UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

LNG DEVELOPMENT COMPANY, LLC, f/k/a SKIPANON NATURAL GAS, LLC,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 3:14-cv-1239-AC

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

LNG Development Company, LLC ("LNG") and the U.S. Army Corps of Engineers ("the Corps") dispute the Corps' right to an easement that which covers land LNG leased from the Port of Astoria. The Corps' easement and LNG's leased land are located on the Skipanon Peninsula, near Warrenton, Oregon. The Corps' claimed easement interferes with LNG's intent to build upon and use the leased land.

LNG sued the Corps under the Quiet Title Act, 28 U.S.C. § 2409a ("the QTA") to obtain a declaration that the Corps' easement is invalid. If the court finds the Corps' easement valid, then LNG seeks the alternative relief of a determination that it has a right of ingress and egress to the leased land. The Corps moves to dismiss LNG's complaint for lack of subject matter jurisdiction, because LNG's lawsuit is time-barred under the QTA's 12-year statute of limitation. The court must dismiss LNG's lawsuit, the Corps asserts, because the statute of limitations is jurisdictional and, consequently, deprives the court of subject matter jurisdiction over LNG's lawsuit.

The court concludes that LNG's lawsuit is time-barred by the QTA's statute of limitation and that the court lacks subject matter jurisdiction over this lawsuit. Therefore, the Corps's motion to dismiss should be granted.

Background

I. Events Which Prompted The Parties' Dispute.

LNG, formerly known as Skipanon Natural Gas, LLC, is an energy company seeking to build a liquefied natural gas terminal and pipeline on land it leased in November 2004 from the Port of Astoria (hereinafter "Leased Land"). (*See* First Amended Complaint ("First Am. Compl.") at ¶¶ 1, 10; First Am. Compl. Ex. A, at 1, and Ex. B, at 1.) The Corps claims a Spoils Disposal Easement it received in 1957 from Clatsop County and recorded that same year (hereinafter "Easement"). (First Am. Compl. ¶¶ 7, 13.) The Corps' Easement encompasses the entire area of the Leased Land. (First Am. Compl. Ex. B, at 1.)

During a November 4, 2009 inter-agency meeting regarding LNG's proposed plans, the Corps raised concerns that LNG's pipeline on the Leased Land would intersect the Corps' dikes and levees on the Easement, and would conflict with the Corps' use of the Easement for disposal of

dredge material. (First Am. Compl. ¶ 11; Declaration of Peter Hansen ("Hansen Decl.") ¶¶ 2, 3.) At this meeting the Corps explicitly asserted to LNG its Easement over the Leased Land; LNG asserts that prior to that meeting it was not aware the Corps intended to assert any interest in the Submerged Lands on the Leased Land. (Hansen Decl. ¶¶ 2, 6; Hansen Decl. Ex. A, at 2.) The Corps told LNG that LNG would need to modify its plans so that its proposed project did not interfere with the Corps's dikes and levees on the Easement. (Hansen Decl. Ex. B, at 1-3.)

II. History of the Land Interests at Issue.

The history of ownership relevant to the Leased Land and the Easement, and the precise basis of LNG's claim, is important to understanding the substantive issues LNG raises and the notice issues the Corps raises, and the distinction between the two. In 1883, the State of Oregon conveyed the land comprising the Easement land, approximately 28 acres, to D. K. Warren. (First Am. Compl. ¶ 4.) In 1916, D. K. Warren's successors in interest created an "indenture," or real estate deed, to the Easement land. (First Am. Compl. ¶ 6.) Later, the indenture to the Easement land was foreclosed and passed to Clatsop County. (First Am. Compl. ¶ 7.)

On January 16, 1957, the Clastop County Court issued an order finding Clatsop County the owner of the Easement lands and ordered the Perpetual Spoils Easement be granted to the United States. (Mo. Dismiss Ex. 1, at 16-18.) On the same date, Clatsop County granted the Easement to the Corps, which extended entirely over the area comprising the Leased Land. (*Id.*; First Am. Compl. Ex. B, at 1, and Ex. D, at 1-2; Defendant's Motion to Dismiss ("Mo. Dismiss") Ex. 1.) The deed is recorded in the Clatsop County real-property records. (First Am. Compl. ¶ 7.) The Easement document grants to the Corps "the perpetual right and privilege to deposit on the hereinbefore described tract of land or any part thereof any and all spoil and other matter excavated in the

improvement and maintenance of the aforesaid improvement." (First Am. Compl. Ex. D, at 2.)

