

No. 14-55583

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY OF SANTA MONICA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, and
MICHAEL P. HUERTA, in his official capacity as
Administrator of the Federal Aviation Administration,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California,
Hon. John F. Walter (Case No. CV 13-8046-JFW (VBKx))

**PRINCIPAL BRIEF FOR PLAINTIFF-APPELLANT
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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The final order dismissing the claims of plaintiff-appellant City of Santa Monica (“City”) was entered on February 13, 2014. The City appealed on April 11, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the City’s claim under the Quiet Title Act, 28 U.S.C. § 2409a, is timely because the City brought suit within the 12-year statute of limitations.

INTRODUCTION

The City owns and operates the Santa Monica Municipal Airport (“Airport” or “SMO”). The City owns in fee simple all the land on which the Airport is located. At issue here are two parcels of land totaling 168 acres, known as the “Runway Lease” and the “Golf Course Lease” (together, “the City’s Land”). The City has owned these parcels in fee simple since the City purchased them between 1926 and 1941.

In 2008, for the first time, the Federal Aviation Administration (“FAA”) claimed that a 1948 “Instrument of Transfer” obligated the City to operate the Airport as an airport *forever* or else *title* to the City’s Land would “revert” to the United States. The United States continues to press that remarkable contention here. ER29. But title to the City’s Land could not “revert” to the United States

under that 1948 Instrument of Transfer because the United States has *never* owned the real property underlying the Airport, i.e., the City's Land.

Rather, that 1948 Instrument of Transfer effected merely a surrender by the United States of its wartime temporary *lease* of the City's Land back to the City, as well as conveying certain easements, improvements, and chattel. Although the Instrument of Transfer contains certain restrictions and obligations, only the "rights transferred by this instrument" could revert to the United States if the City's obligations were not met. The "rights transferred" by the United States did not include title to the City's Land. And any right of the United States to reenter the City's Land under the temporary leasehold interest that the United States did transfer expired with the leases in 1953, leaving nothing to revert.

In 2013, the City filed this suit under the Quiet Title Act, seeking a declaration of the City's rights to the City's Land in light of the FAA's 2008 contention. The City seeks to protect the real property rights of its citizens from encroachment by the federal government and to establish the City's right to determine the best use of the City's Land for the benefit of its citizens.

The district court held the City's Quiet Title Act claim was time barred by the 12-year statute of limitations. The district court erred by not focusing on the precise interests at stake—title to and possession of the City's Land—and when a reasonable landowner would have been on notice that the United States made an

adverse claim to *those* ownership interests. Nothing in the Instrument of Transfer gave the City notice that 60 years later the United States would invent an extraordinary new reading of the reverter clause to contend that ownership rights *never* held by the United States, and thus not transferred to the City by the United States, could somehow “revert” to the United States. Nor did the Instrument of Transfer put the City on notice that the United States could somehow repossess the City’s Land based on an expired leasehold interest. The City brought suit within five years of the United States’ first assertion of its adverse claim in 2008. The City’s suit is therefore timely. To hold otherwise would mean that the City should have filed a premature suit seeking an essentially advisory opinion to protect against the remote possibility that the United States might someday claim ownership (or the right to perpetual possession) of the City’s Land, when (as far as the City could have known) no dispute existed as to those interests.

STATEMENT OF THE CASE

A. Factual Background

1. *The City’s acquisition of the City’s Land*

Beginning in 1917, the land on which the Airport sits was used as an informal landing strip. ER284. In 1922, Douglas Aircraft Company (“Douglas”) began using the Airport as a site for production and testing of its early military and civilian aircraft. ER284. In 1926, the City purchased most of the land at issue

here, obtaining title by grant deed. ER284. The City paid more than \$755,000, which in inflation-adjusted terms is approximately \$10 million. ER284. Between 1926 and 1941, the City acquired through grant deeds additional smaller parcels of land that now make up the rest of the land at issue. ER284. Thus, by December 1941, the City held title in fee simple to all of the City's Land. ER284.¹

2. The United States' World War II leases of the Airport

On May 27, 1941, President Franklin D. Roosevelt issued Presidential Proclamation 2487, declaring an "unlimited national emergency." ER284. The Proclamation required "military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere." ER284-ER285. By that time, Douglas had become a major defense contractor, supplying hundreds of aircraft in support of the war effort. ER284. In December 1941, the City leased the City's Land to the United States to aid in the war effort. ER285.

