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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JAMES BURNEY AND KATHERINE F.  
BURNEY, AS TRUSTEES OF THE  
BURNEY FAMILY TRUST DATED  
MAY 29, 1990,

No. 2:13-cv-02586-MCE-CKD

**MEMORANDUM AND ORDER**

Plaintiffs,

v.

SECRETARY OF THE UNITED  
STATES DEPARTMENT OF THE  
INTERIOR,

Defendant.

James Burney and Katherine F. Burney, as Trustees of the Burney Family Trust, (collectively "Plaintiffs") initiated this action against the Secretary of the United States Department of the Interior ("Defendant") alleging they are entitled to recovery for deprivation of property without just compensation in violation of the Fifth Amendment and for violation of their rights to equal protection under the Fourteenth Amendment. Presently before the Court is Defendant's Motion to Dismiss for lack of subject matter jurisdiction. For the following reasons, Defendant's Motion is GRANTED with leave to amend.<sup>1</sup>

<sup>1</sup> Because oral argument will not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

1 **BACKGROUND<sup>2</sup>**

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3 Plaintiffs are owners of 580 acres of commercial property known at the Blue  
4 Heron RV Park along the Klamath River in Hornbrook, California ("Property"). Plaintiffs  
5 claim that the Property has been substantially improved with a restaurant, recreational  
6 vehicle park, residence, barns and out buildings, domestic water wells, a septic system  
7 and related improvements. Plaintiffs allege Defendant has entered into two separate  
8 agreements with multiple parties which provide in part for the removal of four  
9 hydroelectric dams on the Klamath River upstream from Plaintiffs' Property. According  
10 to Plaintiffs' Complaint, the terms of these agreements are posted online and have been  
11 distributed to the media and the general public.

12 The root of Plaintiffs' claim is that the removal of the dams under the terms of the  
13 agreements will result in damage to the Property because sediment deposits will be  
14 transported downstream and will change the features and character of the surrounding  
15 land. Plaintiffs also allege that the publication and distribution of the future plan has  
16 stigmatized the Property and as a result has substantially diminished its value. Plaintiffs  
17 claim that the Property's value is dependent upon the character and area of the  
18 surrounding features and that the removal of the lake front areas upstream and of the  
19 river access deprives the Plaintiffs of property without just compensation in violation of  
20 the Fifth Amendment. Plaintiffs also allege they have been denied equal protection of  
21 the laws in violation of the Fourteenth Amendment.<sup>3</sup>

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25 <sup>2</sup> The following recitation of facts is taken, sometimes verbatim, from Plaintiffs' Complaint. ECF  
26 No. 1.

27 <sup>3</sup> The Court will construe this latter claim, which is directed at a federal Defendant, as having been  
28 brought under the Fifth Amendment as opposed to the Fourteenth Amendment. See Consejo de  
Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1171 n.4 (9th Cir. 2007).

1 **STANDARD**

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3 Federal courts are courts of limited jurisdiction, and are presumptively without  
4 jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,  
5 377 (1994). The burden of establishing the contrary rests upon the party asserting  
6 jurisdiction. Id. Because subject matter jurisdiction involves a court’s power to hear a  
7 case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630  
8 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at  
9 any point during the litigation, through a motion to dismiss pursuant to Federal Rule of  
10 Civil Procedure 12(b)(1).<sup>4</sup> Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also  
11 Int’l Union of Operating Eng’rs v. Cnty. of Plumas, 559 F.3d 1041, 1043-44 (9th Cir.  
12 2009).

13 There are two types of motions to dismiss for lack of subject matter jurisdiction: a  
14 facial attack, and a factual attack. Thornhill Publ’g Co. v. Gen. Tel. & Elec. Corp.,  
15 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the  
16 allegations of jurisdiction contained in the nonmoving party’s complaint, or may  
17 challenge the existence of subject matter jurisdiction in fact, despite the formal  
18 sufficiency of the pleadings. Id.

