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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

LNG DEVELOPMENT COMPANY, LLC,
f/k/a **SKIPANON NATURAL GAS, LLC,**

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

Case no.: 3:14-cv-1239-AC

**DEFENDANT'S MOTION TO
DISMISS PURSUANT TO
FED. R. CIV. P. 12(B)(1)**

Oral Argument Requested

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant hereby respectfully moves to dismiss the Complaint (Dkt. #1) with prejudice in the above-captioned action. In accordance with LR 7-1(a), undersigned counsel for Defendant represents that he conferred with Plaintiff's counsel on the relief sought by this motion and learned as a result that Plaintiff disputes the grounds of this motion and intends to oppose it. For the reasons supplied in this motion and memorandum in support of the motion, Defendant respectfully submits that the Court should grant the motion and

dismiss this action with prejudice.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) authorizes a party to present a defense to a claim grounded on the court's "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). In reviewing such a motion, the court presumes lack of subject-matter jurisdiction until the plaintiff proves otherwise in response to the motion. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, (1994); La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1026 (9th Cir.2001). A Rule 12(b)(1) motion may be brought as a facial or factual attack. Gould Electronics, Inc. v. United States, 220 F.3d 169, 176 (3rd Cir.2000). In reviewing a factual attack, the court may consider matters outside the pleadings and examine other documents without converting the motion into one for summary judgment. Berardinelli v. Castle & Cooke, Inc., 587 F.2d 37 (9th Cir.1978). The court may weigh disputed evidence and determine the facts to evaluate whether jurisdiction exists. Valdez v. United States, 837 F. Supp. 1065, 1067 (E.D. Cal.1993). The presumption of truthfulness does not attach to the allegations of plaintiff's complaint or any inferences drawn therefrom. Id. Plaintiff has the burden to establish that the court has subject-matter jurisdiction. Ass'n of Am. Med. Coll. v. United States, 217 F.3d 770 (9th Cir.2000).

ARGUMENT

- I. THE STATUTORY BASIS UPON WHICH THE COMPLAINT RELIES IN BRINGING THIS QUIET TITLE ACTION DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES, AND THUS, THIS COURT LACKS SUBJECT-MATTER JURISDICTION TO ENTERTAIN THE ACTION.

In bringing their claims at issue in this action, Plaintiffs invoke 28 U.S.C. § 2410(a)(1), as well as 28 U.S.C. §§ 1331 and 1336. Complaint at ¶ 3. As an initial matter, it has long been established that Section 1331, the general federal-question jurisdictional provision, "does not

waive the government's sovereign immunity from suit.” Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir.1983). And Section 1336 bears no relationship to Plaintiffs’ claims whatsoever, as it addresses the jurisdiction of federal district courts in connection to refer a question or issue to the Surface Transportation Board and to exercise “exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the STB arising out of such referral.” 28 U.S.C. § 1336. That leaves Section 2410(a), which provides that “the United States may be named a party in any civil action or suit in any district court ... to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien.” 28 U.S.C. § 2410(a)(1).

Waivers of the sovereign immunity of the United States are not easily established and require a clear statement of intent to that effect. United States v. White Mtn. Apache Tribe, 537 U.S. 465, 472 (2003). The principle applies even to determination of the scope of explicit waivers. *See, e.g.,* United States v. Nordic Village, Inc., 503 U.S. 30, 34, 112 S.Ct. 1011, 1014-1015, 117 L.Ed.2d 181 (1992). Moreover, “a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” Lane v. Peña, 518 U.S. 187, 192 (1996). These settled legal principles apply not only to the interpretation of the scope of the Government's waiver of immunity, but also to the interpretation of the scope of any exceptions to that waiver. *See id.* (explaining that, consistent with rules of construction respecting waivers of sovereign immunity, ambiguities created by conditions on and qualifications of the waiver must be strictly construed in favor of sovereign immunity).