¹ In April 1945, the United States condemned a number of residential properties on approximately 20 acres of the west side of the Airport to assist the City with expanding the City's Land. ER287. The properties were purchased by the United States using the City's funds, and the land was deeded to the City in 1949. ER287; ER263. In November 1945, the City's Land was further expanded when Douglas conveyed to the City by grant deed an approximately 15-acre parcel on the Airport's south side. ER287. The United States does not appear to dispute the City's title to these parcels, and they are not part of this suit.

The United States leased the land in two parcels. The “Runway Lease” covered approximately 86 acres on the northern portion of the City’s Land, consisting mostly of two runways. ER285; ER314-ER319. The term of the Runway Lease began on December 8, 1941, and was to end 12 months after Proclamation 2487 terminated. ER285. The City charged the United States only \$1 for the entire term of the Runway Lease. ER285. The Runway Lease allowed the United States to construct or install improvements and structures on the land covered by the Runway Lease, “which structures or improvements shall be and remain the property of the [United States] and may be removed by the [United States] at or prior to the termination of this lease.” ER318. Before termination of the Runway Lease, the United States was required to remove “all camouflage structures and all revetments” but was permitted to “leave other improvements or any portion thereof it desires.” ER318.

The “Golf Course Lease” leased to the United States approximately 83 acres on the southern portion of the City’s Land, consisting mostly of a golf course and certain structures, including a clubhouse. ER286; ER329-ER331. The lease provided that the land was “to be used exclusively for . . . Military purposes.” ER329. The Golf Course Lease required the United States to pay only \$150 per month. ER286. The lease term was from December 1, 1941 to June 30, 1943, with an annual-renewal option until 1947. ER286; ER329-ER330. The United

States was permitted to “attach fixtures, and erect additions, structures, or signs, in or upon the premises hereby leased.” ER330. The lease provided that any “fixtures, additions, or structures so placed in or upon or attached to the said premises shall be and remain the property of the [United States] and may be removed therefrom by the [United States] prior to the termination of this lease.” ER330. The United States was required, at the City’s option upon the lease’s expiration, to “restore the premises to the same condition as that existing at the time of entering upon the same under this lease.” ER330.

The 168 acres of land described in the Runway Lease and Golf Course Lease together make up the City’s Land. The picture below depicts the current Airport, with the land covered by the Runway Lease shaded in yellow and the land covered by the Golf Course Lease shaded in red:



ER116.

In 1944, the City Council passed a resolution agreeing to allow the United States to build a project on the City’s Land. ER286. The Civil Aeronautics Administration (the FAA’s predecessor) required, as a condition of this agreement, “that the City have certain property interests in the landing area of the Airport and the lands to be improved.” ER286. Thus, “[i]n order to satisfy the [United States]” that the City was “qualified to sponsor the Project,” the City Council warranted in the resolution that the City had “fee simple title to all the lands comprising the present airport” and that the only encumbrances were the City’s leases to the United States, Douglas, and a gas utility company. ER286.

In 1944 and 1945, respectively, the City and the United States agreed to modifications of the Runway Lease and Golf Course Lease. ER286; ER321-ER324; ER333-ER342. The Golf Course Lease was amended to allow construction of a new runway to accommodate larger aircraft. ER286; ER334. The amendments also relieved the United States of its obligation to restore the City's Land to its original condition. ER286; ER323; ER334.

In exchange for the release of that obligation under the Runway Lease, the United States agreed to pay the City \$3,000, "representing the cost of restoration." ER323. In exchange for release of that obligation under the Golf Course Lease, the United States conveyed to the City certain improvements it made on the land and agreed to pay the City \$150,000, representing "the difference between the value of said improvements and the estimated cost of the restoration required by said lease." ER334; *see* ER336.

