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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HOOD CANAL SAND AND GRAVEL,  
LLC,

Plaintiff,

v.

MICHAEL D. BRADY, et al.,

Defendants.

CASE NO. C14-5620 BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS AND GRANTING  
PLAINTIFF LEAVE TO AMEND

This matter comes before the Court on Defendants Michael Brady, Ray Mabus, the Department of Navy, and the United States of America's ("Federal Defendants") motion to dismiss (Dkt. 29). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion in part, denies it in part, and grants leave to amend for the reasons stated herein.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On July 7, 2014, the United States Navy purchased an easement from the State of Washington. Dkt. 23 (“Comp.”) ¶¶ 1, 35. The easement encompasses portions of state-owned aquatic lands located on the bed of the Hood Canal (“bedlands”). *Id.* ¶ 1. Plaintiff Hood Canal Sand and Gravel, LLC (“Hood Canal”) owns property adjacent to the bedlands. *Id.* ¶ 2. Although the easement does not physically encroach on Hood Canal’s property, the easement blocks Hood Canal’s ability to construct a pier. *Id.* ¶ 37.

On August 4, 2014, Hood Canal filed suit in this Court (“instant action”) against Federal Defendants, as well as Defendants Peter Goldmark, Washington State Department of Natural Resources, and State of Washington (“State Defendants”). Dkt. 1. On August 5, 2014, Hood Canal filed a nearly identical suit in Jefferson County Superior Court, which Federal Defendants removed to this Court (“removed action”). C14-5662, Dkt. 1.

On August 27, 2014, State Defendants filed motions to dismiss in both actions. Dkt. 10. On October 22, 2014, the Court granted State Defendants’ motions to dismiss on Eleventh Amendment immunity grounds. Dkt. 20. The Court dismissed all claims against State Defendants in the instant action and remanded the state claims against State Defendants in the removed action. *Id.*

On November 6, 2014, Hood Canal filed a second amended complaint against Federal Defendants in the instant action. Comp. Hood Canal alleges claims under (1) the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a; (2) the Administrative Procedure Act (“APA”), 5 U.S.C. § 701; (3) the Declaratory Judgment Act (“DJA”), 28 U.S.C. § 2201;

1 and (4) Washington state law. *Id.* Hood Canal seeks a declaratory judgment that the  
2 easement is invalid. *Id.* Hood Canal also seeks injunctive relief preventing Federal  
3 Defendants from enforcing the easement. *Id.*

4 On February 12, 2015, Federal Defendants moved to dismiss under Federal Rules  
5 of Civil Procedure 12(c) and 12(h)(3). Dkt. 29. On March 2, 2015, Hood Canal  
6 responded. Dkt. 30. On March 6, 2015, Federal Defendants replied. Dkt. 32.

## 7 II. DISCUSSION

8 Federal Defendants seek to dismiss all of Hood Canal's claims for lack of subject  
9 matter jurisdiction and for failure to state a claim. Dkt. 29.

### 10 A. Rule 12(h)(3)

11 Challenges to a federal court's subject matter jurisdiction "may be raised by the  
12 parties at any time pursuant to [Rule] 12(h)(3) . . . ." *Augustine v. United States*, 704  
13 F.2d 1074, 1075 n.3 (9th Cir. 1983). Like a motion under Rule 12(b)(1), a Rule 12(h)(3)  
14 jurisdictional challenge can be either facial or factual. *See White v. Lee*, 227 F.3d 1214,  
15 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations  
16 contained in a complaint are insufficient on their face to invoke federal jurisdiction."  
17 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "By contrast, in a  
18 factual attack, the challenger disputes the truth of the allegations that, by themselves,  
19 would otherwise invoke federal jurisdiction." *Id.* The burden falls on the plaintiff to  
20 establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*,  
21 511 U.S. 375, 377 (1993).

