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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PETER JENSEN, as Successor  
Trustee for the 2008 Brett G.  
Jensen Family Trust,

Plaintiff,

v.

UNITED STATES OF AMERICA;  
TEHAMA-COLUSA CANAL  
AUTHORITY, and DOES 1 through  
10, inclusive,

Defendant.

No. 2:12-CV-01418-JAM-EFB

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
TEHAMA-COLUSA CANAL AUTHORITY'S  
MOTION TO DISMISS**

This matter comes before the Court on Defendant Tehama-  
Colusa Canal Authority's ("Defendant" or "TCAA") Motion to  
Dismiss (Doc. #11) Plaintiff Peter Jensen's ("Plaintiff" or  
"Jensen") Complaint (Doc. #1) ("Comp.") for failure to state a  
claim upon which relief can be granted pursuant to Federal Rule  
of Civil Procedure 12(b)(6). Plaintiff opposes the motion (Doc.

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1 #13).<sup>1</sup> For the reasons set forth below, Defendant's motion is  
2 granted in part and denied in part.

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4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 This case arises out of damage to Plaintiff's real property  
6 allegedly caused by Defendant's negligence "in the construction,  
7 operation, maintenance, improvement and repair of the Tehama-  
8 Colusa Canal ["The Canal"] . . . ." Comp. at ¶¶ 1, 7, 10-11.  
9 Plaintiff owns property in Corning, California, "along Jewett  
10 Creek at the crossing of the Tehama-Colusa Canal . . .," which  
11 is used for agricultural purposes, such as the production of  
12 almonds. Id. at ¶ 1. According to Plaintiff's Complaint, at  
13 some point during a project to operate, maintain, or improve The  
14 Canal, Defendant "unreasonably alter[ed] . . . the water flow of  
15 Jewett Creek onto Plaintiff's property . . ., [causing]  
16 continuing erosion damage." Id. at ¶¶ 10-11. To date,  
17 Plaintiff has incurred approximately \$500,000 in damages, which  
18 includes the "costs of necessary remedial repairs." Id. at ¶  
19 12.

20 Both named defendants in this case are government entities,  
21 and Plaintiff alleges he has complied with the statutory pre-  
22 lawsuit presentation of claim requirements under the Federal and  
23 California Tort Claims Acts. Comp. at ¶¶ 2, 4-5, 7.

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27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was originally  
scheduled for August 8, 2012.



1 claim, the court has discretion to allow leave to amend the  
2 complaint pursuant to Federal Rule of Civil Procedure section  
3 15(a). "Dismissal with prejudice and without leave to amend is  
4 not appropriate unless it is clear . . . that the complaint  
5 could not be saved by amendment." Eminence Capital, L.L.C. v.  
6 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

7 Additionally, the Court may "consider a motion to dismiss  
8 accompanied by affidavits as a motion for summary judgment"  
9 under Rule 12(b)(6), but if it does so, the "parties shall be  
10 permitted to present all material pertinent to the motion."  
11 Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)  
12 (citing FED. R. CIV. P. 12(b)(6), 56).

## 13 2. California Tort Claims Act

14 Actions brought against public entities and their officials  
15 are governed by the California Tort Claims Act ("CTCA"), see CAL.  
16 GOV'T CODE § 810, *et seq.*, and "[t]he timeliness of such actions is  
17 governed by the specific statute of limitations set forth in the  
18 Government Code, not the statute of limitations applicable to  
19 private defendants." County of Los Angeles v. Superior Court,  
20 26 Cal. Rptr. 3d 445, 448 (Cal.Ct.App. 2005) (citations  
21 omitted).

22 The CTCA requires an injured party to present his or her  
23 claim to the public entity prior to initiating litigation  
24 against it. CAL. GOV'T CODE § 954.4. Under the CTCA, a claim  
25 against a public entity relating to any cause of action, other  
26 than one "for death or for injury to [a] person or to personal  
27 property or growing crops," must be presented to that entity  
28 prior to initiating litigation and "not later than one year

1 after the accrual of the cause of action.” CAL. GOV’T CODE  
2 §§ 911.2(a), 945.6.

3 Once a claim is timely filed, the public entity has forty-  
4 five (45) days to accept or reject the claim. Id. at § 912.4.  
5 A party then has six months to initiate litigation against the  
6 entity following written notice of rejection of his or her  
7 claim. Id. at § 945.6(a)(1). If the entity “fails or refuses  
8 to act within [45 days], the claim shall be deemed to have been  
9 rejected . . .,” on the last day the entity was required to act.  
10 Id. at § 912.4. If no written notice is given to the party of  
11 the entity’s rejection of the claim, the party must file an  
12 action with the court “within two years from the accrual of the  
13 cause of action.” Id. at § 945.6(b).

14 B. Defendant’s Motion to Dismiss

15 Before turning to the pending motion, the Court will  
16 address the affidavits and exhibits included with Plaintiff’s  
17 Opposition and Defendant’s Reply. While the Court may consider  
18 the evidence submitted by the parties, see Huynh v. Chase  
19 Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006) (citations  
20 omitted), it declines to do so here. The Court may decide the  
21 issues before it on the moving papers alone, and therefore, it  
22 does not need to convert Defendant’s Motion to Dismiss to a  
23 Motion for Summary Judgment. See id.

