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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,

Plaintiffs,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

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

**MEMORANDUM AND ORDER**

Plaintiffs James Burney and Katherine F. Burney, as Trustees of the Burney Family Trust, (collectively "Plaintiffs") originally initiated this action against the Secretary of the United States Department of the Interior ("Defendant") on December 13, 2013. ECF No. 1. Plaintiffs alleged they were entitled to monetary compensation for violations of their rights under the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Id. The Court dismissed the original Complaint with leave to amend. ECF No. 11. Plaintiffs then filed a First Amended Complaint ("FAC"), once again alleging a violation of the Fifth Amendment, but this time seeking only injunctive relief that would restrain Defendant from publishing "stigmatizing or damaging" information pertaining to the Plaintiffs' property until removal of the dams has been

1 authorized and approved. ECF No. 12. Presently before the Court is Defendant's  
2 Motion to Dismiss the FAC for lack of subject matter jurisdiction and for failure to state a  
3 claim upon which injunctive relief can be granted. For the following reasons,  
4 Defendant's Motion is GRANTED, and Plaintiffs are given one final chance to amend  
5 their Complaint.<sup>1</sup>

## 7 **BACKGROUND**<sup>2</sup>

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9 Plaintiffs are the owners of approximately 580 acres of property, commonly known  
10 as Blue Heron RV Park, ("Property") that fronts on and is contiguous with the Klamath  
11 River. There are four hydroelectric dams on the Klamath River upstream from Plaintiffs'  
12 Property. Plaintiffs claim that construction of the dams created lakes and contributed  
13 positively to the character and value of surrounding properties. According to Plaintiffs,  
14 their Property derives substantial value from its location on the frontage of the Klamath  
15 River, the proximity to the lakes upstream of the dams, the lakeside community, and the  
16 public's attraction to water-related activities and recreational opportunities. Moreover,  
17 Plaintiffs contend that they have spent substantial sums improving the Property by  
18 constructing various structures, including a restaurant, residential buildings, roads, and  
19 other utilities on the Property. Plaintiffs also allege that they derive substantial income  
20 from the improvements constructed on their Property and that the value of the Property  
21 is dependent upon the character of the area, features, and activities associated with the  
22 Klamath River and lakes.

23 According to Plaintiffs' FAC, Defendant has entered into two written agreements  
24 which provide for, among other things, the potential removal of the four dams and for the

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26 <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 R. 230(g). See ECF No. 19.

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28 <sup>2</sup> The following recitation of facts is taken, sometimes verbatim, from Plaintiffs' FAC. ECF No. 12.

1 draining the lakes. Plaintiffs assert that these agreements have been published, posted  
2 on the Internet, and distributed by Defendant to the media and public and that,  
3 consequently, there has been substantial publicity and coverage about the planned  
4 removal of the dams. More specifically, Plaintiffs contend that Defendant has prepared  
5 and distributed reports indicating that, if the dams are removed, Plaintiffs' Property will  
6 face a substantially increased risk of flooding and that some of the sediment, which has  
7 accumulated behind the dams and which contains toxic and hazardous substances, will  
8 be transported downstream onto the Property.

9 As a result, Plaintiffs claim that their Property has been stigmatized and that the  
10 publications have damaged the Property's reputation and diminished its value, thus  
11 causing Plaintiffs irreparable harm. Plaintiffs contend Defendant's conduct rises to the  
12 level of an uncompensated taking of Plaintiffs' Property in violation of the Fifth  
13 Amendment, and they seek to permanently restrain Defendant from continuing to publish  
14 damaging and stigmatizing information about the removal of the dams until removal is  
15 authorized, approved, and reasonably probable to occur.

## 17 STANDARD

### 19 **A. Motion to Dismiss for Lack of Subject Matter Jurisdiction under Federal** 20 **Rule of Civil Procedure 12(b)(1)**<sup>3</sup>

21 Federal courts are courts of limited jurisdiction, and are presumptively without  
22 jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,  
23 377 (1994). The burden of establishing the contrary rests upon the party asserting  
24 jurisdiction. Id. Because subject matter jurisdiction involves a court's power to hear a  
25 case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630  
26 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at

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27 <sup>3</sup> Unless otherwise stated, all further references to "Rule" or "Rules" are to the Federal Rules of  
28 Civil Procedure.