The Corps first utilized the Easement in 1963. (Declaration of Jon N. Gornic ("Gornic Decl."), at ¶¶ 2, 3, 4.) In 1967, Clatsop County created a public right-of-way across the Easement (First Am. Compl. ¶ 18), consistent with the county's retained right under the Easement document to make use of the Easement land conveyed without interfering with the Corps' Easement and its purpose. (First Am. Compl. Ex. D., at 2). Also in 1967, the Corps again placed spoils on the Easement. (Gornick Decl., at ¶¶ 2, 3, 4.)

In 1978, the Port of Astoria, an LNG predecessor in interest, by letter from legal counsel, asked the Corps to vacate The Easement. (Mo. Dismiss Ex. 3.) The Corps did not vacate the Easement and continued to use it.

In 1980, the Oregon Attorney General issued an opinion declaring that the State of Oregon owned the Easement Land. *Opinion of the Office of the Attorney General, State of Oregon*, 40 Or. Op. Att'y Gen. 477 (1980). Notwithstanding the opinion, the Corps continued to use the Easement, placing spoils on the Easement in 1981, 1987, and 1992. (Gornick Decl., at ¶ 2.) The Corps last placed spoils on the Easement in 1992. (Declaration of James A. Holm ("Holm Decl."), at ¶ 3.)

On November 1, 2004, the State of Oregon conveyed the Leased Land to the Port of Astoria, which immediately sub-leased the Leased Land to LNG. (First Am. Compl. ¶¶ 9-10.)

III. "Tidelands" and "Submerged Lands".

LNG contends the Corps' Easement, if valid at all, is limited to "tidelands" and does not include "submerged lands." LNG describes "submerged lands" as "property that was originally below the surface of the Pacific Ocean". (First Am. Compl. ¶ 4.) LNG argues the State of Oregon owned both the tidelands and the submerged lands in and around the Easement "[f]rom the time of

statehood," and that the state's 1883 deed conveyed to D. K. Warren only tidelands and did not include submerged lands. (First Am. Compl. ¶ 5.)

LNG provides no evidence of the 1883 deed or the deed's purported limitation to tidelands. The Corps' Easement contains no such distinction or limitation. Instead, the Easement document conveyed to the Corps "the perpetual right and privilege to deposit on the hereinbefore described tract of land or any part thereof any and all spoil and other matter excavated in the improvement and maintenance of the aforesaid improvement." (First Am. Compl. Ex. D., at 2.)

LNG alleges that because the land comprising the Corps' Easement originally came from the State of Oregon, whatever interest Clatsop County conveyed to the Corps could not have included the submerged lands. (First Am. Compl.¶¶ 4, 5, 6.) For LNG, this distinction affects both the merits of LNG's lawsuit and the notice issue raised in the Corps' motion to dismiss. On the merits, LNG contends the Corps has no right, interest, or claim to or in the submerged lands of the Easement, which is the portion of the Easement LNG must use for its project. On the issue of notice, LNG's contention is two-fold: neither it nor its predecessors in interest had actual or constructive notice of the Corps' claim, because the Easement never included the submerged lands and because the Corps' use of the Easement at most created notice only of an interest in the tidelands.

Legal Standard

The federal district courts are courts of limited jurisdiction. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005). The party asserting jurisdiction bears the burden of establishing that it exists in a given case. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178,182-183 (1936)). When a federal court determines it lacks subject matter jurisdiction, it must dismiss the

complaint in its entirety. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), a defendant may move to dismiss a claim for lack of subject matter jurisdiction. A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

When a Rule 12(b)(1) motion attacks the truth of the jurisdictional allegations, the court need not take the allegations in the complaint as true and may decide factual disputes. *White*, 227 F.3d at 1242. *Accord Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) ("[N]o presumptive truthfulness attaches to plaintiff's allegations.") (internal quotation marks omitted). The district court may consider evidence beyond the complaint, and may do so without converting the motion to dismiss into a motion for summary judgment. *Safe Air for Everyone*, 373 F.3d at 1039 (citing *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). When the defendant has introduced evidence to dispute the truth of the jurisdictional allegations, the plaintiff "must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*, 343 F.3d at 1039 n.2 (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)); *accord Safe Air*, 373 F.3d at 1039; *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007) ("Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence.").