24 Defendant moves to dismiss Plaintiff’s Complaint on several  
25 grounds, see Doc. #11, as discussed below.

26 1. Presentation of the CTCA Claim to Defendant

27 Defendant first argues that Plaintiff’s Complaint must be  
28 dismissed because Plaintiff failed to present his tort claim to

1 Defendant before filing this suit, as required by the CTCA.  
2 Doc. #11 at pg. 2-3 (citing CAL. GOV'T CODE § 911.2).

3 As discussed above, the CTCA requires an injured party to  
4 present his or her claim to the public entity prior to  
5 initiating litigation against it. CAL. GOV'T CODE § 945.6(b). In  
6 paragraph 7 of his Complaint, Plaintiff alleges he satisfied  
7 this requirement. However, as currently pled, Plaintiff  
8 provides nothing more than a bare legal conclusion. See, e.g.,  
9 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted).

10 Plaintiff simply pleads: "Plaintiff has complied with the  
11 requirements of [the CTCA]." Comp. at ¶ 7. While Defendant  
12 argues there was no presentation, the Court finds instead that  
13 Plaintiff's pleading is deficient due to lack of factual  
14 specificity, and on that basis, cannot withstand Defendant's  
15 Motion to Dismiss. See, e.g., Iqbal, 556 U.S. at 678.

16 Plaintiff provides important details about the steps he took to  
17 comply with the CTCA's pre-filing requirements in his  
18 Opposition; however, none of the facts that would substantiate  
19 Plaintiff's allegation that he satisfied the CTCA's claim  
20 presentment process are included in his Complaint. Compare Doc.  
21 #13 with Doc. #1. Since Plaintiff has argued that there are  
22 facts that exist showing he satisfied the CTCA's requirements  
23 regarding presentation of a tort claim, in granting Defendant's  
24 Motion to Dismiss, the Court will allow Plaintiff leave to amend  
25 his Complaint. See Eminence Capital, L.L.C. v. Aspeon, Inc.,  
26 316 F.3d 1048, 1052 (9th Cir. 2003).

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1                   2.    Remaining Grounds for Dismissal

2                   Defendant next argues that Plaintiff failed to present a  
3 claim or file this action within the CTCA's statute of  
4 limitations. Doc. #11 at pg. 3-4. Citing a report prepared for  
5 Plaintiff, Defendant argues Plaintiff's claim accrued on March  
6 31, 2010, yet Plaintiff did not file a claim with the other  
7 named defendant until May 23, 2011, more than a year later. Id.  
8 Plaintiff correctly argues that he has alleged the harm is  
9 continuing and that the delayed discovery rule applies in this  
10 case; therefore, the statute of limitations does not bar his  
11 claim. Doc. #13 at pg. 11-12; see also, e.g., K.J. v. Arcadia  
12 Unified School District, 172 Cal.App.4th 1229 (2009). More  
13 importantly, Plaintiff correctly argues that it is likely  
14 Defendant waived any argument regarding an untimely presentation  
15 of Plaintiff's claim under the CTCA. Doc. #13 at pg. 11-13.  
16 For these reasons, Defendant's Motion to Dismiss based on the  
17 statute of limitations is denied.

18                   Next, Defendant argues that Plaintiff's Negligence claim  
19 must be dismissed because it lacks the requisite factual  
20 specificity; namely, a statutory basis for relief. Doc. #11 at  
21 pg. 5-6. The Court agrees. See Eastburn v. Regional Fire  
22 Protection Authority, 31 Cal. 4th 1175 (2003). In his  
23 Opposition, Plaintiff discusses the statutory basis for his  
24 claim, signaling to this Court that allowing leave to amend is  
25 appropriate. See Eminence Capital, L.L.C. v. Aspeon, Inc., 316  
26 F.3d 1048, 1052 (9th Cir. 2003).

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1 Finally, in its reply, Defendant presents arguments that  
2 were not included in the Motion to Dismiss as to why Plaintiff's  
3 Complaint should be dismissed. Compare Doc. #11 with Doc. #14.  
4 This is improper, see, e.g., Association of Irrigated Residents  
5 v. C & R Vanderham Dairy, 435 F.Supp.2d 1078, 1089 (E.D. Cal.  
6 2006), and these arguments will be disregarded. Accordingly,  
7 the Court denies Defendant's Motion to Dismiss on any other  
8 grounds.

9  
10 III. ORDER

11 For the reasons set forth above, Defendants' motion to  
12 dismiss is GRANTED in part and DENIED in part, as follows:

13 1. The motion to dismiss Plaintiff's first and second  
14 causes of action is GRANTED, due to Plaintiff's failure to plead  
15 compliance with the CTCA with the requisite factual specificity.  
16 Plaintiff is granted leave to amend.

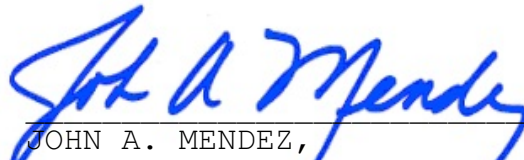
17 2. The motion to dismiss Plaintiff's first cause of  
18 action, Negligence, is GRANTED, due to Plaintiff's failure to  
19 plead a statutory basis for liability. Plaintiff is granted  
20 leave to amend.

21 3. The motion to dismiss is DENIED on all other grounds.

22 4. Plaintiff shall file his Amended Complaint no later  
23 than twenty (20) days from the date of this Order. Defendant's  
24 responsive pleading shall be filed no later than twenty (20)  
25 days after being served with the Amended Complaint.

26 IT IS SO ORDERED.

27 Dated: October 3, 2012

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE