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7 UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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10 SELWYN D.J. VOS,

NO. CIV. S-10-1073 LKK/DAD

11 Plaintiff,

12 v.

O R D E R

13 LINDA GIGLIOTTI, PROPERTY  
14 I.D. CORPORATION aka PROPERTY  
15 I.D. CORPORATION OF NORTHERN  
CALIFORNIA, et al.,

16 Defendants.  
17 \_\_\_\_\_/

18 Plaintiff brings suit regarding purchase of a forty-acre  
19 property in El Dorado County, California. Plaintiff's claims  
20 center on the allegation that defendants warranted "that the  
21 property was not within an earthquake zone and was free of  
22 environmental hazards," but that the property "was on an earthquake  
23 fault line and was riddled with substantial quantities of  
24 [a]sbestos." Compl., 2:7-12. Based on this allegation, plaintiff  
25 claims that defendants, all of whom are private parties, violated  
26 plaintiff's rights under the Due Process Clause of the Fourteenth

1 Amendment. Plaintiff also brings nine state law claims.

2 Defendant Property I.D. Corporation, the only defendant to  
3 have stated an appearance in this case, moves to dismiss for lack  
4 of subject matter jurisdiction and for failure to state a claim.  
5 The court concludes that oral argument is not necessary in this  
6 matter and resolves the motion on the papers. E.D. Cal. L.R.  
7 230(g). For the reasons stated below, plaintiff has failed to  
8 state a claim under the Fourteenth Amendment's Due Process Clause  
9 and the remaining claims do not provide a basis for subject matter  
10 jurisdiction.

## 11 I. Standards

### 12 A. Standard for a Fed. R. Civ. P. 12(b)(1) Motion to Dismiss for 13 Lack of Subject Matter Jurisdiction

14 The party seeking to invoke the jurisdiction of the federal  
15 court has the burden of establishing that jurisdiction exists.  
16 KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936); Assoc.  
17 of Medical Colleges v. United States, 217 F.3d 770, 778-79 (9th  
18 Cir. 2000). Where, as here, a Fed. R. Civ. P. 12(b)(1) motion to  
19 dismiss argues that the allegations of jurisdiction contained in  
20 the complaint are insufficient on their face to demonstrate the  
21 existence of jurisdiction, the plaintiff is entitled to safeguards  
22 similar to those applicable when a Rule 12(b)(6) motion is made.  
23 See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994),  
24 Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990); see  
25 also 2-12 Moore's Federal Practice - Civil § 12.30 (2009). The  
26 factual allegations of the complaint are presumed to be true and

1 the motion is granted only if the plaintiff fails to allege an  
2 element necessary for subject matter jurisdiction. Savage v.  
3 Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1  
4 (9th Cir. 2003), Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir.  
5 2001). Nonetheless, district courts "may review evidence beyond  
6 the complaint without converting the motion to dismiss into a  
7 motion for summary judgment" when resolving a facial attack. Safe  
8 Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

9 **B. Standard for a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss for**  
10 **Failure to State a Claim**

11 A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's  
12 compliance with the pleading requirements provided by the Federal  
13 Rules. Under Federal Rule of Civil Procedure 8(a)(2), a pleading  
14 must contain a "short and plain statement of the claim showing that  
15 the pleader is entitled to relief." The complaint must give  
16 defendant "fair notice of what the claim is and the grounds upon  
17 which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555  
18 (2007) (internal quotation and modification omitted).

19 To meet this requirement, the complaint must be supported by  
20 factual allegations. Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.  
21 Ct. 1937, 1950 (2009). "While legal conclusions can provide the  
22 framework of a complaint," neither legal conclusions nor conclusory  
23 statements are themselves sufficient, and such statements are not  
24 entitled to a presumption of truth. Id. at 1949-50. Iqbal and  
25 Twombly therefore prescribe a two step process for evaluation of  
26 motions to dismiss. The court first identifies the non-conclusory

1 factual allegations, and the court then determines whether these  
2 allegations, taken as true and construed in the light most  
3 favorable to the plaintiff, "plausibly give rise to an entitlement  
4 to relief." Id.; Erickson v. Pardus, 551 U.S. 89 (2007).

5 "Plausibility," as it is used in Twombly and Iqbal, does not  
6 refer to the likelihood that a pleader will succeed in proving the  
7 allegations. Instead, it refers to whether the non-conclusory  
8 factual allegations, when assumed to be true, "allow[] the court  
9 to draw the reasonable inference that the defendant is liable for  
10 the misconduct alleged." Iqbal, 129 S.Ct. at 1499. "The  
11 plausibility standard is not akin to a 'probability requirement,'  
12 but it asks for more than a sheer possibility that a defendant has  
13 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A  
14 complaint may fail to show a right to relief either by lacking a  
15 cognizable legal theory or by lacking sufficient facts alleged  
16 under a cognizable legal theory. Balistreri v. Pacifica Police  
17 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

## 18 **II. Discussion**

19 In general, courts must address jurisdictional issues before  
20 addressing the merits. See, e.g., Steel Co. v. Citizens for a  
21 Better Env't, 523 U.S. 83, 94-95 (1998). In this case, the  
22 complaint invokes both federal question and diversity jurisdiction,  
23 although plaintiff has since conceded that diversity jurisdiction  
24 is absent. Under 28 U.S.C. § 1331, "[t]he district courts . . .  
25 have original jurisdiction of all civil actions arising under the  
26 Constitution, laws, or treaties of the United States." Courts use

1 the "well-pleaded complaint" rule to determine whether a suit  
2 "arises under" federal law for purposes of § 1331. See, e.g.,  
3 Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1,  
4 9-10 (1983). Under this rule, "[a] right or immunity created by  
5 [federal law] must be an element, and an essential one, of the  
6 plaintiff's cause of action.'" Id. at 10-11 (quoting Gully v.  
7 First National Bank in Meridian, 299 U.S. 109, 112 (1936)). Thus,  
8 a cause of action provides a basis for federal jurisdiction either  
9 where the cause of action itself is provided by federal law or  
10 where it is "a state-law claim [that] necessarily raise[s] a stated  
11 federal issue, actually disputed and substantial, which a federal  
12 forum may entertain without disturbing any congressionally approved  
13 balance of federal and state judicial responsibilities." Grable  
14 & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 314  
15 (2005).