The term of the Golf Course Lease also was brought into alignment with the Runway Lease, so that both were in effect until 12 months after the termination of Proclamation 2487. ER287. The City also reduced the rent for the Golf Course Lease to \$1 for the lease's duration. ER287; ER334.

3. The Instrument of Transfer

At the end of World War II, the United States decided it no longer needed a presence at the Airport. ER288. On July 15, 1946, the United States and the City

therefore modified the Runway Lease and Golf Course Lease, allowing the United States to stop maintaining and operating the Airport and paying rent. ER288; ER326-ER327; ER344-ER345. Although the United States' temporary leases remained in effect, the City resumed maintaining and operating the Airport. ER289. The City continued (as it always had) to retain fee simple ownership of title to the City's Land. ER289.

On July 29, 1946, the United States War Assets Administration declared its leasehold interest in the Airport to be "surplus" under the Surplus Property Act of 1944, Pub. L. No. 78-457, 58 Stat. 765 (1944) (codified as amended at 49 U.S.C. §§ 47151–47153). ER289; ER195-ER196. The Act was intended "to facilitate and regulate the orderly disposal of surplus property" in which the federal government had an interest. Surplus Property Act, § 2, 58 Stat. at 766. The Act was amended in 1947 specifically to facilitate and expedite the disposal of surplus airport property. Pub. L. No. 80-289, 61 Stat. 678 (1947).

In the document declaring the Airport surplus property, the United States expressly acknowledged that the City owned the real property underlying the Airport, including the 168 acres at issue here:

Subject Facility is a Municipal Airport which expanded considerably from its original size during the Wartime occupancy of the Government. The Airport comprises a total of approximately 241.637 acres of land, of which approximately 226.4 acres are *owned in Fee or being acquired by the City of Santa Monica*.

Government Leases cover approximately 168.87 acres of *City-owned Lands* together with approximately 15.236 acres of Privately-owned Lands and Closed Streets within the boundary of the Airport. The balance of approximately 57.531 acres of land, occupied by the Government, is not covered by Formal Agreement, but is included in this Report to present a complete description of the Facility.

ER195 (emphasis added).

On September 19, 1946, the City Council wrote a letter to the Chief of the War Assets Administration's Airports Division. ER204-ER206. The letter noted that the War Assets Administration had declared as surplus property the United States' leasehold interest in the City's Land, and it requested that the City also "be given an opportunity to acquire, without reimbursement, all [United States] owned airport facilities located upon land owned by the City of Santa Monica for the purpose of encouraging and fostering the development of civil aviation." ER204-ER205. Specifically, the letter noted that the United States had made improvements "consisting primarily of the construction of a concrete runway, taxiway, two hangars, class room building, control tower, fencing, service road, and utilities." ER204.

On January 9, 1947, in an internal letter, the Deputy Administrator of the War Assets Administration's Office of Real Property Disposal outlined the plans for the improvements on the City's Land. ER208-ER210. The letter provided that certain improvements that the United States had built on the City's Land would be

transferred to the City. ER208-ER209. The City was to “accept[] title *to the improvements and facilities.*” ER209 (emphasis added). Notably, and understandably, the letter did not suggest the City would be accepting title *to the City’s Land*, as the United States did not own that title and could not transfer it. Rather, “[t]he Government’s interest” in the “leased land” was to be transferred. ER208. As to any other “property of whatever nature” that was “owned by the [United States] on the premises” but that was not being conveyed to the City, the United States was to reserve “the right of removal thereof from the premises within a reasonable period of time.” ER209.

On August 10, 1948, the United States officially surrendered to the City the United States’ leasehold interest, as well as certain easements, all remaining improvements, and certain specific chattel, in an “Instrument of Transfer.” ER289; ER347-ER363. The Instrument of Transfer provides that the United States “does hereby surrender, subject to the terms and conditions of this instrument,” the United States’ “leasehold interest in and to” the Airport. ER349. In addition to the leasehold interest, the Instrument of Transfer also conveyed to the City: (1) “all of the structures and improvements on the leased land, including underground and overhead utility systems, which were added thereto by” the United States (ER350); (2) four temporary easements and a temporary right-of-way (ER347-ER349); (3) a sewer pipeline (ER349); and (4) certain chattel,

including an ice chest, an oak barrel, fire extinguishers, a fire truck, tractors, wire camouflage, and a Ping-Pong table (ER349, ER354).

