Jessica J. Spuhler, CO Bar No. 41833
Steven J. Lechner, CO Bar No. 19853
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
(303) 292-1980 (facsimile)
jspuhler@mountainstateslegal.com
lechner@mountainstateslegal.com

Eric Twelker, AK Bar No. 9006045
10430 Dock Street
Juneau, AK 99801
(907) 789-6800
(907) 789-3742 (facsimile)
twelker.eric@gmail.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA, JUNEAU OFFICE

LACANO INVESTMENTS, LLC, NOWELL AVENUE DEVELOPMENT, and AVA L. EADS, on behalf of themselves and the class they seek to represent, Plaintiffs, v. DAN SULLIVAN, Commissioner, Alaska Department of Natural Resources, in his official capacity, BRENT GOODRUM, Director, Division of Mining, Land & Water, Alaska Department of Natural Resources, in his official capacity, Defendants.	No. 1:12-cv-00014-TMB **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

On December 20, 2012, Lacano Investments, LLC, Nowell Avenue Development, and Ava L. Eads (collectively "Plaintiffs"), on behalf of themselves and the class they seek to represent, filed this case against Dan Sullivan, Commissioner of the Alaska Department of Natural Resources, and Brent Goodrum, Director of the Division of Mining, Land & Water of the Alaska Department of Natural Resources (together "Defendants") in their official capacities. Complaint ("Compl.") ¶¶ 3–8, ECF No. 1. Plaintiffs and the members of the class they seek to represent own, or have warranted title, to lands within the State of Alaska that:

1. Formerly constituted part of the public lands of the United States;

2. Were patented by the United States prior to Alaska's statehood based upon one or more public surveys; and

3. Include one or more streams that were not meandered in conjunction with the public survey(s).[1]

Compl. ¶ 24. Plaintiffs are seeking declaratory and injunctive relief requiring Defendants to cease implementing their "Challenged Policy,"[2] through which Defendants unlawfully assert title to Plaintiffs' land in contravention of Sections 6(a) and 6(m) of the Alaska Statehood Act, Public Law 85–508, 72 Stat. 339 (1958), and Section 2(f) of the Submerged Lands Act ("SLA"), 43 U.S.C. §1301(f). *Id.* ¶ 52.

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[1] This class definition describes the owners and warrantors of title of those lands exempted from the Submerged Lands Act under Section 2(f) of the Act, which provides: "The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person." 43 U.S.C. § 1301(f).

[2] Plaintiffs define the "Challenged Policy" as "Defendants' written policy, and implementation and enforcement practices and procedures." Compl. ¶ 22. Plaintiffs refer to Defendants' Navigability Policy as the "written policy." *Id.* ¶ 20.

On January 17, 2013, Defendants filed a motion to dismiss and supporting memorandum pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the Eleventh Amendment bars this Court from hearing this case. Defs.' Mot. to Dismiss, ECF Doc. 16; Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem."), ECF Doc. 17. Although Defendants characterize their motion as "a factual attack on subject matter jurisdiction," Defs.' Mem. CM/ECF p. 5, they have failed to dispute any of the factual allegations set forth in Plaintiffs' Complaint. Instead, Defendants raise only legal arguments based on the well-plead factual allegations in the Complaint. Noticeably absent from Defendants' motion is any acknowledgement or response to the legal basis for Plaintiffs' claims in this case, *i.e.*, Section 2(f) of the SLA and Section 6 of the Alaska Statehood Act. Compl. ¶¶ 1, 16–17, 26–27, 49–52. As demonstrated below, Defendants' arguments are essentially non-responsive to Plaintiffs' claims, which fall squarely within the *Ex parte Young* exception to the Eleventh Amendment. Accordingly, this Court should deny Defendants' motion.

ARGUMENT

I. STANDARD OF REVIEW.

Defendants argue that this Court lacks subject matter jurisdiction on the basis of the Eleventh Amendment and seek dismissal under Federal Rule of Civil Procedure 12(b)(1).[3] Defs.' Mem. CM/ECF p. 2. When raised, the Eleventh Amendment has generally been considered a matter of jurisdiction, *Edelman v. Jordan,* 415 U.S. 651, 678 (1974), however, it has been described as a "rather peculiar kind of 'jurisdictional' issue." *United States v. SCS Bus. & Tech. Inst., Inc.,* 173 F.3d 890, 892 (D.C.Cir.1999); *see also Idaho v. Coeur d'Alene Tribe of*

[3] Dismissal should not be taken lightly, as "[j]urisdictional dismissals in cases premised on federal-question jurisdiction are exceptional." *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 140 (9th Cir. 1983).

Idaho, 521 U.S. 261, 267 (1997) (*Coeur d'Alene*) (stating that the Eleventh Amendment "enacts a [waivable] sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."). The peculiarities of an Eleventh Amendment defense are clear when compared with most jurisdictional issues, which cannot be waived by the parties, and, where present, must be raised by a court on its own. *Wisconsin Dept. of Corrections v. Schacht,* 524 U.S. 381, 389 (1998).

Thus, the Eleventh Amendment does not automatically deprive a court of its original jurisdiction. *Id.* (citing *Calderon v. Ashmus,* 523 U.S. 740, 745 n. 2, (1998) ("While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, . . . we have recognized that it is not coextensive with the limitations on judicial power in Article III.")). Indeed, the Eleventh Amendment only "grants the State a legal power to assert a sovereign immunity defense should it choose to do so." *Schacht,* 524 U.S. at 389. This understanding of the Eleventh Amendment as a "volitional defense" is supported by numerous decisions recognizing the States' rights to waive their protections. *Harris v. Bd. of Trustees Univ. of Alabama*, 846 F. Supp. 2d 1223, 1230 (N.D. Ala. 2012) (citing *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985); *Patsy v. Bd. of Regents of Fla.,* 457 U.S. 496, 515 n.19 (1982) (allowing the court to ignore the issue where it has not been raised.)).

