apply to Commissioner Franz in this case. First, a state can waive its Eleventh Amendment immunity. *E.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 778-79 (1991). Second, Congress can abrogate the immunity, *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). And third, the immunity does not apply where the United States is a plaintiff. *United States v. Miss.*, 380 U.S. 128, 140 (1965). In addition, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), a claim for prospective injunctive relief against a state official for an alleged ongoing violation of federal law can, under some circumstances, proceed in federal court. *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

Here, none of these exceptions apply to Commissioner Franz because the State has not waived its immunity; Plaintiffs have not sued the State under any federal statute that purports to waive the State's immunity; and the federal government is not a plaintiff in this case. Moreover, while Plaintiffs may argue that their claims against Commissioner Franz can proceed under *Ex parte Young*, such claims are nevertheless barred because they challenge the State's management authority over its aquatic lands. This exception to *Ex parte Young* was articulated by the Supreme Court in *Coeur d'Alene Tribe*. These exceptions are discussed in more detail below.

**1. The State of Washington Has Not Waived Its Eleventh Amendment Immunity.**

The test for whether a state has waived its immunity from federal court jurisdiction is a "stringent" one. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S.

666, 675 (1999). A state's waiver must be "unequivocally expressed" and is only effective "where stated by the most express language." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990); *College Sav. Bank*, 527 U.S. at 675.

Here, the State has not waived its sovereign immunity. While the Washington State Constitution permits the Legislature to waive sovereign immunity by "direct[ing] by law, in what manner, and in what courts, suits may be brought against the state", Wash. Const. art. II, § 26, the Legislature has directed that suits may *only* be brought against the State in Washington State courts. *See* Wash. Rev. Code § 4.92.010. This statute is not a consent for a State official acting in her official capacity to be sued in federal court, let alone an "unequivocal" one. *E.g., Skokomish Indian Tribe v. France*, 269 F.2d 555, 561 (9th Cir. 1959); *Title Guar. & Surety Co. v. Guernsey*, 205 F. 94, 95 (W.D. Wash. 1913).

**2. Congress Has Not Abrogated Washington's Eleventh Amendment Immunity.**

Congress has the power, under Section 5 of the Fourteenth Amendment, to abrogate states' Eleventh Amendment immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). However, Congress must make its intent to do so "unmistakably clear." *Atascadero*, 473 U.S. at 238, 242. Plaintiffs have not sued Commissioner Franz under any law that purports to waive her sovereign immunity, much less a law that contains an "unmistakably clear" waiver, as neither the Interstate Commerce Termination Act (ICCTA) nor the Ports and Waterways Safety Act (PWSA) contain a sovereign immunity waiver. Moreover, while Plaintiffs bring claims under 42 U.S.C. § 1983, section 1983 does not abrogate states' Eleventh Amendment immunity. *See Quern v. Jordan*, 440 U.S. 332, 341-45 (1979). Indeed, unless *Ex parte Young* applies, the Eleventh Amendment also bars section 1983 claims against state officials acting in their official capacity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65-71 (1989) ("neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). Accordingly, Plaintiffs'

section 1983 claims, and their associated 42 U.S.C. § 1988 claims, against Commissioner Franz are also barred.

**3. *Ex parte Young* Does Not Apply to Commissioner Franz's Management Decisions Regarding State-Owned Aquatic Lands, Because State Control of These Aquatic Lands Is an "Essential Attribute of Sovereignty."**

In *Ex parte Young*, the Supreme Court recognized a limited exception to sovereign immunity for a state official named in an official capacity, which permits a federal court to hear a suit when the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.*, 535 U.S. at 645. While *Ex parte Young* typically allows claims for prospective injunctive or declaratory relief against state officials to proceed in federal court, such claims cannot proceed when they involve certain management decisions over the State's bedlands. This exception was articulated by the Supreme Court in *Coeur d'Alene Tribe*.

*Coeur d'Alene Tribe* involved an action by the Coeur d'Alene Tribe against the State of Idaho, and several Idaho officials, seeking declaratory and injunctive relief establishing the Tribe's ownership over portions of the bed of Lake Coeur d'Alene. *Coeur d'Alene Tribe*, 521 U.S. at 264-65. In holding that the Tribe's claims were barred by the Eleventh Amendment, the Supreme Court recognized the unique nature of a state's ownership of the beds of its navigable waters as an "essential attribute" of a state's sovereignty. *Id.* at 283. The Court further recognized that "[t]he requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Id.* at 282.

The states, upon entry into the Union, "'became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.'" *Id.* at 283 (quoting *Martin v. Waddell's Lessee*, 41 U.S. 367, 16 Pet. 367, 10 L. Ed. 997 (1842)). The State's title to these sovereign lands arises under the equal footing

doctrine.[4] As the *Coeur d'Alene Tribe* Court stated, "[t]he principle which underlies the equal footing doctrine and the strong presumption of state ownership is that *navigable waters uniquely implicate sovereign interests*. The principle arises from ancient doctrines." *Coeur d'Alene Tribe*, 521 U.S. at 284 (emphasis added).