1 **B. Rule 12(c)**

2 “After the pleadings are closed—but early enough not to delay trial—a party may  
3 move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “Judgment on the pleadings  
4 is proper when the moving party clearly establishes on the face of the pleadings that no  
5 material issue of fact remains to be resolved and that it is entitled to judgment as a matter  
6 of law.” *Hal Roach Studios, Inc. v. Richard Feiner & Co. Inc.*, 896 F.2d 1542, 1550 (9th  
7 Cir. 1990). The standard applied on a Rule 12(c) motion is essentially the same as that  
8 applied on a Rule 12(b)(6) motion for failure to state a claim: “the allegations of the non-  
9 moving party must be accepted as true, while the allegations of the moving party which  
10 have been denied are assumed to be false.” *Id.* The Court, however, is not required to  
11 accept as true mere legal conclusions unsupported by alleged facts. *Ashcroft v. Iqbal*,  
12 556 U.S. 662, 681 (2009). To survive a motion to dismiss, the complaint “must contain  
13 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its  
14 face.” *Id.* at 678 (internal quotation marks omitted). “A claim has facial plausibility  
15 when the plaintiff pleads factual content that allows the court to draw the reasonable  
16 inference that the defendant is liable for the misconduct alleged.” *Id.*

17 **C. QTA Claim**

18 Hood Canal brings a claim under the QTA, alleging that it has a right under state  
19 law to lease the bedlands adjacent to its property. Comp. ¶¶ 56–62. Federal Defendants  
20 argue that Hood Canal’s QTA claim should be dismissed for lack of subject matter  
21 jurisdiction because Hood Canal does not have a property interest in the bedlands. Dkt.  
22 29 at 7.

1 The QTA provides a limited waiver of federal sovereign immunity for quiet title  
2 suits. *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct.  
3 2199, 2205 (2012). “[T]wo conditions must exist before a district court can exercise  
4 jurisdiction over an action under the Quiet Title Act: 1) the United States must claim an  
5 interest in the property at issue; and 2) there must be a disputed title to real property  
6 between interests of the plaintiff and the United States.” *Leisnoi, Inc. v. United States*,  
7 267 F.3d 1019, 1023 (9th Cir. 2001). Under the first requirement, the United States need  
8 only claim some interest in the property. *See id.* Under the second requirement, the  
9 plaintiff must claim a property interest to which title may be quieted. *See id.*

10 Here, the parties dispute whether Hood Canal has a sufficient property interest in  
11 the bedlands to support its QTA claim. Hood Canal premises its QTA claim on its  
12 alleged “right under state law to lease the bedlands adjacent to its property.” Comp. ¶ 57.  
13 According to Hood Canal, this “right takes precedence over [Federal] Defendants’ claim  
14 to those bedlands.” *Id.*

15 The Court ruled in its previous order that Hood Canal does not have an absolute  
16 right to lease the bedlands. Dkt. 20 at 9. While the Washington Department of Natural  
17 Resources may lease the beds of navigable waters to abutting shoreland owners under  
18 RCW 79.130.010, the Department is not required to do so. *See id.* (citing RCW  
19 79.130.010). The Court’s prior ruling is the law of the case. *Richardson v. United States*,  
20 841 F.2d 993, 996 (9th Cir. 1988). To the extent that Hood Canal raises new arguments  
21 that it has a property interest in the bedlands under state law, this Court is not the proper  
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1 forum to hear such arguments and, until some interest is established in state court, Hood  
2 Canal fails to show a property interest to which title may be quieted.

3 In sum, Hood Canal currently does not have a property interest in the bedlands.  
4 The Court therefore dismisses Hood Canal’s QTA claim for lack of subject matter  
5 jurisdiction.

6 **D. APA Claims**

7 Hood Canal brings several claims under the APA. Comp. ¶¶ 47–55, 68–77.  
8 Specifically, Hood Canal alleges that: (1) Federal Defendants’ decision to purchase the  
9 easement was arbitrary and capricious under 10 U.S.C. § 2663(c); (2) Federal Defendants  
10 violated Hood Canal’s procedural and substantive due process rights; (3) Federal  
11 Defendants violated Hood Canal’s equal protection rights; (4) Federal Defendants took  
12 Hood Canal’s property without just compensation; and (5) Federal Defendants violated  
13 NEPA’s procedural requirements. *Id.* Federal Defendants argue that all of Hood Canal’s  
14 APA claims should be dismissed for lack of subject matter jurisdiction because the QTA  
15 provides the exclusive means for challenging Federal Defendants’ title to the bedlands.  
16 Dkt. 29 at 6.

17 The APA waives federal sovereign immunity for judicial review of a final agency  
18 action. *Patchak*, 132 S. Ct. at 2204. The APA’s waiver, however, does not apply “if any  
19 other statute that grants consent to suit expressly or impliedly forbids the relief which is  
20 sought” by the plaintiff. *Id.* Where the QTA applies, it is “the exclusive means by which  
21 adverse claimants [can] challenge the United States’ title to real property.” *Id.* at 2207.  
22

1 For the reasons discussed above, the QTA is inapplicable because Hood Canal  
2 does not have a property interest in the bedlands. Thus, the QTA does not bar Hood  
3 Canal’s APA claims. The Court denies Federal Defendants’ motion on this ground.