In this instance, because resolution of the jurisdictional question raised in Defendants' 12(b)(1) motion to dismiss is intertwined with the merits of the case, this Court is required to convert Defendants' motion to dismiss into a Rule 56 motion for summary judgment. *See Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1040 (9th Cir. 1979) (district court erred in dismissing under Rule 12(b)(1) where a provision of RCRA provided the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief);

Murgia v. Reed, 338 Fed. Appx. 615, 616 (9th Cir. 2009) ("[W]hen a factual jurisdictional issue is intertwined with the merits of an action, a Rule 12(b)(1) motion must be converted into a motion for summary judgment."); *see also Sun Valley Gasoline,* 711 F.2d at 139. The jurisdictional question is considered intertwined with the merits of the case where, as in this case, "'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" *Id.* at 139–40 (quoting *Timberlane Lumber Co. v. Bank of America,* 549 F.2d 597, 602 (9th Cir.1976)).

Plaintiffs rely on the SLA and the Alaska Statehood Act as support for this Court's federal question subject matter jurisdiction over this case. Compl. ¶ 1. Plaintiffs' substantive claim for relief is based on Section 2(f) of the SLA, incorporated by reference as Section 6(m) of the Alaska Statehood Act, which clearly exempts Plaintiffs' lands from those lands transferred to the State of Alaska upon statehood under the SLA.[4] *Id.* ¶¶ 1, 16, 17. Meanwhile, Defendants assert that their motion is "a factual attack on subject matter jurisdiction," Defs.' Mem. CM/ECF p. 5, but they have offered no evidence that would tend to put into dispute any of Plaintiffs' well-plead facts. Defendants simply assert that the State of Alaska unmistakably owns the property at issue in this case pursuant to the equal footing doctrine and the SLA.[5] *Id.* CM/ECF pp. 6, 10, 12, 14. Based upon this unsupported assertion, Defendants argue Plaintiffs' claims are barred by the Eleventh Amendment under *Coeur d'Alene*. Defs.' Mem. CM/ECF pp. 7–13. Thus, in order

[4] Section 6(a) of the Alaska Statehood Act also protects rights existing at the time of statehood, it provides: "That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied." Public Law 85-508, 72 Stat. 339, 343 (1958); Compl. ¶51.

[5] Although Defendants claim they own Plaintiffs' land pursuant to the equal footing doctrine, the SLA is a codification of the equal footing doctrine, and thus defines the extent of any possible claim Defendants may have to Plaintiffs' land.

to decide whether Defendants' Eleventh Amendment jurisdictional argument should bar Plaintiffs' suit, this Court has to determine whether the State of Alaska has a sovereign ownership interest in the lands at issue in this case despite Section 2(f) of the SLA. Such a determination goes to the heart of the merits of Plaintiffs' claims.

Accordingly, this Court must convert Defendants' 12(b)(1) motion into a motion for summary judgment, and "should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional facts is akin to a decision on the merits." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.,* 594 F.2d 730, 733–34 (9th Cir. 1979)). Under that standard, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. Unless that standard is met, the jurisdictional facts must be determined at trial by the trier of fact." *Augustine*, 704 F.2d at 1077 (citing *Thornhill,* 594 F.2d at 733–35). More importantly, a motion for summary judgment must be supported by admissible evidence that shows there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). Because Defendants have not provided any evidence to dispute the well-plead factual allegations of Plaintiffs' Complaint, much less enough evidence to settle any factual disputes in favor of Defendants, this Court should deny their motion to dismiss and allow this case to proceed.

II. THIS COURT SHOULD DENY DEFENDANTS' MOTION BECAUSE DEFENDANTS MISCHARACTERIZE THE LANDS AT ISSUE AND IGNORE THE FEDERAL LAW UPON WHICH PLAINTIFFS' CLAIMS ARE BASED.

At the outset, Defendants assert that "lands underlying tidally influenced or navigable waters" are "sovereign lands."[6] Defs.' Mem. CM/ECF p. 2. In fact, the entirety of Defendants' Eleventh Amendment argument is premised on the notion that the lands at issue in this case underlie "navigable waters" and are therefore "sovereign." Defendants' mischaracterization of Plaintiffs' land makes the remainder of Defendants' motion to dismiss non-responsive to the claims raised in the Complaint. The gravamen of Plaintiffs' Complaint is that, under Section 2(f) of the SLA (incorporated by reference as Section 6(m) of the Alaska Statehood Act), Congress exempted Plaintiffs' lands from the SLA because they lie beneath nonnavigable waters. Compl. ¶¶ 14–18, 52. Thus, Plaintiffs' lands were never transferred upon statehood to the State of Alaska. Compl. ¶ 32. The plain language of Section 2(f) and the legislative history of the SLA could not be any clearer on this point.

What would later become Section 2(f) of the SLA was discussed in joint hearings before the Committees on the Judiciary in 1948. *Title to Submerged Lands Beneath Tidal and Navigable Waters: J. Hearings on S. 1988 and Similar House Bills Before the Comms. on the Judiciary*, 80th Cong. 2 (1948) (hereinafter "*Hearings*").[7] The Idaho Chamber of Commerce ("Chamber"), and an Idaho attorney, Oscar W. Worthwine, submitted extensive comments into

[6] It is axiomatic that such lands are considered "sovereign" with title passing from the federal government to the states if the waters flowing over them were navigable at the time of statehood. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227–28 (2012). The lands at issue in this case were determined by the General Land Office ("GLO") to be nonnavigable and conveyed from the federal public domain prior to statehood when the United States patented the lands into private ownership. Compl. ¶¶ 33–36. Defendants are using their Challenged Policy to surreptitiously overturn the GLO's official determinations and assert title to certain streambeds that were conveyed into private ownership prior to statehood.