Because of the sovereign interests a state has in the beds of its navigable waters, the Supreme Court in *Coeur d'Alene Tribe* held that the Tribe's claims, which amounted to a quiet title action against a state in federal court, were barred by the Eleventh Amendment. In reaching this conclusion, the Supreme Court recognized that:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity. . .[5]

The State's ownership of its aquatic lands reflects its obligations under the public trust doctrine. *Pope Res. v. Wash. State Dep't of Nat. Res.*, 418 P.3d 90, 95 (Wash. 2018). In Washington, state-owned aquatic lands are managed by DNR pursuant to the aquatic lands statutes under Wash. Rev. Code Title 79. *See* Wash. Rev. Code § 79.105.020. DNR is a tri-partite entity consisting of the Board of Natural Resources, the Administrator (Commissioner of Public Lands), and the Supervisor. Wash. Rev. Code § 43.30.030; Wash. Rev. Code § 43.30.105; Wash. Rev. Code § 43.30.155. Through the aquatic lands statutes, "the State has granted sovereign powers to DNR for protection of the State's interest in the trust." *Pope Res.*, 418 P.3d at 95. As the manager of the State's aquatic lands, "DNR executes its leasing authority with a view toward the State's duty to protect the public trust." *Id.* Thus, the Commissioner's leasing decisions on state-owned aquatic lands are inextricably linked to State sovereignty. Plaintiffs'

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[4] The equal footing doctrine means that "States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.'" *Coeur d'Alene Tribe*, 521 U.S. at 283 (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228-229, 3 How. 212, 11 L. Ed. 565 (1845)).

[5] *Coeur d'Alene Tribe*, 521 U.S. at 287.

claims against Defendant Franz are therefore, in effect, claims against the State itself which are barred in this Court under the Eleventh Amendment.

Throughout this case, Lighthouse has confused the State's role as a regulator with the State's proprietary role as a landowner. *See, e.g.,* Dkt. 75 at 12. It is the latter under which Commissioner Franz manages the State's sovereign interests in its aquatic lands. *See* Wash. Rev. Code § 79.105.020. Plaintiffs' arguments are similar to the arguments in *Hood Canal Sand & Gravel, LLC v. Brady*, No. C14-5662 BHS, 2014 WL 5426718, at *4 (W.D. Wash. Oct. 22, 2014). Like Lighthouse, Hood Canal Sand and Gravel asserted its right to lease state-owned aquatic lands and sought to limit the State's management discretion under the guise of merely seeking an order requiring compliance with federal and state law. *Id.* Hood Canal Sand and Gravel's declaratory and injunctive relief would have had the effect of "prevent[ing] the State's officers from exercising their authority over the bedlands." *Id.* Accordingly, their action against the Commissioner was barred under the Eleventh Amendment. *Id.* at *5.

**C. Plaintiffs' Requested Relief Implicates the State's Sovereign Interests in Control Over the State's Aquatic Lands. Their Claims Against Commissioner Franz Are Therefore Barred Under the Eleventh Amendment as Set Forth in *Coeur d'Alene Tribe*.**

The issues that Plaintiffs raise in this case against Commissioner Franz center on the State's authority and discretion to determine who uses, and for what purposes, state-owned aquatic lands. *See* Dkt. 1 at 12-13, 31-32; Dkt. 1-2 at 1-11; and Dkt. 22-1 at 15. The State's control of its navigable waters was *the* sovereign interest that was implicated in *Coeur d'Alene Tribe*. This was also the same sovereign interest at issue in *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1073-74 (9th Cir. 2014). Both *Lacano* and *Coeur d'Alene Tribe* stand for the proposition that when an action implicates "the state's control over submerged lands, federal courts lack jurisdiction to hear the case." *Lacano*, 765 F.3d at 1074. Because Plaintiffs' requested relief in this case goes right to the State's control over its submerged lands, their claims against Commissioner Franz are barred by the Eleventh Amendment.



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As Plaintiffs make clear in their complaints, the relief they seek against Commissioner Franz is a declaration invalidating the State'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; Dkt. 22-1 at 24-25, ¶¶ 127, 128, 132, 133, 134, 135. This requested relief is an attempt to establish a possessory interest in the State's aquatic lands for the purpose of Millennium's proposed terminal. While BNSF has previously argued that a sublessor such as Millennium would take "only a leasehold" to state-owned aquatic lands,[6] such a leasehold would impair a core state property interest by subverting the State's discretion to determine who uses state property, and for what purposes. Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Several cases that Plaintiffs previously cited in opposition to Defendant Franz's assertion of Eleventh Amendment immunity simply do not apply here because none of those cases involved the State's management authority over its aquatic lands.[7] Indeed, the State's interest at stake in this case is not merely an interest in its tax revenue.[8] The State's interest in this case goes directly to *the* sovereign interest addressed in *Coeur d'Alene Tribe*: namely the State's control over the use of its aquatic lands. As Justice O'Connor recognized in her concurring opinion in *Coeur d'Alene Tribe*, "[w]e have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters." *Coeur d'Alene Tribe*, 521 U.S. at 289. As such, Plaintiffs' claims for relief against Commissioner Franz fall directly under the unique and narrow exception to *Ex parte*

[6] Dkt. 74 at 14, n.19.

[7] Dkt.74 at 7-9. Dkt. 75 at 4-6.

[8] *See Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1043 (9th Cir. 2000); *In re Ellett*, 254 F.3d 1135, 1143 (9th Cir. 2001); and *Duke Energy Trading & Mktg., LLC v. Davis*, 267 F.3d 1042 (9th Cir. 2001). The *Duke Energy* Court also recognized that, unlike the authority to commandeer certain contracts at issue there, the State's control of its navigable waters uniquely implicates sovereign interests. Such waters are infused with a public trust the State itself is bound to respect. *See Duke Energy*, 267 F.3d at 1054, n.8.

*Young* outlined in *Coeur d'Alene Tribe*, as they are "so much of a divestiture of the state's sovereignty as to render the suit as one *against the state itself*."[9] They are therefore barred by the Eleventh Amendment.

## V. CONCLUSION

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

DATED this 20th day of September, 2018.

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[9] *Agua Caliente Band*, 223 F.3d at 1048 (emphasis in original).

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2018, 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 such filing to all counsel of record.

DATED this 20th day of September, 2018.

Kim L. Kessler

KIM L. KESSLER
Legal Assistant
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