4 Federal Defendants nevertheless argue that Hood Canal’s due process, equal  
5 protection, uncompensated taking, and NEPA claims are subject to dismissal for  
6 additional reasons. Dkt. 29 at 6. The Court will address each of these claims in turn.

### 7 **1. Due Process**

8 Hood Canal alleges that Federal Defendants violated Hood Canal’s procedural and  
9 substantive due process rights by purchasing the easement. Comp. ¶¶ 68–73. Federal  
10 Defendants contend that Hood Canal fails to state a due process claim. Dkt. 29 at 10.

11 In order to state a procedural or substantive due process claim, Hood Canal must  
12 allege that it has been deprived of a constitutionally protected liberty or property interest.  
13 *Gerhart v. Lake Cnty.*, 637 F.3d 1013, 1019 (9th Cir. 2011). Hood Canal premises its  
14 due process claims on its alleged property interest in the bedlands. Comp. ¶ 68. As  
15 discussed above, Hood Canal has failed to show a current property interest in the  
16 bedlands. The Court dismisses Hood Canal’s due process claims.

### 17 **2. Equal Protection**

18 Hood Canal also alleges that Federal Defendants violated Hood Canal’s equal  
19 protection rights because the easement expressly excludes from its restrictions “a number  
20 of pending leases and a pending easement, but fails to expressly [exclude] the bedlands  
21 that are subject to [Hood Canal’s] interest.” *Id.* ¶ 70. Federal Defendants argue that  
22 Hood Canal has not sufficiently alleged an equal protection violation. Dkt. 29 at 16–17.

1 Hood Canal does not allege any class-based discrimination, but instead claims that  
2 it has been singled out by Federal Defendants. *See* Comp. ¶ 70. Accordingly, Hood  
3 Canal’s equal protection claim is a “class of one” claim. *Engquist v. Or. Dep’t of Agric.*,  
4 553 U.S. 591, 601 (2008) (“[A]n equal protection claim can in some circumstances be  
5 sustained even if the plaintiff has not alleged class-based discrimination, but instead  
6 claims that she has been irrationally singled out as a so-called ‘class of one.’”). To state a  
7 class of one claim, Hood Canal must allege that Federal Defendants “intentionally treated  
8 [Hood Canal] differently from others similarly situated and that there is no rational basis  
9 for the difference in treatments.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)  
10 (per curiam).

11 Hood Canal’s class of one claim is deficient for two reasons. First, Hood Canal  
12 does not allege that Federal Defendants intentionally treated Hood Canal differently from  
13 others. Additionally, Hood Canal does not allege that those exempted from the  
14 easement’s restrictions are “similarly situated” to Hood Canal. Because Hood Canal fails  
15 to sufficiently allege an equal protection claim, the Court dismisses this claim without  
16 prejudice.

### 17 **3. Uncompensated Taking**

18 Next, Hood Canal asserts that Federal Defendants took Hood Canal’s property  
19 without compensation in violation of the Fifth Amendment. Comp. ¶¶ 71–73. Federal  
20 Defendants argue that this claim fails because Hood Canal has not been deprived of a  
21 protected property interest. Dkt. 29 at 15.  
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1 The takings clause of the Fifth Amendment provides that private property shall not  
2 be taken for public use without just compensation. U.S. Const. amend. V. Hood Canal’s  
3 takings claim suffers from the same defect as its due process claims: Hood Canal has  
4 failed to show a current property interest in the bedlands. Additionally, Hood Canal’s  
5 only remedy under the takings clause is monetary compensation. *Clouse v. Espy*, 42 F.3d  
6 1522, 1539 (9th Cir. 1994). Hood Canal, however, seeks declaratory and injunctive relief  
7 rather than monetary relief. Accordingly, the Court dismisses Hood Canal’s takings  
8 claim.

#### 9 **4. NEPA**

10 Hood Canal alleges that Federal Defendants violated NEPA by failing to prepare  
11 an environmental impact statement before purchasing the easement. Comp. ¶¶ 75–77.  
12 Federal Defendants assert that Hood Canal’s NEPA claim should be dismissed for lack of  
13 statutory standing because Hood Canal has not alleged any injury to the environment.  
14 Dkt. 29 at 21.