1 any point during the litigation, through a motion to dismiss pursuant to Federal Rule of  
2 Civil Procedure 12(b)(1). Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also Int'l  
3 Union of Operating Eng'rs v. Cnty. of Plumas, 559 F.3d 1041, 1043-44 (9th Cir. 2009).  
4 Lack of subject matter jurisdiction may also be raised by the district court sua sponte.  
5 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999). Indeed, “courts have an  
6 independent obligation to determine whether subject matter jurisdiction exists, even in  
7 the absence of a challenge from any party.” Id.; see Fed. R. Civ. P. 12(h)(3) (requiring  
8 the court to dismiss the action if subject matter jurisdiction is lacking).

9 There are two types of motions to dismiss for lack of subject matter jurisdiction: a  
10 facial attack and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.,  
11 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the  
12 allegations of jurisdiction contained in the nonmoving party’s complaint, or may  
13 challenge the existence of subject matter jurisdiction in fact, despite the formal  
14 sufficiency of the pleadings. Id.

15 When a party makes a facial attack on a complaint, the attack is unaccompanied  
16 by supporting evidence, and it challenges jurisdiction based solely on the pleadings.  
17 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to  
18 dismiss constitutes a facial attack, the Court must consider the factual allegations of the  
19 complaint to be true, and determine whether they establish subject matter jurisdiction.  
20 Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir.  
21 2003). In the case of a facial attack, the motion to dismiss is granted only if the  
22 nonmoving party fails to allege an element necessary for subject matter jurisdiction. Id.  
23 However, in the case of a facial attack, district courts “may review evidence beyond the  
24 complaint without converting the motion to dismiss into a motion for summary judgment.”  
25 Safe Air for Everyone, 373 F.3d at 1039.

26 In the case of a factual attack, “no presumptive truthfulness attaches to plaintiff’s  
27 allegations.” Thornill, 594 F.2d at 733 (internal citation omitted). The party opposing the  
28 motion has the burden of proving that subject matter jurisdiction does exist, and must

1 present any necessary evidence to satisfy this burden. St. Clair v. City of Chico,  
2 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of jurisdictional facts are  
3 challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the  
4 mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind.,  
5 Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat'l Bank of Chi. v. Touche  
6 Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may  
7 review any evidence necessary, including affidavits and testimony, in order to determine  
8 whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560  
9 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its  
10 burden and the court determines that it lacks subject matter jurisdiction, the court must  
11 dismiss the action. Fed. R. Civ. P. 12(h)(3).

12 **B. Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6)**

13 On a motion to dismiss for failure to state a claim under Federal Rule of Civil  
14 Procedure 12(b)(6), all allegations of material fact must be accepted as true and  
15 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.  
16 Co., 80 F.3d 336,337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and plain  
17 statement of the claim showing that the pleader is entitled to relief" in order to "give the  
18 defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell  
19 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,  
20 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require  
21 detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of  
22 his entitlement to relief requires more than labels and conclusions, and a formulaic  
23 recitation of the elements of a cause of action will not do." Id. (internal citations and  
24 quotations omitted). A court is not required to accept as true a "legal conclusion  
25 couched as a factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009)  
26 (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a  
27 right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles  
28 Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)

1 (stating that the pleading must contain something more than “a statement of facts that  
2 merely creates a suspicion [of] a legally cognizable right of action.”)).

3 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket  
4 assertion, of entitlement to relief.” Twombly, 550 U.S. at 556 n.3 (internal citations and  
5 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard  
6 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of  
7 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles  
8 Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain “only enough  
9 facts to state a claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . .  
10 have not nudged their claims across the line from conceivable to plausible, their  
11 complaint must be dismissed.” Id. However, “[a] well-pleaded complaint may proceed  
12 even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a  
13 recovery is very remote and unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S.  
14 232, 236 (1974)).