[7] Relevant excerpts of the *Hearings* are attached hereto as Exhibit 1.

the record proposing an amendment ("Idaho Amendment") to prevent the damage the SLA, as it was written at that time, could have done to longstanding property rights in Idaho and other states. *Hearings* at 434–40 (statements of the Chamber and Mr. Worthwine). The comments were prescient in their identification of an issue that still plagues the federal courts today: precisely how should navigability for title be defined? The Chamber noted that, even in 1948, "[r]ecent United state court decisions and Federal administrative rulings ha[d] greatly broadened the concept of 'navigability' . . ." *Id.* at 434. The Chamber urged Congress to adopt changes to the proposed legislation because consideration of the SLA "afford[ed] an excellent opportunity to clarify, through congressional legislation, the rapidly growing confusion on the subject of Federal control over streams and stream beds." *Id.*

Thus, the Chamber and Mr. Worthwine proposed the Idaho Amendment to exclude from the definition of "lands beneath navigable waters" all lands beneath unmeandered streams that had previously been patented into private ownership by the United States. *Id.* at 435. As the Chamber summarized, "[t]he purpose of excluding beds of unmeandered streams in the proposed amendment is to prevent a cloud being cast upon thousands of acres of land [in Idaho alone at that time] that have been patented by the United States Government to homesteaders, miners, and others." *Id.* at 435. This proposition was not mere protectionism, as the Chamber went on to explain; indeed, the lands covered by the Idaho Amendment had already been determined to lie beneath nonnavigable waters:

> Ever since 1796 in all of the public land of the United States that has been surveyed, meander lines have indicated what the engineers in charge believed to be navigable streams. Those that were not meandered were considered as nonnavigable. By meandering a stream, the stream beds were segregated from the public domain for public use.

> Where a stream was not meandered, the land below the stream bed was included in the lands surveyed, and in Idaho alone, thousands of acres of stream beds have been purchased and paid for by homesteaders and miners.
>
> The particular effect of a survey across nonmeandered streams is a representation by the United States that the lands embraced by the survey and across the stream are subject to sale and disposition under the laws of the United States, and are not, as in the case of meandered streams, reserved from sale and disposition by the United States.

Hearings at 435. Plaintiffs' lands are those described by the Chamber. They were surveyed, left unmeandered, and patented by the United States to homesteaders and miners prior to Alaska Statehood.[8] Compl. ¶ 32.

Most applicable to Defendants' Challenged Policy, which attempts to redefine "navigable waters" in order to assert title to Plaintiffs' lands are the words of Mr. Worthwine, who explained the importance of the Idaho Amendment as follows:

> To have titles to valuable properties turn on the uncertain, fickle, and ever-changing test of waters being navigable or nonnavigable is not in keeping with the times when the simple test of whether, when surveyed, the stream was meandered or not can be applied, for the purpose of establishing titles only (and not for the purpose of regulating commerce). *If a stream or body of water was not meandered Congress should not attempt to grant the lands thereunder to the States*.

Hearings at 436 (emphasis added). Of course, Congress found Mr. Worthwine and the Chamber persuasive, and adopted the Idaho Amendment as Section 2(f) of the SLA, which provides:

> The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person.

43 U.S.C. § 1301(f).

[8] Importantly, Defendants have not disputed this fact.

In their motion, Defendants fail to confront or even acknowledge the existence of Section 2(f) of the SLA, and thus have not provided any argument for how their actions have not violated this provision of federal law. Instead, Defendants recite portions of the equal footing doctrine and mischaracterize Plaintiffs' lawsuit as a quiet title action barred by the Eleventh Amendment. Defs.' Mem. CM/ECF pp. 2–4, 11–12. Defendants' motion can only succeed if this Court also turns a blind eye toward the basis for Plaintiffs' claims, *i.e.*, Section 2(f) of the SLA, which is also incorporated in the Alaska Statehood Act. Public Law 85-508, 72 Stat. 339, 343 (1958). Therefore, this Court should deny Defendants' motion.

III. PLAINTIFFS' CLAIMS FALL SQUARELY WITHIN THE *EX PARTE YOUNG* EXCEPTION TO THE ELEVENTH AMENDMENT.

The Eleventh Amendment provides: "[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." U.S. Const. amend. XI. The Supreme Court expanded the scope of the Eleventh Amendment to capture suits brought by a citizen against his own state in *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). The Eleventh Amendment does not, however, bar all forms of relief against state officials. *See Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine established that a state official acting under his title as an officer of the state and committing an illegal act:

> [C]omes into conflict with the superior authority of th[e] Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159–60 (citing *Ex parte Ayers*, 123 U. S. 507 (1887)). The type of relief allowed under *Ex parte Young* is not unlimited, but it is unquestionable. Indeed, "prospective relief requiring, or having the effect of requiring, governmental officials to obey the law has long been available."

E.E.O.C. v. Peabody W. Coal Co., 610 F.3d 1070, 1085 (9th Cir. 2010). Plaintiffs' claims fall squarely within the *Ex parte Young* exception to the Eleventh Amendment. They seek prospective declaratory and injunctive relief establishing that Defendants have violated federal law and are prohibited from doing so in the future. Compl. CM/ECF pp. 15–17.

A. Defendants' Reliance On *Coeur d'Alene* Is Misplaced.

Defendants contend that, under *Coeur d'Alene*, Plaintiffs' lawsuit is barred by the Eleventh Amendment. Defs.' Mem. CM/ECF pp. 7–10. Defendants construct a tautology to support their theory that *Coeur d'Alene* is analogous to the instant case, which goes as follows: the State of Alaska has recently claimed Plaintiffs' lands as sovereign, therefore this Court's enforcement of federal law, *i.e.*, Section 2(f) of the SLA, would transfer ownership of sovereign lands to Plaintiffs, making this a quiet title case, which would violate the Eleventh Amendment as interpreted by the Court in *Coeur d'Alene*. *Id.* CM/ECF p. 6.

The primary flaw with Defendants' argument is that it presumes the lands at issue are sovereign lands. As demonstrated by Plaintiffs' uncontested facts and Section 2(f) of the SLA, Defendants' presumption is patently false. Compl. ¶¶ 32–44. This flaw and many others become crystal clear when one examines the Court's opinion in *Coeur d'Alene*.

The Coeur d'Alene Tribe ("Tribe") sued the State of Idaho, various state agencies, and numerous state officials in federal district court, seeking numerous forms of relief. *Coeur d'Alene*, 521 U.S. at 265. The Tribe claimed ownership in the bed of Lake Coeur d'Alene, the beds of "the various navigable rivers and streams that form part of its water system," and all the submerged lands that were within the original boundaries of the Tribe's Coeur d'Alene Reservation, as defined by an Executive Order in 1873. *Id.* at 264–65. Along with its claim to title of these submerged lands, which the Tribe conceded lay beneath navigable waters, the Tribe

sought declaratory judgment establishing "its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands." *Id.* at 265. The Tribe also sought an injunction prohibiting defendants from "regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands." *Id.* Importantly, and contrary to Defendants' assertion, Defs.' Mem. CM/ECF p. 6, the Tribe did not bring any claims under the SLA, nor did the Court even mention that Act.

The district court dismissed the Tribe's lawsuit, holding that the action was barred under the Eleventh Amendment because the Tribe's claims were "the functional equivalents of a damages award against the State." *Id.* Moreover, the court dismissed the Tribe's claims for injunctive relief on the merits, "since Idaho was in rightful possession of the submerged lands as a matter of law." *Id.* at 266.

On appeal, the Ninth Circuit affirmed in part and reversed in part. *Id.* (citing *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244 (9th Cir. 1994)). It affirmed the district court's holding that the Tribe's quiet title action against state officials was barred by the Eleventh Amendment, but found the *Ex parte Young* doctrine was applicable to the Tribe's claims for declaratory and injunctive relief, and allowed those claims to proceed in as much as they "sought to preclude continuing violations of federal law." *Id.* The Supreme Court granted certiorari and, in a badly divided opinion[9], reversed the Ninth Circuit, holding that the Tribe's lawsuit did not

[9] Justice Kennedy delivered the opinion of the Court with respect to Parts I, II-A, and III, concluding that the Tribe's suit against state officials may not proceed in federal court. Justice O'Connor filed an opinion concurring in part and concurring in the judgment, in which Justices

fall under the *Ex parte Young* exception to the Eleventh Amendment. *Id.* at 281. The facts and circumstances of *Coeur d'Alene* are inapposite to the case at bar. Moreover, the Supreme Court has since clarified and narrowed *Coeur d'Alene* to comport with its longstanding *Ex parte Young* jurisprudence.

Justice O'Connor's concurrence in *Coeur d'Alene* rejected the principal opinion to the extent that it "replace[d] a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors." *Id.* at 296. For example, the principal opinion's recognition of the obvious fact that "the State will have a continuing interest in litigation against its officials," Justice O'Connor asserted, "cannot supply a basis for deciding [the] case." *Id.* Ultimately, Justice O'Connor objected to the principal opinion's reasoning in *Coeur d'Alene* because it "unnecessarily recharacterize[d] and narrow[ed] much of [the Court's *Ex parte*] *Young* jurisprudence." *Id.* at 291. Defendants now seek to revive and expand the flawed reasoning by the principal opinion in this case. *See* Defs.' Mem. CM/ECF p. 6.

Instead of pursuing the balancing approach of the principal opinion, Justice O'Connor reaffirmed the basic tenets of *Ex parte Young* in her concurrence, namely that "a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment." *Coeur d'Alene*, 521 U.S. at 288. Indeed, "where a plaintiff seeks prospective relief to end a state

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Scalia and Thomas joined. Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined.

officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." *Id.* (citing *Milliken v. Bradley*, 433 U.S. 267, 289–290 (1977)).

Since the Court's decision in *Coeur d'Alene*, Justice O'Connor's view has been adopted in lieu of the reasoning in the principal opinion. In *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635, 645 (2002), the Supreme Court unanimously reaffirmed the view espoused by Justice O'Connor's concurrence in *Coeur d'Alene*, noting that the question of Eleventh Amendment immunity requires only a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." The Tenth Circuit has read *Verizon* as "abrogating" *Coeur d'Alene* to the extent it can be interpreted to require the courts to "linger over the question whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought" in cases where the Eleventh Amendment is invoked. *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008). The Tenth Circuit is not alone; the circuit courts have generally been reluctant to recognize *Coeur d'Alene* as a narrowing of the *Ex parte Young* doctrine based on a State's sovereign interest in any particular matter. *See In re Dairy Mart Convenience Stores, Inc*., 411 F.3d 367, 372 (2d Cir. 2005) (No special state sovereignty interest implicated by claim to recover from state fund established to assist owners and operators of underground storage tanks to meet obligations under federal law); *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d 512, 516–517 (8th Cir. 2004) (No special state sovereignty interest implicated by suit seeking injunction against governor's enforcement of state statute delegating eminent domain power in conflict with federal law); *Hamilton v. Myers*, 281 F.3d 520, 528 (6th Cir. 2002) (The plaintiffs' requested relief required Tennessee to tailor its regulatory scheme to protect riparian rights. Such relief "does not begin to approach the far-reaching and invasive

relief sought by the Tribe under the particular and special circumstances of *Coeur d'Alene*, and this court does not read the ruling of *Coeur d'Alene* to extend to the facts of this case."); *Lipscomb v. Columbus Mun. Separate Sch. Dist.,* 269 F.3d 494, 501–02 (5th Cir. 2001) (lessee's Contract Clause action to declare as enforceable the terms of leases state entered in the early nineteenth century did not implicate special state sovereignty interest); *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1048 (9th Cir. 2000) (no special state sovereignty interest implicated by discharge of state taxes in federal bankruptcy proceeding as relief sought merely related to, but did not intrude upon, core state sovereign interest in taxation); *Lewis v. N.M. Dept. of Health,* 261 F.3d 970, 978 (10th Cir. 2001) (state's interest in taxation of Indian tribe important but not core in light of federal interest in Indian immunity); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 632–33 (10th Cir. 1998) (relief sought by school districts and public school students to enjoin changes to state management of land trust for public schools was not equivalent to quiet title action); *Elephant Butte Irrigation Dist. of N.M. v. Dept. of Interior*, 160 F.3d 602, 612–13 (10th Cir. 1998) (suit by irrigation district to enjoin state to pay district a share of net profits under recreational land lease with United States did not entail special state sovereignty interest, and relief sought was not equivalent to quiet title action); *Duke Energy Trading and Mktg., L.L.C. v. Davis,* 267 F.3d 1042, 1053–54 (9th Cir.2001) (governor's emergency power to take private property a core state sovereignty interest, although lawsuit merely implicating that power still did not trigger *Coeur d'Alene*).