The conveyance of the leasehold interest and the specific easements, improvements, and chattel identified in the Instrument of Transfer was made subject to certain restrictions. ER350. Among them, “the land, buildings, structures, improvements and equipment in which this instrument transfers any interest shall be used for public airport purposes for the use and benefit of the public”:

That by the acceptance of this instrument or any rights hereunder, the said PARTY OF THE SECOND PART, for itself, its successors, and assigns, agrees that the aforesaid surrender of leasehold interest, transfer of structures, improvements and chattels, and assignment, shall be subject to the following restrictions, set forth in subparagraphs (1) and (2) of this paragraph, which shall run with the land, imposed pursuant to the authority of Article 4, Section 3, Clause 2 of the Constitution of the United States of America, the Surplus Property Act of 1944, as amended, Reorganization Plan One of 1947 and applicable rules, regulations and orders:

(1) That, except as provided in subparagraph (6) of the next succeeding unnumbered paragraph, the land, buildings, structures, improvements and equipment in which this instrument transfers any interest shall be used for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport within the meaning of the terms “exclusive right” as used in subparagraph (4) of the next succeeding paragraph. As used in this instrument, the term “airport” shall be deemed to include

at least all such land, buildings, structures, improvements and equipment.

ER350.

The document also provided that “no property transferred by this instrument shall be used, leased, sold, salvaged, or disposed of . . . for other than airport purposes without the written consent of the Civil Aeronautics Administrator”:

(6) That no property *transferred by this instrument* shall be used, leased, sold, salvaged, or disposed of by the PARTY OF THE SECOND PART for other than airport purposes without the written consent of the Civil Aeronautics Administrator, which shall be granted only if said Administrator determines that the property can be used, leased, sold, salvaged or disposed of for other than airport purposes without materially and adversely affecting the development, improvement, operation or maintenance of the airport at which such property is located

ER352 (emphasis added).

The Instrument of Transfer included a reverter clause, which provided that, in the event any restriction or condition in the Instrument of Transfer is not met, “the title, right of possession and all other rights *transferred by this instrument*” to the City shall, at the United States’ option, “revert” to the United States:

By acceptance of this instrument, or any right hereunder, the PARTY OF THE SECOND PART further agrees with the PARTY OF THE FIRST PART as follows:

(1) That in the event that any of the aforesaid terms, conditions, reservations or restrictions is not met,

observed, or complied with by the PARTY OF THE SECOND PART or any subsequent transferee, whether caused by the legal inability of said PARTY OF THE SECOND PART or subsequent transferee to perform any of the obligations herein set out, or otherwise, *the title, right of possession and all other rights transferred by this instrument to the PARTY OF THE SECOND PART, or any portion thereof, shall at the option of the PARTY OF THE FIRST PART revert to the PARTY OF THE FIRST PART* sixty (60) days following the date upon which demand to this effect is made in writing by the Civil Aeronautics Administrator or his successor in function, unless within said sixty (60) days such default or violation shall have been cured and all such terms, conditions, reservations and restrictions shall have been met, observed or complied with, in which event said reversion shall not occur and title, right of possession, and all other rights transferred hereby, except such, if any, as shall have previously reverted, shall remain vested in the PARTY OF THE SECOND PART, its transferees, successors and assigns.

ER352 (emphasis added).

By its express terms, the reversion clause applies only to “rights transferred by this instrument,” ER352, i.e., the leasehold interest and the certain easements, improvements, and chattel. Fee simple title to the City’s Land had been held continuously by the City; the City’s Land merely had been leased to the United States. The United States had no fee simple title to return to the City, and thus the fee simple title to the City’s Land was not subject to the Instrument of Transfer’s reverter clause, nor would any reasonable property owner have believed it to be.