The Ninth Circuit has held that a "[j]urisdictional finding of genuinely disputed facts is

inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of an action." *Sun Valley Gas, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). The jurisdictional issue is "so intertwined" with the merits of the case where "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Id.*

Discussion

I. Preliminary Procedural Issue.

LNG contends the court cannot decide the Corps' Rule 12(b)(1) motion at this stage of the case because the facts relevant to the Corps' jurisdictional attack are too intertwined with the facts underlying the merits of its quiet title claim. The court finds the facts are not so intertwined. The facts underlying Corps' Rule 12(b)(1) motion are distinct from the facts upon which LNG bases its quiet title claim.

Although the facts relevant to the merits of LNG's quiet title claim span more than 100 years and allegedly include competing grants of title to the land comprising the Easement, the Corps' 12(b)(1) motion puts notice, not ownership, at issue. To resolve the Corps' Rule 12(b)(1) motion, the court need not decide which party has actual ownership of, holds legal title to, or has a valid right to use the Easement. Instead, the court must determine, based on the parties' respective fact submissions and applying controlling QTA statute of limitation precedent, whether LNG or its predecessors had sufficient notice that the Corps claimed some interest that affected the property at issue. Actual ownership or a legal interest need not be present to establish the notice sufficient under the QTA; the court need determine only whether and when LNG or its predecessors in interest knew

or had reason to know the Corps claimed an interest in the Easement.

LNG's position here is distinguishable from the plaintiff's position in *Safe Air*, upon which LNG relied at oral argument. There, the plaintiff filed a "citizen suit" under the Resource Conservation and Recovery Act, 42 U.S.C. 6972(a)(1)(B) ("RCRA"), alleging grass residue from defendant's Kentucky bluegrass harvest constituted "solid waste" under RCRA. *Safe Air*, 373 F.3d at 1037. In their Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the defendants argued grass residue did not constitute "solid waste" under RCRA; thus, because RCRA applied only to cases involving the disposal of solid waste, RCRA could not be the basis for federal subject matter jurisdiction. *Safe Air*, 373 F.3d at 1038, 1040. The district court granted the defendants' motion, concluding it lacked jurisdiction because grass residue did not constitute "solid waste" under RCRA. *Safe Air*, 373 F.3d at 1038.

The Ninth Circuit reversed the district court's ruling because the jurisdictional facts were sufficiently intertwined with the merits of the plaintiff's RCRA claim. The question whether subject matter jurisdiction existed because grass residue was "solid waste" under RCRA (thus invoking federal subject matter jurisdiction), could not be separated from plaintiff's merits argument that defendants had violated RCRA by disposing of "solid waste" in the form of grass residue (thus establishing a violation of RCRA). *Safe Air*, 373 F.3d at 1040-41. In other words, "the crux of [the] case turn[ed] on the issue of whether Kentucky bluegrass reside is 'solid waste' within the meaning of RCRA." *Safe Air*, 373 F.3d at 1041.

Here, the crux of LNG's case is that the Corps has no valid right, title, or interest in the Easement and its submerged lands. The crux of the Corps' Rule 12(b)(1) motion is that LNG's predecessors in interest had notice more than twelve years before LNG filed its lawsuit that the

Corps had a claim or interest that affected the Easement land and the Leased Lands, including the submerged lands therein. Deciding the Corps' motion does not require the court to decide the merits of LNG's quiet title claim. First, the QTA expressly covers disputes over submerged lands. *See* 28 U.S.C. 2409a(l). Second, notice will be decided on evidence showing if and when LNG's predecessors knew or should have known of the Corps' claim to or interest in or affecting the Easement lands; questions of whether LNG or its predecessors knew the Corps' claim or interest was valid or invalid, as well as the ultimate determination of validity itself, are questions based on facts different from those needed to decide the notice issue. *See, e.g.*, *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991) ("The crucial issue in the [QTA] statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid.").