### 15 **C. Leave to amend**

16 A court granting a motion to dismiss a complaint must then decide whether to  
17 grant leave to amend. Leave to amend should be “freely given” where there is no  
18 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice  
19 to the opposing party by virtue of allowance of the amendment, [or] futility of the  
20 amendment . . . .” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.  
21 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to  
22 be considered when deciding whether to grant leave to amend). Not all of these factors  
23 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .  
24 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,  
25 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that  
26 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,  
27 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,  
28 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.

1 1989) (“Leave need not be granted where the amendment of the complaint . . .  
2 constitutes an exercise in futility . . .”).

### 4 ANALYSIS

5  
6 Defendant moves to dismiss Plaintiffs’ Fifth Amendment Takings Claim for lack of  
7 subject matter jurisdiction. More specifically, Defendant argues that, under the Tucker  
8 Act and the Little Tucker Act, district courts have jurisdiction over takings claims only if  
9 the plaintiff seeks \$10,000 or less in compensation, while the Court of Federal Claims  
10 has jurisdiction over the remaining claims. ECF No. 13 at 7 (citing 28 U.S.C. §  
11 1491(a)(1); 28 U.S.C. § 1346(a)(2)). Defendant further argues that jurisdiction for  
12 takings claims under the Tucker Act is limited to monetary relief, and equitable relief is  
13 not authorized. See ECF No. 13 at (citing Richardson v. Morris, 409 U.S. 464, 465  
14 (1973)). Defendant is correct, and, to the extent the Complaint may be construed as  
15 seeking injunctive relief for a Takings Claim, the Motion is GRANTED with leave to  
16 amend.

17 In opposition, Plaintiffs tacitly concede this point, arguing instead only that they  
18 are seeking relief pursuant to the Administrative Procedures Act (“APA”). See ECF  
19 No. 15. This argument is not well-taken. The Amended Complaint is devoid of any  
20 factual assertions going to unlawful agency action, let alone final agency action. Bennett  
21 v. Spear, 520 U.S. 154, 177 (1997) (only final agency action is subject to judicial review  
22 under the APA). Dismissal is thus appropriate.

23 Regardless, even if Plaintiffs had adequately set forth an APA claim and alleged a  
24 basis for the Government’s waiver of sovereign immunity, they still cannot show that they  
25 are entitled to equitable relief when their injuries could be adequately remedied with  
26 monetary compensation in the appropriate court (i.e., a takings claim brought in a court  
27 with subject matter jurisdiction). See Stop the Beach Renourishment, Inc. v. Fla. Dept.  
28 of Environmental Protection, 560 U.S. 702, 740-41 (2010) (citations omitted). Indeed,


1 injunctive relief is not available where a monetary award would suffice because  
2 compensable injuries are not irreparable. Cotter v. Desert Palace, Inc., 880 F.2d 1142,  
3 1145 (9th Cir. 1989) (citations omitted); Los Angeles Mem'l Coliseum Comm'n v. Nat'l  
4 Football League, 634 F.2d 1197, 1202 (9th Cir. 1980) (lost revenue would be  
5 compensable by a damage award if plaintiff prevailed on the merits and therefore injury  
6 was not irreparable). Accordingly, since Plaintiffs are free to pursue a takings claim and  
7 receive compensation in the appropriate court, they cannot show irreparable harm. See  
8 Preseault v. I.C.C., 494 U.S. 1, 11-12, (1990) (The Tucker Act and Little Tucker Act  
9 provides jurisdiction for a claim to recover damages founded on the Constitution in the  
10 United States claims court and district courts, respectively). Defendant's Motion to  
11 Dismiss is GRANTED with leave to amend.

### 12 13 CONCLUSION

14  
15 As set forth above, Defendant's Motion to Dismiss (ECF No. 13) is GRANTED,  
16 and Plaintiffs are given one final chance to amend. Not later than twenty (20) days  
17 following the date this Order is electronically filed, Plaintiffs may (but are not required to)  
18 file an amended complaint. If no amended complaint is timely filed, the causes of action  
19 dismissed by virtue of this Order shall be dismissed with prejudice upon no further notice  
20 to the parties.

21 IT IS SO ORDERED.

22 Dated: October 2, 2014

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26 MORRISON C. ENGLAND, JR., CHIEF JUDGE  
27 UNITED STATES DISTRICT COURT  
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