In 1948, the Santa Monica City Council (“City Council”) passed Resolution No. 183, accepting the transfer from the United States and authorizing the City Manager to execute the instrument. ER290; ER358. The resolution confirmed that the Instrument of Transfer effected only a transfer of the United States’ “leasehold interest in and to the premises known as Cloverfield Santa Monica Municipal Airport and certain easements and temporary rights of way appurtenant thereto.” ER358. The executed Instrument of Transfer was filed as a quitclaim deed with the County Recorder for the County of Los Angeles, California. ER4; ER228, ER235-ER247.

On April 28, 1952, President Harry S. Truman terminated Proclamation 2487, proclaiming that the national emergency declared in 1941 no longer existed. ER291. Accordingly, 12 months thereafter, on April 28, 1953, the Runway and Golf Course Leases expired by their own terms. ER291. That was the end of the leasehold interest the United States had transferred under the Instrument of Transfer. ER349-ER350.

Thus, because the leases expired long ago, there now is no transferred leasehold interest that could revert to the United States. ER302. And the current improvements on the City’s Land either (1) were paid for with City funds, (2) were conveyed to the City before the execution of the Instrument of Transfer in exchange for the City’s release of the United States from the leasehold obligations

to return the City's Land to its original condition, or (3) have exceeded their useful life. ER302-ER303.

4. *City's operation of the Airport subject to grant agreements*

Since the United States relinquished its leasehold interest in the Airport, the City has continuously maintained and operated the Airport. ER288. Over that time, the City accepted several grants from the United States for airfield improvements. Numerous agreements were signed, including at least in 1948, 1968, and 1969, and the last such agreement was signed in 1994. ER294; ER271; ER71.

In exchange for each grant, the City contractually promised to maintain the Airport for the use and benefit of the public for the useful life of improvements made with federal funds, but no more than 20 years from the date of execution of each grant agreement. ER294; ER4. For example, the City agreed that it "will operate the Airport as such for the use and benefit of the public." ER181. Further, the City "will suitably operate and maintain the Airport and all facilities thereon or connected therewith which are necessary for airport purposes other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for aeronautical purposes." ER181. The City's obligations under the grant agreements are distinct from the obligations under the Instrument of Transfer.

5. *The 1952 and 1956 releases*

In 1952, before the Runway and Golf Course Leases had expired, the City obtained from the United States a release from the City's obligations to use for airport purposes an approximately 10-acre parcel of land within the Golf Course Lease, known as "Lot A" of the "George Tract." ER265; ER329. That parcel was situated within the City of Los Angeles and could not be used for airport expansion because of Los Angeles' zoning restrictions. ER265. In 1956, the City obtained a similar release for a tract of land known as "Runway No. 1," which was part of the Runway Lease. ER271. Both the George Tract and Runway No. 1 are depicted in the picture *supra* p. 7.

By obtaining permission to use these parcels for non-airport purposes, the City ensured that it could not be held in breach of the Instrument of Transfer or the 1948 grant agreement. Nothing in the 1952 or 1956 releases suggests that the City believed the releases were necessary to preclude title to the City's Land from reverting to the United States.

6. *The FAA's recognition in the 1960s and 1970s of the City's authority to close the Airport*

In the 1960s, the first civilian jets began using the Airport, and their use grew steadily throughout that decade. ER291. At that time, civilian jets were ten times louder and more polluting than present-day jets and exposed the surrounding neighborhoods to severe noise. ER291. Residents complained and brought legal

action against the City. ER291. The California Supreme Court held that the City could be sued by residents for airport impacts under theories including nuisance. ER291; *Nestle v. City of Santa Monica*, 6 Cal. 3d 920 (1972). The City thus explored a wide range of options, including Airport closure. ER291-ER292.

In 1962, the City Council asked the City Attorney: “Can the City, unilaterally, on motion of the City Council, abandon the use of the Santa Monica Municipal Airport as an airport?” ER173. The City Attorney issued an Opinion in response, concluding that both the Instrument of Transfer and a grant agreement “compel the conclusion that the City must operate the airport as an airport, and that the City cannot legally unilaterally, on its own motion, abandon the use of the Santa Monica Municipal Airport as an airport.” ER181-ER182. The City Attorney was not asked and did not opine on whether title and right of possession to the City’s Land would “revert” to the United States if the Airport were closed. ER173-ER182. Indeed, inconsistent with any reverter of *title* to the City’s Land, the Opinion noted that, in the Instrument of Transfer, the United States “surrendered its leasehold interest in the Airport and assigned to the City certain easements, structures, improvements, and chattels.” ER176.