The court finds the facts underlying the Corps' Rule 12(b)(1) motion are not so intertwined with the facts underlying the merits of LNG's quiet title claim. Accordingly, the court can consider and decide the Corps' motion at this stage of the lawsuit.

II. LNG's First Claim to Quiet Title.

A. The QTA's jurisdictional statute of limitations.

As relevant to the Corps' Rule 12(b)(1) motion, the QTA, 28 U.S.C. § 2409a, provides:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.
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> * * * *
>
> (d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property,

> the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.
>
> * * * *
>
> (g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

The QTA waives sovereign immunity to suits against the United States "to adjudicate title disputes involving real property in which the United States claims an interest." *Block v. North Dakota*, 461 U.S. 273, 275-76 (1983). Disputes over the right to an easement and suits seeking a declaration as to the scope of an easement fall within the purview of the QTA. *Skranak v. Castenada*, 425 F.3d 1213, 1218 (9th Cir.2005)

The limitations period contained in the QTA is a strictly construed jurisdictional prerequisite to suit. *See Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir. 2005) ("Such bar is jurisdictional. The Quiet Title Act is a waiver of sovereign immunity. If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction."). More generally, any limitations and exceptions to the QTA's waiver "must be strictly observed." *Gardner v. Stager*, 103 F.3d 886, 887 (9th Cir. 1996) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)).

B. Notice under the QTA.

The twelve-year limitations period begins to run "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." § 2409a(g). Knowledge or notice of such a claim is subject to a test of reasonableness. *McIntyre v. United States*, 789 F.2d 1408, 1411 (9th Cir. 1986). *Accord Cal. Ex rel. State Land Comm'n v. Yuba Goldfields, Inc.*, 752

F.2d 393, 396 (9th Cir. 1985) (finding that "the words 'should have known' . . . impart a test of reasonableness" and that the government need not "communicate its claim in clear and unambiguous terms"). In fact, "[k]nowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Kingman Reef Atoll Investments, L.L.C. v. United States*, 545 F. Supp. 2d 1103, 1110-11 (D. Hawai'I 2007) (quoting *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980), *aff'd*, 541 F.3d 1189 (9th Cir. 2008).

Subsection 2409(g)'s "knew or should have known" standard is expansive. Formal or recorded documents can satisfy the standard, *see, e.g., Yuba Goldfields, Inc.*, 752 F.2d at 396 (a recorded deed may give constructive notice that triggers the limitations period), but the scope of the QTA's notice standard is not limited to recorded documents of valid claims. "If a claimant asserts fee title to disputed property, notice of a government claim that creates even a cloud on that title may be sufficient to trigger the limitations period." *Kingman Reef*, 545 F. Supp. 2d at 1111, quoting *Michel v. United States*, 65 F.3d 130, 132 (9th Cir. 1995). Thus, notice of an "interest[] that raise[s] questions that may *affect* the claim of title and pose problems in the future" is sufficient. *Robinson v. U.S.*, 586 F.3d 683, 687 (9th Cir. 2009) (emphasis in original) (finding that Congress did not intend to limit the waiver solely to the traditional "quiet title" causes of action, but that Congress instead was more generally concerned with interests that "cloud title."). And, the government's claimed interest need not be facially valid: "Even where the government's interest is based on a null deed, such governmental interest, even without legal title, constitutes a cloud on plaintiff's title sufficient to satisfy the notice provision." *Kingman Reef*, 545 F. Supp. 2d at 1111, citing *Knapp v. U.S.*, 636 F.2d 279, 283 (10th Cir.1980). *See also Yuba Goldfields*, 752 F.2d at 397 (finding that

a quitclaim deed provides notice of a cloud on title).

The government's use of the land also is sufficient to meet subsection 2409(g)'s "knew or should have known" standard. "The existence of one uncontroverted instance of notice suffices to trigger the limitations period." *State of Nevada v. U.S.*, 731 F.2d 633, 635 (9th Cir. 1984) (finding that the State of Nevada failed to submit admissible evidence "to dispute each specific instance of notice presented by the United States in its papers"). The government's use need not be openly and obviously hostile. *See, e.g., Shultz v. Department of Army*, U.S., 886 F.2d 1157, 1160 (9th Cir. 1989) ("This circuit has rejected explicitly [plaintiff's] contention that the cause of action accrues and the statute of limitations begins to run only when the United States acts in a manner openly hostile and adverse to a landowner's interest.").