16 In this suit, plaintiff's first claim alleges solely that  
17 defendants have violated plaintiff's rights under the Due Process  
18 Clause of the Fourteenth Amendment to the United States  
19 Constitution by depriving him of property and by threatening to  
20 deprive him of life without due process. This claim obviously  
21 arises under federal law. Just as obviously, this claim fails on  
22 the merits. The Fourteenth Amendment regulates state conduct. U.S.  
23 Const., Amdt. 14, § 1 ("No State shall . . . deprive any person of  
24 life, liberty, or property, without due process of law . . . .")  
25 (emphasis added), Nat'l Collegiate Ath. Ass'n v. Tarkanian, 488  
26 U.S. 179, 191 (1988). All of the defendants in this suit are

1 private parties, and plaintiff has not alleged any connection to  
2 state action. This issue was conspicuously argued in defendant's  
3 motion to dismiss, and plaintiff declined to offer a response.  
4 Instead, plaintiff's opposition appears to abandon all due process  
5 allegations.

6 None of the remaining claims implicate questions of federal  
7 law.<sup>1</sup> The complaint argues that federal questions exist because  
8 the land at issue includes both asbestos and Native American  
9 archeological sites, both of which are federally regulated. As to  
10 asbestos, plaintiff observes that asbestos is or has been  
11 regulated, in various ways, by the Clean Air Act, the Toxic  
12 Substances Control Act, and the Occupational Safety and Health Act.  
13 Discussion of the particulars of these statutes is unnecessary,  
14 because plaintiff has not alleged a violation of any provision of  
15 any of these statutes, nor do any of plaintiff's claims demonstrate  
16 any connection thereto.<sup>2</sup> Again, this issue was raised in  
17 defendant's motion, yet plaintiff declined to respond.

18 Federal regulation of Native American archeological sites  
19 lends no further support to plaintiff. Plaintiff's complaint  
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21 <sup>1</sup> These claims are for negligence, fraud, reformation of  
22 contract, cancellation of contract, injunctive relief, reformation  
23 of title, negligent infliction of emotional distress, intentional  
infliction of emotional distress, and breach of contract.

24 <sup>2</sup> Plaintiff's wholly unadorned allegation that "A substantial  
25 part of Plaintiffs [sic] damages as stated in this Complaint are  
26 a direct and proximate result of actions by defendants which amount  
to violations of federal law regulating Asbestos" is a conclusory  
statement the court need not accept as true. Iqbal, 129 S. Ct. at  
1949-50.

1 asserts that "[t]he Bureau of Reclamation . . . has exclusive  
2 jurisdiction over Native American Archaeological Sites in the  
3 Western states," and that this provides a basis for federal  
4 question jurisdiction. Plaintiff's opposition further argues that  
5 such sites are federally regulated under the National Historic  
6 Preservation Act and the Archaeological Resource Protection Act,  
7 although plaintiff acknowledges that the complaint itself does not  
8 discuss this. Again, without examining these statutes and federal  
9 authority, it is clear that the federal government's "jurisdiction"  
10 to regulate such *sites* does not itself demonstrate this court's  
11 jurisdiction over this case. Jurisdiction under § 1331 requires  
12 that a federal law provide an essential element of plaintiff's  
13 claim. Franchise Tax Bd., 463 U.S. at 10-11. Plaintiff has not  
14 explained how any of his claims necessarily raise a disputed and  
15 substantial issue regarding federal regulation of such sites.  
16 Grable, 545 U.S. at 314. More generally, plaintiff is reminded  
17 that "arising under" jurisdiction over state law causes of action  
18 is the exception rather than the rule.

19 Accordingly, the only claim arising under federal law is the  
20 due process clause claim. Because the court dismisses this claim,  
21 the court declines to retain supplemental jurisdiction over the  
22 remaining claims. 28 U.S.C. § 1367(c); see Carnegie-Mellon Univ.  
23 v. Cohill, 484 U.S. 343, 350 (1988); Gini v. Las Vegas Metropolitan  
24 Police Dept., 40 F.3d 1041, 1046 (9th Cir. 1994).

### 25 **III. Conclusion**

26 For the reasons stated above, defendant Property I.D.

1 Corporation's motion to dismiss (Dkt. No. 11) is GRANTED.  
2 Plaintiff's due process claim is DISMISSED for failure to state a  
3 claim. Plaintiff's remaining claims are DISMISSED for lack of  
4 subject matter jurisdiction. The clerk of the court is directed  
5 to CLOSE this case.

6 IT IS SO ORDERED.

7 DATED: July 2, 2010.

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11 LAWRENCE K. KARLTON  
12 SENIOR JUDGE  
13 UNITED STATES DISTRICT COURT  
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