In an April 23, 1971 letter responding to the Aircraft Owners and Pilots Association, the FAA recognized concerns that, in response to growing apprehension from City residents, the City might shut down Airport operations.

ER47-ER48; ER291-ER292. The FAA stated that upon expiration of the City's obligations under the then-in-force grant agreement, the "Santa Monica Airport is vulnerable to being discontinued and used for non-airport purposes." ER47. According to the FAA, if the City closed the Airport, the FAA's recourse would be to "declare the City in default of its obligation of its Grant Agreements" and to "seek[] recovery of the funds expended." ER47. The FAA did not take the position that title and right of possession to the City's Land would "revert" to the United States if the City ceased Airport operations.

7. The 1984 Settlement Agreement

In 1975, the City Council adopted ordinances seeking to alleviate the Airport's impact on City residents, including a total jet ban, a ban on helicopter flights, a noise limit, and a night curfew. ER292. These ordinances led to litigation against the City by the Santa Monica Airport Association. ER292. The FAA intervened on the side of the plaintiff and against the City. ER292. The ordinances were upheld with the exception of the jet-ban ordinance. ER292.

In 1979, the City Council adopted an ordinance imposing a lower Airport decibel limit. ER292. This ordinance prompted litigation by the National Business Aircraft Association. ER292-ER293. The FAA again intervened on behalf of the plaintiff and against the City. ER293. In 1981, while that litigation was pending, the City Council adopted a resolution declaring its intention to close

the Airport when legally possible. ER293. Thereafter, in 1983, the National Business Aircraft Association's lawsuit was dismissed after the City adopted a new Airport Master Plan and Noise Mitigation Project. ER293.

In response, multiple Airport users filed administrative complaints with the FAA. ER293. The City negotiated with the FAA, culminating in the signing of a 1984 Settlement Agreement. ER293-ER294; ER365-ER392.

The Agreement allowed the City to make substantial changes in the operation of the Airport. The Agreement "recogni[zed] that the Airport is poorly designed and organized" and that the Airport needed to be "redesigned." ER369. In particular, the "Airport is bounded on three sides by densely populated residential areas" severely impacted by aircraft noise. ER368. The Agreement thus approved a new "Airport Layout Plan" that "shifts a substantial portion of aeronautical services from their present location on the south side of the Airport to the north side." ER370. The reconfiguration made available a substantial amount of land, which the new Airport Layout Plan designated as "parkland and residual land." ER370-ER371. The Agreement expressly permitted that land to be used "for other than airport and aviation purposes." ER371.

In addition to approving the "redesign of the Airport," the Agreement provided overarching "principles and plans for the operation of the Airport" going forward. ER369, ER371. The Agreement "resolve[d] all existing legal disputes

among the parties” and “release[d] the City and this parkland and residual land from any and all conditions, covenants, and restrictions imposed by the Instrument of Transfer.” ER369, ER371. The City agreed to a new 30-year commitment “to improve the Airport physical layout as shown in the Airport Layout Plan and maintain the Airport and the facilities located on the Airport.” ER373. The City agreed to “operate and maintain the Airport as a viable functioning facility . . . until July 1, 2015.” ER373. The Agreement also provided that “[a]ll prior agreements between the parties concerning the Airport, and all actions of the parties during the duration of this Agreement, shall be interpreted consistently with this Agreement.” ER369.

In 1998, the FAA expressly acknowledged that the 1984 “Settlement Agreement makes clear that the City is obligated to operate the Airport only for the duration of the [1984] Agreement (through July 1, 2015).” ER294. The FAA did so in a Director’s Determination in an administrative proceeding regarding the City’s refusal to offer leases beyond 2015 to two Airport tenants. ER294. The Director explained that to the extent that parties “seek to prevent the future closure of the Airport or require the City to operate the Airport beyond July 1, 2015, *that is a local land use matter. . . .* When the City’s last grant agreement expires in approximately 2014, the [Airport Improvement Program] grant sponsor assurances

will no longer require the City to operate the Airport as an airport.” ER294-ER295 (emphasis added).