Finally, notice under the QTA is determined under federal law, not state law. *See, e.g., State of Hawai'i ex rel. Dept. of Hawaiian Home Lands v. United States*, 866 F.2d 313, 313 (9th Cir. 1989) (holding that Hawaiian common law "has no bearing on the type of notice required by the Quiet Title Act").

C. Documentary evidence of the Easement as notice.

LNG argues that the Easement is invalid and does not convey title, interest, or notice of the government's claim to or interest in the Easement or Leased Land because the Corps's predecessors in interest never had the right to grant the Easement. LNG contends "state law governs issues relating to . . . property, unless some other principle of federal law requires a different result . . . . [P]roperty ownership is not governed by a federal law, but rather the laws of the several States." *Ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). Under Oregon law, LNG observes, an invalid deed is not in the chain of title and does not constitute notice. *Advance*

Thresher Co. v. Esteb, 41 Or. 469, 473-74 (1902). LNG additionally argues that the Oregon Attorney General confirmed in a 1980 opinion that the State of Oregon owned the Subject Property (40 Op. Att'y Gen. Or. 477 (1980)), so the Corps could claim no right to the Easement from that date forward.

LNG's reflexive reliance on Oregon state law to define the limits of notice is without merit. The ample Ninth Circuit case law interpreting the scope of notice under the QTA's statute of limitations makes clear that notice under the QTA is exclusively a question of federal law. The decisions cited above make clear that a cloud on the title, a reasonable awareness of a governmental claim adverse to a plaintiff's claim, and even a null deed and a quitclaim deed satisfy the QTA's notice requirement and start the running of the QTA's statute of limitations.

The evidence here establishes that multiple documents in official records evidenced the Corps' claim or interest. In 1957, Clatsop County granted the Corps an unrestricted Perpetual Spoils Easement, which easement was recorded in the Clatsop County real property records. (First Am. Compl. ¶ 7, and Ex. D, at 2; Mo. Dismiss Ex. 1, at 15.) Also in 1957, the Clastop County Court issued an order finding Clatsop County the owner of the Subject Property and ordered the Perpetual Spoils Easement be granted to the United States. (Mo. Dismiss Ex. 1, at 16-18.) In 1968, the Port of Astoria granted by deed a disposal easement to the City of Warrenton, which deed also was recorded in the Clatsop County records. (Mo. Dismiss Ex. 2.) In 1978, the Port of Astoria, an LNG predecessor in interest, through legal counsel and in writing asked the Corps to vacate its easement. (Mo. Dismiss Ex. 3.)

These documents establish that LNG's predecessors in interest had both knowledge and reason to know of the Corps' Easement. That Clatsop County allegedly lacked authority to grant the

Easement or that the Oregon Attorney General's opinion purported to find the Easement invalid are facts potentially relevant to deciding the validity of the Corps' claim or interest, but they are not relevant under federal precedent to determining whether LNG's predecessors knew or should have known of the Corp's claim or interest. Accordingly, LNG's argument on this point is unavailing.

D. The Corps's use of the easement as notice.

The record establishes the Corps openly and actively used the Easement and that LNG's predecessors in interest knew or should have known of the Corps' use. In 1963 the Corps first placed spoils material on easement. (Gornick Decl. ¶¶ 2, 3.) The Corps kept using the easement until at least 1992, during which time the Corps on multiple occasions dumped spoils material on the Easement. (Holm Decl. ¶ 3.)

LNG does not dispute the Corps actively used the Easement from 1963 to 1992, but it contends the Corps' use amounted to nothing more than notice of adverse possession or trespass (Plaintiffs.' Response to Motion to Dismiss ("Pls.' Resp.") at 9). LNG argues that under Oregon law such use is not notice of any interest in the Easement or the Leased Land. Thus, LNG's predecessors, and LNG, never had notice legally sufficient to trigger the running of the QTA's statute of limitations.

Again, LNG's notice argument is directly contrary to federal law. First, the QTA expressly provides:

> (k) Notice for the purposes of the accrual of an action brought by a State under this section shall be –
>
> > (1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

> (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

28 U.S.C. § 2409a(k). This subsection expressly includes as notice the very circumstances LNG argues do constitute notice under the QTA. As described above, the state knew, or certainly should have known, of the Corps' use of the Easement, if only because the Corps continued to use the Easement at least three times, in 1981, 1987, and 1992, after the Oregon Attorney General opined that the state owned it. Thus, the statute of limitations would have started running at least by 1963, the year the Corps first dumped spoils on the Easement, and no later than 1992, the date the Corps last used it, and thus would have expired by 2004.

That subsection 2904a(k) specifically refers to "accrual of an action brought by a State" does not affect that the subsection applies to LNG. The State of Oregon leased the Leased Land to the Port of Astoria, which then subleased it to LNG. Because LNG's rights to the Leased Land ultimately derive from the state, LNG has the same rights, remedies, obligations, and burdens as those the state possesses under the QTA. This court interprets subsection 2904a(k) to apply to lessees of state property who bring an action under the QTA. A contrary interpretation would nullify the QTA's statute of limitations in any case brought by a state lessee who acquired state land more than twelve years after actual or constructive notice occurred. In such situations, lessee could argue that it is not the state, so actual or constructive notice imputed to the state that occurred prior to its lease does not apply to it. LNG provides no authority, and the court has found none, to suggest such a confined reading of the QTA's statute of limitations, exceptions to which must be narrowly, not expansively, construed.

Second, even if subsection 2904a(k) did not apply to lessees of state property, LNG's

argument still fails. Case law consistently interprets subsection 2904a(g)'s "should have known" standard broadly: it includes actions and interests that create a cloud on title, or raise questions that may affect the claim of title and pose future. The record leaves no doubt that the Corps' use during a 29-year period of the Easement as a depository for tons of spoil and other excavated material was both open and adverse to the State of Oregon's and the Port of Astoria's interests. The Corps' activities on the Easement were sufficient to meet the QTA's "should have known" standard and put LNG's predecessors in interest on notice of the government's claim.

E. LNG's "submerged lands" argument.

LNG argues that the Corps' Easement could not include "submerged lands" because the Corps' predecessors in interest never owned the submerged lands. Thus, even if the Corps holds a valid Easement, it does not include submerged lands. LNG also asserts that the Corps does not distinguish between "tidelands" and the "submerged lands" when describing its use of the Easement. Thus, the Corps' actual use of the Easement "is of no consequence" to establishing notice under the QTA, because the Corps' use would not provide notice of the Corps' claimed interest in the submerged lands. At best, LNG observes, the Corps' use provided notice only of "claims for adverse possession, trespass and/or nuisance" of the submerged lands, which LNG asserts is not notice of an ownership interest. (Pls.' Resp. at 9.)

LNG's arguments are unavailing for each of three reasons. First, LNG's argument that "submerged lands" are distinct from "tidelands" requires the court to examine and determine the scope of the Easement claimed by the Corps, a merits-based inquiry in which this court may not engage if it has no jurisdiction because § 2409a(g) bars LNG's lawsuit. *See, e.g., Block v. North Dakota ex rel. Bd. of University and School Lands*, 461 U.S. 273, 292 (1983) ("Whatever the merits

of the title dispute may be, the federal defendants are correct: If North Dakota's suit is barred by [§ 2409a(g)], the courts below had no jurisdiction to inquire into the merits."). LNG's contention is without merit for this reason.

Second, LNG's acknowledgment the Corps' activities would have created notice only of the Corps' potential adverse possession or trespass reinforces that the Corps' activities created notice of *some* adverse government interest that potentially affected the Easement land and the Leased Lands. The Ninth Circuit has held that the notice inquiry is governed by federal law, and it has instructed that this inquiry includes examination of whether the conduct gave notice of an "interest[] that raise[s] questions that may *affect* the claim of title and pose problems in the future." *Robinson v. U.S.*, 586 F.3d at 687. Here, the Corps' unrestricted dumping of spoils into the waters of the Easement during a 29-year period creates notice of a government interest that was inconsistent with LNG's predecessors' rights in the Leased Land. *See Kingman Reef*, 545 F. Supp. 2d at 1110 ("Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's.") (citations omitted). Thus, LNG's argument is unpersuasive for this additional reason.