15 “To have standing to sue under the Administrative Procedure Act, a plaintiff’s  
16 alleged injury must be within the zone of interests protected by the statute allegedly  
17 violated.” *Fair v. EPA*, 795 F.2d 851, 854 (9th Cir. 1986). NEPA is a procedural statute  
18 that was enacted “to protect the environment, not the economic interests of those  
19 adversely affected by agency decisions.” *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8  
20 F.3d 713, 716 (9th Cir. 1993). “Thus, to assert a claim under NEPA, a plaintiff must  
21 allege injury to the environment; economic injury will not suffice.” *Ranchers Cattleman*  
22

1 *Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078,  
2 1103 (9th Cir. 2005).

3 Here, Hood Canal does not allege any injury to the environment in its amended  
4 complaint. Because Hood Canal has failed to allege an injury within NEPA's zone of  
5 interests, Hood Canal lacks statutory standing to bring a NEPA claim.<sup>1</sup> The Court  
6 dismisses this claim without prejudice.

7 **E. DJA Claims**

8 Finally, Hood Canal asserts two declaratory relief claims under the DJA. Comp.  
9 ¶¶ 63–67, 78–94. Hood Canal's third claim seeks a declaration that Hood Canal's  
10 planned pier project is not inconsistent with the purposes of the easement, as well as an  
11 injunction enjoining Federal Defendants from enforcing the easement. *Id.* ¶ 67. Hood  
12 Canal's sixth claim seeks a declaration that Federal Defendants have no enforceable  
13 rights under the easement because the State of Washington was not legally authorized to  
14 grant the easement to Federal Defendants. *Id.* ¶ 79.

15 Under federal law, declaratory relief is a remedy, not a claim. *See Morongo Band*  
16 *of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1382–83 (9th Cir.  
17 1988) (“The Declaratory Judgment Act merely creates a remedy in cases otherwise

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18  
19 <sup>1</sup> Federal Defendants do not address Hood Canal's first APA claim, which alleges that  
20 Federal Defendants' acquisition of the easement violated 10 U.S.C. § 2663(c). Comp. ¶¶ 47–55.  
21 In order to have standing to sue under the APA, Hood Canal's alleged injury must be within the  
22 zone of interests protected by section 2663(c). *See Fair*, 795 F.2d at 854. Section 2663(c)  
provides that the Secretary of a military department may acquire an interest in land that is needed  
for national defense. 10 U.S.C. § 2663(c). This claim survives the instant motion because  
Federal Defendants do not independently address it and the Court declines to *sua sponte* dismiss  
it.

1 within the court’s jurisdiction; it does not constitute an independent basis for  
2 jurisdiction.”). Thus, Hood Canal’s declaratory relief claims are not valid causes of  
3 action. In order to obtain declaratory relief, Hood Canal must succeed on a claim within  
4 the Court’s jurisdiction. *Id.* The Court dismisses Hood Canal’s third and sixth claims.

5 **F. Leave to Amend**

6 “Leave to amend should be granted if it appears at all possible that the plaintiff  
7 can correct the defect.” *Balisteri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir.  
8 1988). Although Rule 12(c) does not mention leave to amend, courts may grant a motion  
9 for judgment on the pleadings with leave to amend. *Sprint Telephony PCS, L.P. v. Cnty.*  
10 *of San Diego*, 311 F. Supp. 2d 898, 903 (S.D. Cal. 2004); *Moran v. Peralta Cmty.*  
11 *College Dist.*, 825 F. Supp. 891, 893 (N.D. Cal. 1993). Dismissal with leave to amend is  
12 appropriate if the pleadings may be cured by further amendment. *Lopez v. Smith*, 203  
13 F.3d 1122, 1127 (9th Cir. 2000).

14 Here, the Court finds that Hood Canal’s QTA, due process, uncompensated taking,  
15 and DJA claims cannot be cured by amendment. However, it appears possible that Hood  
16 Canal could cure the defects in its remaining claims by providing additional allegations.  
17 The Court therefore grants Hood Canal leave to amend its equal protection and NEPA  
18 claims.

19 **III. ORDER**

20 Therefore, it is hereby **ORDERED** that Federal Defendants’ motion to dismiss  
21 (Dkt. 29) is **GRANTED in part** and **DENIED in part**. Hood Canal is **GRANTED**  
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1 **leave to amend** its complaint as stated herein. Hood Canal shall file an amended  
2 complaint no later than April 24, 2015.

3 Dated this 13th day of April, 2015.

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5 BENJAMIN H. SETTLE  
6 United States District Judge  
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