In a 2003 Final Agency Decision, the FAA Administrator affirmed the Director’s Determination. ER295. The FAA Administrator concluded the 1984 Settlement Agreement only required the City to maintain the Airport’s “role in the National Airport System as a general aviation reliever airport until July 1, 2015.” ER295.

8. *The FAA’s 2008 change of position*

In 2001, the City Council commissioned a study to address the safety and liability risks inherent in the increase of Category C and D aircraft traffic at the Airport, which are large jets requiring longer runways to land. ER295-ER296 & n.7. The study recommended adoption of an “Aircraft Conformance Program” that would promote safety by expanding the distance from the runway ends to the Airport perimeter. ER295. The City Council approved the Airport Conformance Program and directed staff to seek a voluntary agreement with the FAA to implement it. ER296. The FAA refused a voluntary agreement. ER296. Then in 2008, the City Council passed an ordinance banning Category C and D aircraft. ER296.

Subsequently, on March 26, 2008, the FAA issued an Order to Show Cause, seeking to prohibit the City from enforcing the ordinance. ER296.

Notwithstanding the 1984 Settlement Agreement's release of the City from the Instrument of Transfer's obligations, the FAA asserted that the Instrument of Transfer obligates the City to maintain the Airport "in perpetuity" and that the City's Land would revert to the United States if the City tried to close the Airport:

Under the Surplus Property Act of 1944 (SPA), surplus property instruments of transfer are one of the means by which the Federal government provides airport development assistance to public airport sponsors. . . . Upon acceptance of surplus property conveyance by the City, the obligations in the instrument of disposal became a binding obligation of the City.

The SPA deed contains Federal obligations similar to [Airport Improvement Program] grant obligations to offer access on fair and reasonable terms, that *run in perpetuity until the FAA releases the SPA obligations or reverts the airport under the right to revert clause for violations of the SPA deed covenants*. One of the surplus property conveyance covenants contained in the 1948 Surplus Property Instrument of Transfer stipulates that the Airport "shall be used for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport"

ER99 (second omission in original) (emphasis added and omitted).

The 2008 Order to Show Cause was the first time the FAA claimed that title to the City's Land could revert to the United States if the City ever ceased operating the Airport. According to the Order to Show Cause, the Instrument of Transfer allows the United States to cause the "airport" to revert to the United

States if the City does not operate the Airport as an airport “in perpetuity.” ER99. That was the first time that the FAA claimed that the reverter clause allowed the United States to take parts of the “airport” to which the United States had never owned title, including the City’s Land itself.

The FAA continues to maintain that position. In the district court here, the defendants asserted that, under the reverter clause, “the United States may exercise an option to take title or possession of the land.” ER29.

9. The City’s evaluation of the Airport’s future

In December 2010, in anticipation of the 1984 Settlement Agreement’s expiration, the City Council directed staff to conduct a comprehensive public process concerning the Airport’s future. ER298. The result was a March 2013 report concluding that the Airport’s status quo is unacceptable to City residents. ER298.

Thereafter, City staff members met with FAA representatives several times to convey community concerns and the City’s position about the Airport’s future. ER298. The FAA would not negotiate any compromise regarding the Airport’s future operation. ER298. FAA representatives maintained that the City is obligated to continue operating the Airport in perpetuity under the Instrument of Transfer, that the operational status quo must be maintained, and that no agreements to the contrary could be made outside of litigation. ER298.

B. Proceedings Below

In October 2013, the City filed this suit against the United States, the FAA, and the FAA Administrator in his official capacity. The complaint includes a claim under the Quiet Title Act, 28 U.S.C. § 2409a, seeking to quiet title to the 168 acres described in the Runway and Golf Course Leases. ER300-ER303. The complaint alleges that the City first learned that the United States claimed a reversionary interest to the title to the City's Land on or after March 26, 2008, through the FAA's Order to Show Cause. ER302.

