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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 DEREK HOYTE and COLUMBIA
12 CREST PARTNERS,

13 Defendants.

CASE NO. C10-2044 BHS

ORDER DENYING LEAVE TO
AMEND

14 This matter comes before the Court on Defendants Derek Hoyte (“Hoyte”) and
15 Columbia Crest Partners, LLC’s (collectively “Defendants”) motion for leave to amend
16 (Dkt. 103). The Court has considered the pleadings filed in support of and in opposition
17 to the motion and the remainder of the file and hereby denies the motion for the reasons
18 stated herein.

19 **I. PROCEDURAL HISTORY**

20 On December 20, 2010, the United States (“Government”) filed a complaint
21 against Defendants. Dkt. 1. The Government contends that (1) Defendants are violating
22

1 the conditions of certain easements that have been placed on Defendants' property; (2)
2 Defendants' conduct has injured adjoining land owned by the Government; and (3)
3 Defendants have also misappropriated timber from the adjoining land. *Id.*

4 On September 14, 2011, the Court granted the Government leave to amend its
5 complaint. Dkt. 54. On September 20, 2011, the Government filed an amended
6 complaint adding a cause of action for violations of the Clean Water Act, 33 U.S.C. §
7 1251, *et seq.* Dkt. 55 ("FAC").

8 On November 11, 2011, Defendants answered and asserted counterclaims against
9 the Government. Dkt. 63. On November 22, 2011, the Government filed a motion to
10 dismiss the counterclaims. Dkt. 65. On March 7, 2012, the Court granted the
11 Government's motion. Dkt. 80.

12 On June 8, 2012, Defendants' attorneys filed a motion for leave to withdraw. Dkt.
13 89. On July 2, 2012, the Court granted the motion. Dkt. 98. On July 19 and 23, 2012,
14 new attorneys appeared on behalf Defendants. Dkts. 100 & 102.

15 On August 10, 2012, Defendants filed a motion for leave to amend their current
16 answer. Dkt. 103. On August 27, 2012, the Government responded. Dkt. 104. On
17 August 30, 2012, Defendants replied. Dkt. 105.

18 **II. DISCUSSION**

19 Leave to amend should be freely given when justice so requires. Fed. R. Civ. P.
20 15(a). In this case, Defendants seek leave to amend to include (1) an affirmative defense
21 that Hoyte's liability, if any, was discharged in bankruptcy and (2) an affirmative defense
22 that Defendants' conduct fell within the scope of the easement. Dkt. 103. With regard to

1 the bankruptcy, discharge has been deleted from the list of affirmative defenses making
2 any such amendment unnecessary.

3 With regard to the second proposed amendment, it is not an affirmative defense.
4 “A defense which demonstrates that plaintiff has not met its burden of proof is not an
5 affirmative defense.” *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088
6 (9th Cir. 2002) (citing, *Flav-O-Rich v. Rawson Food Service, Inc. (In re Rawson Food*
7 *Service, Inc.)*, 846 F.2d 1343, 1349 (11th Cir. 1988)). Defendants’ allegation that their
8 conduct falls within the conditions of use placed on Defendants’ property merely negates
9 the Government’s contention that Defendants are violating the conditions of certain
10 easements that have been placed on Defendants’ property. Therefore, the Court denies
11 Defendants’ motion for leave to amend.

12 III. ORDER

13 Therefore, it is hereby **ORDERED** that Defendants’ motion for leave to amend
14 (Dkt. 103) is **DENIED**.

15 Dated this 11th day of September, 2012.

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BENJAMIN H. SETTLE
19 United States District Judge
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