The "special sovereignty interests" language of *Coeur d'Alene*, by which Defendants now seek to invoke the Eleventh Amendment, has been largely abrogated by the Court's decision in *Verizon*. Even before *Verizon*, and certainly after, circuit courts have shown a hesitancy to apply

Defendants' interpretation of *Coeur d'Alene* in any circumstance. Even if this were not the case, Plaintiffs' action is factually distinct form *Coeur d'Alene* in three crucial respects.

1. It was undisputed in *Coeur d'Alene* that the lands at issue lay beneath navigable waters and had been considered the State's sovereign land for more than a century.

In light of Defendants' serious mischaracterization of Plaintiffs' lands in this case, Plaintiffs emphasize that it was conceded by the parties and accepted by the Court in *Coeur d'Alene* that Lake Coeur d'Alene was a navigable body of water, and thus the land underneath it was sovereign.[10] *Coeur d'Alene*, 521 U.S. at 283. Furthermore, the principal opinion made much of the State of Idaho's longstanding claim to the lands at issue in *Coeur d'Alene*. *Id.* at 282. Thus, the Court's judgment in *Coeur d'Alene* rested on factual and legal premises that were not disputed in *Coeur d'Alene*, but that go to the core of Plaintiffs' claims in this case.

It was also undisputed in *Coeur d'Alene* that the Tribe sought to claim ownership of lands beneath navigable waters that had long ago passed to the State of Idaho under the equal footing doctrine. *Id.* at 264–65. More than a century after Idaho was granted statehood, the Tribe sought to have a federal court declare that an Executive Order establishing its Reservation in 1873 defeated the equal footing doctrine and the transfer of lands. *Id.* Of course, lands beneath navigable waters are "'considered an essential attribute of sovereignty'" and the law is clear that "'disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.'" *Id.* at 283–84 (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195–98 (1987); *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

[10] Lake Coeur d'Alene's status as a navigable water body was considered beyond reproach, as the Court noted, the lake is 24 miles long and 1 to 3 miles wide. *Coeur d'Alene*, 521 U.S. at 264.

In the case at bar, the GLO, during its surveys of the public lands of Alaska more than a century ago, determined that the waters overlying what are now Plaintiffs' lands were nonnavigable. Compl. ¶¶ 33–36. Based on the GLO's surveys, the federal government collected payment from Plaintiffs' predecessors in title and issued patents for those lands. Compl. ¶¶ 32–36. Congress later recognized the importance of the property rights contained in these patents and protected them against future claims by passing Section 2(f) of the SLA, which was also incorporated in Alaska's founding statute, the Alaska Statehood Act. Despite Section 2(f), through the use of their Challenged Policy, Defendants make administrative determinations that previously nonnavigable waters are now navigable and then claim that the lands beneath those waters have been the property of the State of Alaska since statehood. Compl. ¶ 23. In adopting Section 2(f) of the SLA, Congress considered the inherent injustice of Defendants' actions long before they began implementing their Challenged Policy, indeed:

> [I]t would be dishonest for the United States to have accepted payment for the land embraced in the stream bed . . . and then for the State to say that it owned the land all the time. . . . no technicality of the law should be used by a state to injure its citizens.

Hearings at 439.

Thus, the question in this case is not whether Plaintiffs can "quiet title" to sovereign lands, but whether Defendants may cloak themselves in sovereign immunity to continue violating the SLA, the Alaska Statehood Act, and century-old federal patents.

2. The Court's decision in *Coeur d'Alene* turned largely on the expansive relief sought by the Tribe.

The Tribe in *Coeur d'Alene* sought to "eliminate altogether the State's regulatory power over the submerged lands at issue." *Coeur d'Alene*, 521 U.S. at 289 (O'Connor, J. concurring); *id*. at 282 ("The suit seeks, in effect, a determination that the lands in question are not even

within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters."). Thus, the Court held that the Tribe's lawsuit was the functional equivalent of a quiet title action in large part because the Tribe was trying to eliminate all state regulatory control. *Id*. at 282 (["T]he declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe."). *Id*. at 289 (O'Connor, J., concurring) ("[A]s the Tribe concedes, the suit is the functional equivalent of an action to quiet its title to the bed of Lake Coeur d'Alene.").

Plaintiffs are neither challenging, nor seeking to extinguish, the State's limited regulatory powers over their private land. The SLA only exempts Plaintiffs' title to their lands from being transferred to the State upon statehood. Section 2(f) does not act as a barrier to the State's regulatory reach, and Plaintiffs have not claimed any protection from State regulations. Plaintiffs seek only prospective declaratory and injunctive relief establishing that Defendants have violated federal law through their Challenged Policy. Compl. CM/ECF pp. 15–17.

3. The case at bar does not raise the difficult issue of competing Sovereignty that lies at the core of all the cases cited by Defendants.

A primary feature of the "extraordinary circumstances" at play in *Coeur d'Alene* was the backdrop of competing sovereign interests. The Supreme Court has long recognized that "'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory,'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980)). Indeed, "[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control,' *Mescalero Apache Tribe v.*

Jones, 411 U.S. 145, 152 (1973), and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" *Mescalero Apache Tribe*, 462 U.S. at 332 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 153 (1980)). The principal opinion's focus in *Coeur d'Alene* on the "special sovereign interests" of the State is unsurprising, in light of the Court's longstanding position that determinations regarding State authority over Indian Reservations "'calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake.'" *Mescalero Apache Tribe*, 462 U.S. at 333 (quoting *Bracker*, 448 U.S. at 145).

Defendants also rely on two other cases confronting competing Indian and State sovereignty interests to support their argument: *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2d. Cir. 2004) (per curiam) and *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000). Defs. Mem. CM/ECF p. 8. In *Western Mohegan Tribe*, the Second Circuit dealt with the plaintiff tribe's claims that its "tribal and aboriginal rights," established in 1621, when the tribe signed "a covenant of peace and friendship with the British" were superior to the State of New York's statehood claim to land now constituting various parks, historic sites, and wildlife management areas throughout several counties. *W. Mohegan Tribe*, 395 F.3d at 18, 20. The tribe sued the State of New York, openly seeking to quiet title and gain exclusive regulatory authority based on its aboriginal rights. *Id.* The court recognized the case as presenting the exact same "extraordinary circumstances as those present in *Coeur d'Alene*." *Id.* at 23. Indeed, the court noted that the case raised "the core issues of land, state regulatory authority, and sovereignty expressly examined by the *Coeur d'Alene* Court." *Id.* Thus, because the same factual distinctions exist between the case at bar and *Western Mohegan Tribe*, Defendants' reliance on that case is badly misplaced..

In *Ysleta Del Sur Pueblo*, the plaintiff tribe sued to eject Texas state officials from a piece of property based on its aboriginal title, which dated back to 1751, when "the Governor of New Mexico granted land, including the Property, to the Pueblo." *Ysleta Del Sur Pueblo*, 199 F.3d at 284. The Fifth Circuit determined that the tribe had sued the State of Texas for ejectment, as opposed to the state officials named in the complaint. The Court came to this conclusion after considering the facts of the case, namely that "the State holds record title to the Property, utilizes the Property as a maintenance facility, and the Pueblo is attempting to persuade us to declare that title null and void." *Id.* at 286. In the case at bar, Plaintiffs hold record title to the lands at issue, and Defendants, acting in violation of federal and state law[11], have placed cloud on that title. Neither Defendants, nor the State of Alaska, have taken possession of Plaintiffs' land, and Plaintiffs thus do not seek ejectment. Plaintiffs seek only prospective declaratory and injunctive relief establishing that Defendants have violated federal law and are prohibited from doing so in the future. Compl. CM/ECF pp. 15–17.

In sum, *Coeur d'Alene* and the other cases Defendants rely upon to support their Eleventh Amendment argument all involve competing tribal and state sovereign interests. These cases are simply inapposite to the case at bar in which Plaintiffs, private citizens, seek only prospective declaratory and injunctive relief against ongoing violations of federal law.

In apparent recognition of the weakness of their argument, Defendants attempt to reframe Plaintiffs' allegations to match the "extraordinary circumstances" of *Coeur d'Alene*. However, the facts of the instant case are distinct from *Coeur d'Alene* in three crucial respects: (1) under Section 2(f) of the SLA, Plaintiffs' lands are not "sovereign," unlike the lands at issue in *Coeur*

[11] State regulations incorporate the SLA, and in addition, state that "those lands and rights therein lawfully vested in others by Acts of Congress prior to January 3, 1959 shall not be infringed upon." Alaska Admin. Code tit. 11, § 62.020.

d'Alene; (2) Plaintiffs do not challenge the State of Alaska's limited regulatory power over the private property at issue in this lawsuit; and (3) this case does not involve the thorny issue of competing sovereign interests. Thus, *Coeur d'Alene* is inapposite to the case at bar. Moreover, Defendants' argument that the primary question after *Coeur d'Alene* remains "the relation between the sovereign lands at issue and the immunity the State asserts," Defs.' Mem. CM/ECF p. 14 (citing *Coeur d'Alene*, 521 U.S. at 287), is inaccurate, given the Court's more recent affirmation that the Eleventh Amendment requires only a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645.

B. Plaintiffs Seek Only Prospective Declaratory And Injunctive Relief.

Defendants suggest that Plaintiffs are seeking retroactive relief, which is outside the scope of the *Ex parte Young* exception to the Eleventh Amendment. Defs.' Mem. CM/ECF p. 10. Defendants base their suggestion on their contention that the relief sought by Plaintiffs would "invalidate claims that the State has already made" to Plaintiffs' lands. *Id.* CM/ECF p. 10.

Plaintiffs' claim for relief, however, is posed prospectively. Compl. CM/ECF p. 15–17. Moreover, the prohibition on retroactive relief is meant to protect the government from damages claims for past wrongdoing. *See, e.g., Edelman*, 415 U.S. at 664–65. However, the Supreme Court and the Ninth Circuit have both recognized that sovereign immunity applies only to property rightfully belonging to the government. *United States v. Lee*, 106 U.S. 196, 208–09 (1882); *Taylor v. Westly*, 402 F.3d 924, 932 (9th Cir. 2005). Indeed, plaintiffs seeking return of property or funds from a government official are not barred by the Eleventh Amendment where a government official's actions are "'not within the officer's statutory powers or, if within those

powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Taylor*, 402 F.3d at 933 (quoting *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962)).

In addition, almost all declaratory relief will to some extent be retroactive, otherwise the case would not be ripe for adjudication. The Supreme Court acknowledged as much in *Verizon*, where the plaintiff sought both declaratory and injunctive relief seeking to bring a state-agency defendant into compliance with federal law. The Court noted that plaintiff's "prayer for injunctive relief-that state officials be restrained from enforcing an order in contravention of controlling federal law-clearly satisfies our 'straightforward inquiry'" as to whether the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645. In addressing Verizon's claim for declaratory relief, the Court recognized that such a claim "to be sure, seeks a declaration of the *past*, as well as the *future* . . ." *Id.* at 646 (emphasis in original). However, the relief sought would not "impose *upon the State* 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.' In so far as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction." *Id.* (quoting *Edelman*, 415 U.S. at 668) (emphasis in original).

Similarly, in this case Plaintiffs merely seek prospective declaratory and injunctive relief forcing Defendants' to comply with Section 2(f) of the SLA. Thus, even if the injunctive and declaratory relief sought in this case has some retroactive impact by invalidating Defendants' recent claims to Plaintiffs' lands,[12] Defendants' unlawful conduct is not protected by the

[12] Defendants characterize the relief sought by Plaintiffs as the divestiture of "potentially thousands of acres of sovereign lands." Defs.' Mem. CM/ECF p. 4. To Plaintiffs' knowledge, Defendants have not imposed their Challenged Policy on such a vast amount of land. More importantly, Defendants have presented no evidence that such a vast amount of land is implicated in this case. Defendants confuse the number of Plaintiffs potentially included in the

Eleventh Amendment bar on retroactive relief. Ultimately, if the prospective relief Plaintiffs seek in this case has an ancillary, retroactive effect, Defendants have only themselves to blame for previously violating federal law.

Finally, even if this Court determines that certain aspects of Plaintiffs' claim for relief cannot be granted due to the prohibition on retroactive relief, dismissal is not warranted. Indeed, "[a] claim to which sovereign immunity is not a defense may be entertained even if another claim in the suit is dismissed because of sovereign immunity." *See, e.g., United States v. Georgia,* 546 U.S. 151, 159 (2006) (finding sovereign immunity of state was not a bar to some of the plaintiffs' claims and remanding to the district court to allow suit to proceed for any claims that were not shielded by sovereign immunity). Thus, even if one aspect of this case were barred by the Eleventh Amendment, this Court should not dismiss the entire case.

C. Commissioner Sullivan And Director Goodrum Are Proper Defendants.

Defendants argue that "[n]either the Commissioner of the DNR, nor the Director of the Division of Mining, Land & Water, personally possess or claims to possess title to the submerged lands in question, and thus, they are not the true defendants." Defs.' Mem. CM/ECF p. 14. Defendants fail to recognize the basic premise of the Ex parte Young exception to the Eleventh Amendment, which is to allow suit against a state official who is acting outside his authority because such actions are considered "individual and not sovereign actions." *Peabody*

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proposed class with the amount of land affected. *See id.* CM/ECF p. 4. The amount of land potentially at risk under Defendants' Challenged Policy is unknown, however, the number of property owners potentially affected could be in the thousands, due to the subdivision of federal patents during the last hundred years. Compl. ¶ 25. Moreover, the whole purpose of bringing a class action was to prevent Defendants' violation of federal law from spreading to additional acres.

W. Coal Co., 610 F.3d at 1085 (quoting *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 (1949)). In other words,

> The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Id.

In this case, Defendants' actions are clearly prohibited by Section 2(f) of the SLA and the Alaska Statehood Act. Defendants' actions also violate Alaska law, which recognizes the rights of property owners who received lands from the United States prior to statehood:

> Except as otherwise provided herein, the State of Alaska by virtue of the Submerged Lands Act of 1953, 43 U.S.C. 1301 (67 Stat. 29), Public Law 85-303 (71 Stat. 623) and Public Law 85-508 (72 Stat. 339), reserves and has succeeded to all right, title and interest of the United States, including lands, improvements, reclaimed lands, or title to lands and natural resources it had to all lands permanently or periodically covered by tidal waters up to the line of mean high tide and seaward to a line three geographical miles distant from the coast line or further as may be allowed; *provided, however, that those lands and rights therein lawfully vested in others by Acts of Congress prior to January 3, 1959 shall not be infringed upon.*

Alaska Admin. Code tit. 11, § 62.020 (emphasis added); Compl. ¶ 18. Defendants' behavior is thus precisely the kind of *ultra vires* activity the *Ex parte Young* doctrine was meant to capture, as Defendants lack any authority, state or federal, to assert title to Plaintiffs' lands.

Defendants seemingly argue that the State of Alaska fully supports the Defendants' Challenged Policy and thus, the State is the real party in interest. *See* Defs.' Mem. CM/ECF p. 14. Whether Defendants have the support of the State is irrelevant: "The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government." *Florida Dept. of State v. Treasure Salvors*, *Inc.*, 458 U.S. 670, 684 (1982).

Thus, whether the State endorses Defendants' ongoing violations of federal and state law—which is hard to believe—is of no moment.

IV. *EX PARTE YOUNG* DOES NOT MANDATE THAT PLAINTIFFS VINDICATE THEIR FEDERAL INTERESTS IN STATE COURT.

Defendants contend that, because of the Eleventh Amendment, they should be able to "insist on responding to these claims in [state] courts." Defs. Mem. CM/ECF p. 15. Defendants offer AS § 09.45.010, Alaska's quiet title statute, as well as AS § 09.45.630, addressing actions for recovery of real property, as alternative avenues for Plaintiffs to pursue their claims in state court. *Id.* CM/ECF p. 15 n.62.

Plaintiffs seek only prospective injunctive and declaratory relief requiring Defendants to cease their ongoing violation of federal law. Such relief is not available through the statutes cited by Defendants. Alaska's quiet title statute, AS 09.45.010, provides: "[a] person in possession of real property, or a tenant of that person, may bring an action against another who claims an adverse estate or interest in the property for the purpose of determining the claim." Meanwhile, Plaintiffs and putative class members in this case include "fee simple owners and/or warrantors of lands within the State of Alaska that were surveyed by the GLO and granted to private parties by the United States prior to Alaska's statehood in 1959." Compl. ¶ 32. Those Plaintiffs and potential class members who seek declaratory and injunctive relief against Defendants' Challenged Policy based on their previous warranties are not persons "in possession of real property, or a tenant of that person."[13] Thus, they may not protect themselves from the liability caused by Defendants' actions through a quiet title action in state court.

[13]Similarly, these individuals and entities cannot qualify as "[a] person who has a legal estate in real property and has a present right to the possession of the property . . ." under AS § 09.45.630. Moreover, Defendants have placed cloud upon Plaintiffs' land, but have not, to Plaintiffs' knowledge, taken possession, making AS § 09.45.630 entirely irrelevant.

Moreover, it is unclear at best whether Defendants have "claim[ed] an adverse estate or interest in the property" at issue in this case, for purposes of Alaska's quiet title statute. *See* AS § 09.45.010. Defendants' navigability determinations are addressed by AS § 38.04.062, which provides, in part: "A determination made by the commissioner under this section (1) does not create an interest in or right of entry onto any real property that does not otherwise exist under state law; (2) may not be recorded; and (3) does not constitute final agency action." It is unclear under this statute what legal import Defendants' assertions of title to Plaintiffs' land, either by navigability determination or case-by-case correspondence, would be deemed to have under Alaska's quiet title statute. Thus, Plaintiffs seeking to quiet title based upon the Challenged Policy would probably be faced with a motion to dismiss by the State.

Given that it is unclear whether a state forum exists for Plaintiffs in this case, it must be acknowledged that "a most important application of the *Ex parte Young* doctrine" is when "there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law." *Coeur d'Alene*, 521 U.S. at 270–71; *id.* at 271 ("Where there is no available state forum the [*Ex parte Young*] rule has special significance [because] providing a federal forum for a justiciable controversy is a specific application of the principle that the plan of the Convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy." (citing The Federalist No. 80, p. 475 (C. Rossiter ed. 1961) (A. Hamilton))). Indeed, in *Ex parte Young* itself, the Court noted that an action in federal court seeking injunctive relief would be "undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon." *Ex parte Young*, 209 U.S. at 166.

A. Federal Courts Are Meant To Enforce And Interpret Federal Rights.

Justice O'Connor emphasized in *Coeur d'Alene* that the Court's *Ex parte Young* jurisprudence makes clear that the doctrine does not "rely on the absence of a state forum as a basis for jurisdiction. . ." *Coeur d'Alene*, 521 U.S. at 291. The Court has frequently "permitted federal actions to proceed even though a state forum *was* open to hear the plaintiff's claims." *Id.* (emphasis in original). And, *Ex parte Young* has been applied "'[e]ven if there is a prompt and effective remedy in a state forum.'" *Id.* at 293. Thus, any suggestion by Defendants that Plaintiffs must proceed in state court to seek enforcement of federal law is entirely mistaken. *See* Defs.' Mem. CM/ECF pp.14, 15 n. 62.

Indeed, the Court's Eleventh Amendment precedent has "frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of the law"); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 105 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States. . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

B. Judicial Economy Dictates That The State Courts Should Not Be Flooded To Halt Defendants' Ongoing Violation Of Federal Law.

Judicial economy also dictates against forcing Plaintiffs and putative class members to flood the state courts. This is the exact scenario that Section 2(f) of the SLA was meant to prevent. *Hearings* at 439. Indeed, as proponents of the Idaho Amendment explained:

> We have no complaint to make of our jury system in administering the law generally, but we must point out that it would be possible to have innumerable lawsuits involving the stream beds; one-half of the suits resulting in the holding that they are navigable under the above definition, and the other half holding that they are nonnavigable.

Id. Requiring Plaintiffs to pursue such actions now would produce precisely this type of absurd result.

Along with absurd outcomes, the logistics of such challenges would be complex. If one property owner were to sue the State in a quiet title action in response to Defendants' application of the Challenged Policy, it must be assumed that all other property owners on the same stream would have to be joined. *See* Alaska R. Civ. P. 19. Each of these individual property owners would then have to incur the substantial expense involved in litigation. The proponents of the Idaho Amendment anticipated this problem:

> Many valuable properties have been located and developed in and under stream beds. If Congress enacts without amendment S. 1988, we are fearful that it will be possible for blackmailers to file claims for stream beds for the very purpose of 'shaking down' the lawful owners.

Hearings at 439. In effect, Defendants are "shaking down" Plaintiffs through the use of the Challenged Policy and their arguments that Plaintiffs pursue their claims in state court. Such actions should not be condoned.

Indeed, Plaintiffs' and other class members' patents have long been intended to act as "instrument[s] of quiet and security to [their] possessor[s]" *Knight v. United Land Ass'n*, 142 U.S. 161, 189 (1891); *Pollard's Heirs v. Kibbe*, 39 U.S. 353, 357 (1840) (A patent issued by the

United States is the "highest evidence of title."); *see Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) (recognizing "the special need for certainty and predictability" with respect to federal patents). Thus, Plaintiffs and other class members should not be forced to maintain separate actions in state court to defend against Defendants' Challenged Policy, which is in derogation of federal patents and violates the SLA, the Alaska Statehood Act, and Alaska Admin. Code tit. 11, § 62.020.

CONCLUSION

As the foregoing demonstrates, Plaintiffs' action is not barred by the Eleventh Amendment. Thus, this Court should deny Defendants' motion to dismiss. Should this Court find Plaintiffs' Complaint deficient for any reason, Plaintiffs respectfully request leave to file an amended complaint.

DATED this 19th day of February 2013.

Respectfully submitted,

s/ Jessica J. Spuhler
Jessica J. Spuhler, CO Bar No. 41833
Steven J. Lechner, CO Bar No. 19853
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021
(303) 292-1980 (facsimile)

Eric Twelker, AK Bar No. 9006045
10430 Dock Street
Juneau, AK 99801
(907) 789-6800
(907) 789-3742 (facsimile)

Attorneys for Plaintiffs and the class they seek to represent

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February 2013, I filed the foregoing document using the CM/ECF system and caused counsel of record to be served electronically through the CM/ECF system.

s/ Jessica J. Spuhler
Jessica J. Spuhler, Esq.