As noted above, section 2410 provides that “the United States may be named a party in any civil action or suit in any district court ... to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien.” 28 U.S.C. § 2410(a)(1); *accord*

Farr v. United States, 990 F.2d 451, 453 (9th Cir.), *cert. denied*, 114 S. Ct. 634 (1993); Hughes v. United States, 953 F.2d 531, 537-38 (9th Cir. 1992); Patchak v. Salazar, 632 F.3d 702, 709 n.5 (D.C. Cir. 2011)(describing 24 U.S.C. § 2410(a)(1) as “dealing with ‘quiet title’ actions involving property in which the United States holds a security interest”). A section 2410(a) quiet title action is jurisdictionally barred if the United States claims a title interest, rather than a lien interest, in the disputed property. Farr, 990 F.2d at 453; Hughes, 953 F.2d at 538.

In their complaint, Plaintiff alleges that the property interest in the subject property is an easement. Complaint at ¶ 2. An easement is a title interest in property, not a lien interest. *See* Restatement (First) of Property § 450 (1944) (defining easement as “an interest in land in the possession of another”). This means that 2410 does not, and cannot provide the necessary waiver of sovereign immunity for Plaintiff’s case, and therefore, it must be dismissed for lack of jurisdiction. Hughes, 953 F.2d at 538.

II. THE CLAIMS BROUGHT FALL OUTSIDE THE STATUTE OF LIMITATIONS APPLICABLE TO QUIET TITLE ACTIONS AGAINST THE UNITED STATES BROUGHT PURSUANT TO 28 U.S.C. § 2410, OR EVEN IF PLAINTIFF WERE TO AMEND ITS COMPLAINT TO PLEAD 28 U.S.C. § 2409A, THE LIMITATIONS PERIOD FOR THAT PROVISION AS WELL.

The jurisdiction of this Court over an action brought against the United States is limited to the terms of the consent by the United States, which includes any limitation as to the time period for bringing the action. United States v. Dalm, 494 U.S. 596, 608 (1990)(citing United States v. Mottaz, 476 US. 834, 841 (1986)). Any action to take advantage of the waiver of sovereign immunity for claims to quiet title under 28 U.S.C. § 2410(a)(1) must be brought within six years of the time that the right to bring such an action accrues. 28 U.S.C. 2401(a); *see also* Fidelity & Deposit Co., 87 F.3d at 335 n.2 (applying the statute of limitations in § 2401 to § 2410).

Even if this Court were to allow Plaintiff to amend its complaint so as to bring this Quiet Title Action under 28 U.S.C. §2409a, it would not matter. Subsection (a) of that provision states among other things that “the United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.” 28 U.S.C. § 2409a(a). Another subsection of the provision also contains its own statute of limitations specific to claims brought under subsection (a) against the United States, and it provides that “[a]ny civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” 28 U.S.C. §2409a(g).

Here, two of Plaintiff’s predecessors in interest, the State of Oregon and the Port of Astoria (“Port”), clearly “knew or should have known” of the United States’ easement interest in the Subject Property more than twelve years prior to Plaintiff’s bringing this action. Plaintiffs concede by way of their complaint that the State and the Port are predecessors in interest to the property over which they now assert a sublease. Complaint at ¶¶ 4-10.

With respect to the State, it clearly knew or should have known of the United States’ easement interest for at least two reasons. First, as Plaintiff itself acknowledges, in January 1957, Clatsop County granted a perpetual Spoil Disposal Easement to the Corps. Complaint at ¶ 7 & Exh. D to Complaint. Contrary to the alleged description of the easement in the complaint as only extending to the “Tidelands” of the subject property, the easement contains no such limitation. Exh. D to Complaint (describing the easement as “the perpetual right and privilege to deposit on the hereinbefore described trace of land or any part thereof any and all spoil and other

matter excavated in the improvement and maintenance of the aforesaid improvement”). In fact, in the Final Certificate of Title for Easements issued by the Title and Trust Company at the time the easement was granted, it is certified that “valid title to a perpetual easement for improvement of Skipanon River Channel, Warrenton, Oregon in said property was indefeasibly vested of record in the United States of America as of the 26th day of February, 1957, free and clear of all encumbrances, defects, interest, and all other matters whatsoever, either of record or otherwise known to the corporation, impairing or adversely affecting the title to said property, except as shown in SCHEDULE ‘B’ hereof.” Exh. 1 at p.6. In turn, the referenced SCHEDULE “B” exceptions are limited to the following:

1. Rights of fishing, navigation and commerce in the Federal Government and State of Oregon and rights of the public in and to that portion of said premises lying below the high water line of Skipanon River and Columbia River.
2. Easement for the construction of bulkheads granted to city of Warrenton by instrument recorded September 13, 1919 I Book 99, page 37, Deed Records, to which reference is hereby made.
3. Dredging and disposal rights granted to United States of America by instrument recorded March 23, 1931 in Book 129, page 628, Deed Records, to which reference is hereby made.

Exh. 1 at p. 8.

Thus, the terms of easement itself and the certificate of title confirm on their face that Clatsop County did have fee interest in the subject property and that there were no expressed limitations on the easement it conveyed to the Corps. In addition, shortly before the easement was executed, the City of Warrenton, the Skipanon Project sponsor, applied to the State Court for Clatsop County for a declaration of the Spoil Disposal Easement in favor of the Corps as part of the process for securing improvement of the Skipanon River Channel pursuant to the project as authorized by an act of Congress. Exh. 1 at 17-18. The court found by Order dated January 16,

1957, that the County “is the owner in fee simple of a tract of land situated in Clatsop County, State of Oregon, which is suitable and desirable for a spoil disposal area in connection with said project.” Id. at 17. The Court then ordered that “a perpetual spoil disposal easement be granted to the United States of America on the above described premises to be used in connection with the project above mentioned.” Id. at 18.

In addition to this documentation, in the form of a State Court order, an easement, and certificate of title, is the mere fact that the Corps has been utilizing the easement for its explicit purposes for more than 50 years since it was initially granted pursuant to congressional directive. Nowhere in the Complaint does Plaintiff ever allege that, in exercising its rights under the easement, the Corps has limited its disposal of spoil to Tidelands.

Another of Plaintiff’s predecessors in interests, the Port of Astoria – the State’s initial lessee – also had clear reason to know of the Corps’ assertion of a property interest in the easement that extended beyond Tidelands. Indeed, the Port had granted the Skipanon Project’s non-Federal Sponsor, the City of Warrenton, a disposal easement in the same by Deed dated July 22, 1968, recorded August 19, 1968, as Fee #241988 in Book 309, page 359, Clatsop County, Oregon, Deed Records. *See City of Warrenton Attorney’s Certificate of Title* dated April 22, 1981, in connection with provision of its Right of Entry to the Corps for Skipanon dredged material disposal, and so was on notice of the Corps’s easement interest there. Exh. 2.

The twelve-year limitations period in 28 U.S.C. § 2409a(g) is jurisdictional. Kingman Reef Atoll Investments, L.L.C. v. United States, 541 F.3d 1189, 1195 (9th Cir. 2008). Its running therefore deprives the federal courts of “jurisdiction to inquire into the merits” of an action brought under the Quiet Title Act. Block v. North Dakota, 461 U.S. 273, 292 (1983). The critical issue is when an action under Section 2409a accrues, which, by statute, is when the

plaintiff or its predecessor in interest knew or should have known of the United States' claim. Shultz v. Department of Army, 886 F.2d 1157, 1158 (9th Cir. 1989). Moreover, the Quiet Title Action limitations period begins to accrue "as soon as the United States makes a 'claim that creates even a cloud on' a plaintiff's, or its predecessors', ownership interest. Kingman Reef, 541 F.3d at 1198. Here, at the very least the State of Oregon had actual and/or constructive notice of the United States' full interest in the easement at issue as early as 1957. See Fidelity Exploration & Production Co. v. United States, 506 F.3d 1182, 1186 (9th Cir. 2007). Thus, Plaintiff's claims are time-barred, this Court lacks jurisdiction to entertain them, and this case should be dismissed with prejudice.

Conclusion

For the foregoing reasons, Defendant respectfully submits that this Court should grant its motion and dismiss the above-captioned action with prejudice.

Respectfully submitted this 14th day of November 2014.

S. AMANDA MARSHALL
United States Attorney
District of Oregon

s/ Stephen J. Odell
STEPHEN J. ODELL
Assistant United States Attorney
(503) 727-1024
Of Attorneys for Defendant

MEMORANDUM

ASSURANCES OF LOCAL COOPERATION

Project and Location: Skipanon River Channel at Warrenton,
Clatsop County, Oregon

Sponsors: City of Warrenton, Oregon
E. R. Baldwin
Auditor and Police Judge
City of Warrenton
Box 1324
Warrenton, Oregon

Authorizing Act: Rivers and Harbors Act, Public Law No.
858, 80th Congress, 2d Session, Approved
30 June 1948, Title I - Rivers and Harbors,
Section 101. Senate Document No. 93
80th Congress, 1st Session.

Description of Work: Dredging a mooring basin and small boat
harbor at Warrenton, Oregon, to provide
a depth of 12 feet at mean lower low
water.

Orders and Regulations - Chapter V, Part II, Civil Works:

Paragraph 5209.09 Rivers and Harbors Projects - Assurances and Acceptance
Thereof.

- a. * * * It is the responsibility of the District Engineer to obtain the required assurances and investigate the ability and authority of the local agency to provide lands, easements or rights-of-way required for a project. The sufficiency of assurances of other measures of local cooperation and the fulfilling thereof rests with the District Engineer.
- b. Upon receipt of assurances and the Division or District Engineer, who has been or may be hereinafter assigned real estate functions, has determined that (1) the assurance furnished is in strict compliance with the pertinent Act of Congress; (2) the local interest furnishing the assurance has legal authority so to do and is financially responsible to fulfill all measures of local cooperation; and (3) that the instrument is legally sufficient, he will accept the assurance.
- c. All assurances of a doubtful or controversial nature will be submitted to the Chief of Engineers, prior to acceptance, for consideration, accompanied by the comments and recommendations of the Division and District Engineers.

Incl 2

Assurances:

Under the provisions of the authorizing act, the local interests are required to:

- (a) Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project and the subsequent maintenance thereof,
- (b) Hold and save the United States free from damages due to the construction works,
- (c) Maintain project depth in the basin after completion, and
- (d) Construct, maintain, and operate the necessary mooring facilities and utilities within the basin, including a public landing with suitable supply facilities, all of which shall be open to all on equal and equitable terms.

Evaluation:

Legal

1. The City of Warrenton, a municipal corporation, was organized 11 February 1899 pursuant to the Laws of the State of Oregon, and is operating under the provisions of Chapter 221 et seq., Oregon Revised Statutes.
2. Pursuant to Section 223.005, Oregon Revised Statutes, any incorporated city may:
"(1) Appropriate any private real property, water, watercourse and riparian rights to any public or municipal use or for the general benefit and use of the people of the city, * * *."
3. Pursuant to Sections 221.020, 221.120, and 221.410, Oregon Revised Statutes, the City of Warrenton has the required statutory power and authority to do such things as may be necessary to sponsor said work.

Financial

1. As stated herein, the City of Warrenton, Oregon, has full and complete legal authority to cooperate with the United States to accomplish the work contemplated herein and to sponsor said work.

Evaluation (Cont'd):Financial (Cont'd)

2. The following is the balance sheet provided by the City of Warrenton:

BALANCES FOR THE MONTH OF JULY 1956, plus invested funds:

City Treasurer	\$ 75,428.70	
Dike District No. 1		\$ 288.36
Dike District No. 2		743.65
Dike District No. 3		397.09
General Fund		13,170.80
Water Fund		29,966.89
Cash Warrants Issued		
Cash Warrants Outstanding		
Petty Cash	75.00	
Water Fund Invested		6,160.00
Lease Rental Fund		2,336.59
Reclamation Dist. 1, 2, 3		394.94
Channel		4,464.95
Interest from Delinquent Taxes		
Clatsop County Resale Account		136.00
Land Sales		269.56
Fines, Licenses, etc.		11,193.77
Road District		2,200.71
State Tax Street Fund		7,587.63
Water Fund Reserved		1,676.39
Dike Dist. No. 1, Reserved		260.91
Dike Dist. No. 2, Reserved		152.54
Dike Dist. No. 3, Reserved		149.50
Building, Repair & Replacement Res.		113.42
Building, Repair & Replacement Inv.		64,605.36
First National Savings Account		
	70,765.36	
	<u>\$146,269.06</u>	<u>\$146,269.06</u>