19 When a party makes a facial attack on a complaint, the attack is unaccompanied  
20 by supporting evidence, and it challenges jurisdiction based solely on the pleadings.  
21 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to  
22 dismiss constitutes a facial attack, the Court must consider the factual allegations of the  
23 complaint to be true, and determine whether they establish subject matter jurisdiction.  
24 Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir.  
25 2003). In the case of a facial attack, the motion to dismiss is granted only if the  
26 nonmoving party fails to allege an element necessary for subject matter jurisdiction. Id.

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28 <sup>4</sup> All further references to “Rule” or “Rules” are to the Federal Rules of Civil Procedure unless otherwise noted.

1 However, in the case of a facial attack, district courts “may review evidence beyond the  
2 complaint without converting the motion to dismiss into a motion for summary judgment.”  
3 Safe Air for Everyone, 373 F.3d at 1039.

4 In the case of a factual attack, “no presumptive truthfulness attaches to plaintiff’s  
5 allegations.” Thornhill, 594 F.2d at 733 (internal citation omitted). The party opposing the  
6 motion has the burden of proving that subject matter jurisdiction does exist, and must  
7 present any necessary evidence to satisfy this burden. St. Clair v. City of Chico,  
8 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff’s allegations of jurisdictional facts are  
9 challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the  
10 mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind.,  
11 Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat’l Bank of Chi. v. Touche  
12 Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may  
13 review any evidence necessary, including affidavits and testimony, in order to determine  
14 whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560  
15 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its  
16 burden and the court determines that it lacks subject matter jurisdiction, the court must  
17 dismiss the action. Fed. R. Civ. P. 12(h)(3).

18 A court granting a motion to dismiss a complaint must then decide whether to  
19 grant leave to amend. Leave to amend should be “freely given” where there is no  
20 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice  
21 to the opposing party by virtue of allowance of the amendment, [or] futility of the  
22 amendment . . . .” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.  
23 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to  
24 be considered when deciding whether to grant leave to amend). Not all of these factors  
25 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .  
26 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,  
27 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that  
28 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,

1 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,  
2 1013 (9th Cir. 2005)); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.  
3 1989) (“Leave need not be granted where the amendment of the complaint . . .  
4 constitutes an exercise in futility . . .”).

## 6 ANALYSIS

8 Defendant moves to dismiss Plaintiffs’ claims, which appear to be set forth under  
9 the Takings Clause and the Equal Protection Clause, for lack of subject matter  
10 jurisdiction. More specifically, Defendant argues that because Plaintiffs seek to recover  
11 well in excess of \$10,000 in damages, Plaintiffs’ takings claim falls within the exclusive  
12 jurisdiction of the United States Court of Federal Claims. See ECF No. 7 at 6-7 (citing  
13 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2)). Similarly, any equal protection claim is  
14 barred because “the United States has not waived its sovereign immunity from  
15 constitutional damage claims.” ECF No. 7 at 10 (citing Rivera v. United States, 924 F.2d  
16 948, 951 (9th Cir. 1991)).

17 In opposition, Plaintiffs ignore Defendant’s above contentions and argue only that  
18 “[a]lthough, perhaps, it is not pleaded as clearly as it could be pleaded, Plaintiffs’ claim is  
19 a ‘Bivens’ tort claim under 42 U.S.C. § 1983 because defendant – an employee of the  
20 United States – has denied Plaintiffs rights and privileges guaranteed them by the laws  
21 of the United States, while acting in her official capacity as Secretary and, at all times,  
22 under color of law.” ECF No. 8 at 2.<sup>5</sup> The Court construes Plaintiffs’ response as a  
23 statement of non-opposition to the dismissal of any claims based on the Takings Clause  
24 or the Equal Protection Clause. Defendant’s Motion is thus GRANTED with leave to  
25 amend as to those causes of action.

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28 <sup>5</sup> The Court construes Plaintiffs’ reference to Bivens to refer to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