Third, the substantive distinction between "tidelands" and "submerged lands" LNG urges the court to make here is irrelevant to the notice inquiry under the QTA. Section 2409a(l) groups the two land forms together as one for purposes of the QTA: "For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301)." That definition provides:

(a) The term "lands beneath navigable waters" means –

(1) all lands within the boundaries of each of the respective States

> which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
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> (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and
>
> (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined[.]

The QTA is a waiver of the United States' sovereign immunity and Congress defines the scope and conditions of that waiver, including the conditions under which a claim will be deemed to have accrued. By grouping "tidelands" and "submerged lands" together as "lands beneath navigable waters" for purposes of quiet title actions, Congress may have deemed it prudent to eliminate from the notice inquiry (even if not from the merits inquiry) the murky and evasive separation between the two. *See, e.g.*, *State of Alaska v. United States*, 201 F.3d 1154, 1161 (9th Cir. 2000) ("By reading the [QTA] itself and performing the traditional exercise of attributing a rational purpose to the legislature, we can attribute to Congress a purpose of furnishing a means by which state governments can remove clouds on their title created by federal assertions of claims.").

In this context, the essence of LNG's claim demonstrates the rationality of Congress' choice of definition. LNG alleges: "The State of Oregon owns a portion of the Subject Property, which real property was created in part from the property that was originally below the surface of the Pacific Ocean by the placement of dredged materials ('the Submerged Lands')." (First Am. Compl. ¶ 4.)

The foundation of LNG's claim is that the Corps' activities interfered with LNG's rights to land beneath the surface of the water – exactly the area encompassed in the QTA's"lands beneath the navigable waters" grouping of tidelands and submerged lands. LNG's claim arises from the Corps' activities occurring on and affecting lands underneath the surface of the waters of the Easement, and that activity was sufficient to put LNG's predecessors on notice that the Corps' activities potentially affected the submerged lands. The finer distinction LNG urges the court to make between tideland and submerged lands might be appropriate for the merits inquiry, but it is neither necessary or appropriate for the notice inquiry.

The QTA's lengthy twelve-year statute of limitations supports this interpretation. Congress broadly defined the circumstances constituting notice under the QTA, thus making easier the government's burden to establish a QTA claim's accrual date. But Congress also gave state and private claimants twelve years from the accrual date to inquire, investigate, and file a quiet title lawsuit. Importantly, the QTA does not require validity or the "full contours" of the federal interest be determined before that twelve-year period expires; all that is necessary is recognition of a federal interest that potentially affects title to their property and the filing of a lawsuit to settle questions over title, ownership, or use. Congress' decision to employ a broad definition of notice but allow a long period of time within which to file a QTA action serves the rational purpose of balancing of competing interests.

Finally, the subsection's grouping of "tidelands" and "submerged lands" together is consistent with court decisions holding that notice does not require knowledge of the exact nature or full contours of the government's interest. Otherwise, every QTA lawsuit involving tidelands or submerged lands automatically would involve jurisdictional and substantive facts "so intertwined"

that every QTA lawsuit based on such a dispute never could be subject to a statute of limitations challenge at its outset. LNG has cited no authority, and the court has found none, to support a de facto deferral of a statute of limitations challenge where the QTA claim involves tidelands and submerged lands. For this additional reason, LNG's submerged lands argument is unavailing.

Accordingly, the court agrees with the Corps that the court may not exercise subject matter jurisdiction over this case because LNG's lawsuit is time-barred.

II. LNG's Second Claim to Quiet Title

LNG seeks a declaratory judgment that it has a right to use the public right-of-way across the Subject Property. For the reasons set forth in Section I., above, LNG's second claim is time-barred and the does not have subject matter jurisdiction over that claim. Accordingly, the court may not determine LNG's second claim.

Conclusion

For the reasons stated above, the Corps's motion to dismiss (Dkt No. 20) should be GRANTED.

Scheduling Order

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due seventeen (17) days from the date of entry of this Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within seventeen (17) days from the date of

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service of a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 28th day of July, 2015.

JOHN V. ACOSTA
United States Magistrate Judge