2. (Cont'd)

Funds deposited in the First National
Bank during July 1956:

Water	\$ 3,641.51
Fines & Licenses	775.00
General	849.49
Land Sales	13.00
Chammel	188.18
State Tax Street	5.00
Rental	20.00
	<u> </u>
	\$ 5,492.18

Warrants Issued:

Water	\$ 2,221.30
General	2,108.26
State Tax Street	293.06
Dike Dist. #1	66.00
Dike Dist. #2	26.15
	<u> </u>
	\$ 4,714.77

I hereby certify that the above financial statement has been prepared by me and is complete and correct to the best of my knowledge and belief.

(SEAL)

/s/ E. R. Baldwin
E. R. Baldwin
Auditor & Police Judge
City of Warrenton, Oregon

The City has no bonded indebtedness.

3. On the basis of the foregoing financial statement and the authority granted by Section 221.410, Sections 223.405 et seq. and Section 224.030, Oregon Revised Statutes, whereby the City of Warrenton can provide funds for the operation and maintenance of works within its boundaries by levying assessments, the financial responsibility is deemed acceptable.

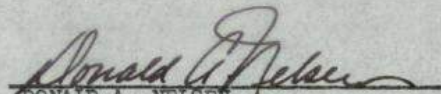
Rights-of-Way

1. Rights-of-way over tracts of land in the subject location will be provided by the City of Warrenton.

Findings and Conclusions


In accordance with and pursuant to the provisions of Paragraph 5209.09b of Orders and Regulations (15 Oct 52), the undersigned finds as follows, and recommends that said assurances dated 7 August 1956 be accepted:

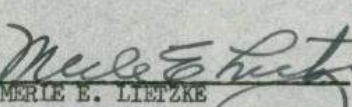
1. That the assurances furnished by the City of Warrenton are in compliance with the pertinent Act of Congress.
2. That the local interest furnishing the assurances has sufficient legal authority so to do, and is financially responsible to fulfill all measures of local cooperation, and
3. That the instruments of assurance furnished by said City are legally sufficient.


DONALD A. NELSEN
Attorney Adviser (General)

Date: AUG 20 1956

APPROVED:


A. D. STANLEY
Supervisory Attorney-Adviser (General)
Chief, Acquisition Branch


MERLE E. LIETZKE
Chief, Real Estate Division

FINAL CERTIFICATE OF TITLE
FOR EASEMENTS

Title and Trust Company
321 S. W. Fourth Avenue
Portland 4, Oregon

Order No. C-20-818-A

TO (City of Warrenton and) the United States of America:

The Title and Trust Company, A Corporation organized and existing under the laws of the State of Oregon with its principal office in the City of Portland, hereby certifies that it has made a thorough search of the title to the property described in SCHEDULE "A" hereof, and that valid title to a perpetual easement for improvement of Skipanon River Channel, Warrenton, Oregon in said property was indefeasibly vested of record in the United States of America as of the 26th day of February, 1957, free and clear of all encumbrances, defects, interest, and all other matters whatsoever, either of record or otherwise known to the corporation, impairing or adversely affecting the title to said property, except as shown in SCHEDULE "B" hereof.

The maximum liability of the undersigned under this certificate is limited to the sum of \$1,000.00.

In consideration of the premium paid, this certificate is issued for the use and benefit of (said City of Warrenton and) the United States of America, (and each of them).

IN WITNESS WHEREOF, said Corporation has caused these presents to be signed in its name and behalf, sealed with its corporate seal, and delivered by its proper officers thereunto duly authorized, as of the date last above mentioned.



Attest:

Chas M. Johnson
Assistant Secretary

TITLE AND TRUST COMPANY

By: [Signature]
President