On the United States' motion, the district court dismissed the City's Quiet Title Act claim with prejudice under Rule 12(b)(1), holding that there is no subject-matter jurisdiction because the claim is barred by the 12-year statute of limitations. ER9-ER14. The district court concluded that, "by executing and accepting the terms of the Instrument of Transfer, the City had actual notice of the reversion clause in 1948, and thus had actual notice that the United States claimed an interest in the title to the Airport Property in 1948." ER10.

The district court reasoned that, irrespective of its context, "the use of the term 'title' in the Instrument of Transfer would have, or at least should have, alerted a reasonable landowner that the government claimed an interest in the title to the land." ER11. Alternatively, the district court held that the Instrument of Transfer "create[d] a cloud on title," thus triggering the limitations period. ER11.

The district court brushed aside the City's contention that, by its terms, the reverter clause could not apply to property interests, such as ownership of the City's Land, that the United States never held. The district court rejected that contention as going to the merits rather than to whether the City was on notice. ER11, ER13-ER14.

The district court further reasoned that because the City had requested releases from the Instrument of Transfer's obligations for certain parcels of land, and because the City Attorney had issued an opinion that the City could not unilaterally stop maintaining the Airport, the City knew "that the United States had a continuing and substantial interest in the Airport Property." ER11-ER12. But the district court did not explain how these actions purportedly demonstrated the City's knowledge of a claim that the United States could retake its onetime leasehold interest long after the leases had expired, much less take title to the City's Land that the United States never held.

The district court also concluded that the FAA's repeated, official acknowledgements that the City is obligated to operate the Airport only until the 1984 Settlement Agreement expires in 2015 did not constitute abandonment of the United States' claim to the City's Land. ER12-ER13. The district court acknowledged that abandonment and later reassertion of a claim begins a new limitations period under the Quiet Title Act. ER12. Nevertheless, the court held

that the FAA's statements were not sufficiently "clear and unequivocal" to constitute abandonment. ER12.

Finally, the district court concluded that the City had notice of the United States' claim, even while acknowledging that the court must not resolve factual issues in the context of a Rule 12(b)(1) motion if "the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits." ER13 (internal quotation marks omitted). The district court reasoned only that "the crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid." ER13-ER14 (alteration and internal quotation marks omitted).²

SUMMARY OF ARGUMENT

A. The Instrument of Transfer's reverter clause could not have started the running of the statute of limitations in 1948. The reverter clause provides only that "the title, right of possession and all other rights *transferred by this instrument*" may revert to the United States. ER352 (emphasis added). Only the (long-expired) leasehold interest, easements, and (now-valueless) improvements and chattel were transferred in the Instrument of Transfer; thus, only those interests

² The complaint also includes certain constitutional claims, which the district court dismissed without prejudice as unripe. Those claims are not part of this appeal, as the City can bring them, if necessary, when they ripen. *Wolfson v. Brammer*, 616 F.3d 1045, 1064 (9th Cir. 2010).

potentially could have reverted. Title to the City's Land always remained with the City; such title was not transferred in the Instrument of Transfer and therefore cannot legally revert to the United States. Any right of the United States to possess the City's Land terminated when the leases expired in 1953.

The Instrument of Transfer thus gave no notice that the United States might decades later claim it could take title to (or have a perpetual right of possession of) the City's Land. Nor did the Instrument of Transfer create any "cloud" on the title to the City's Land, as nothing in the reverter clause is inconsistent with the City's continuing to maintain full title to the City's Land. Even if another reading were plausible (and it is not), it would at best make the reverter clause ambiguous; but an ambiguous provision cannot provide the requisite notice.

That the Instrument of Transfer was recorded as a quitclaim deed did not provide notice that title to the City's Land could somehow revert. The recordation gave no more notice than the Instrument of Transfer itself. Nor does the City's conduct after entering into the Instrument of Transfer suggest that the City had such notice. Neither the releases from the Instrument of Transfer's obligations nor the City Attorney's 1962 Opinion indicated that the City knew that, if it closed the Airport, the United States could claim title to (or a right of perpetual possession of) the City's Land solely on the basis of the Instrument of Transfer.

B. Even if the Instrument of Transfer somehow gave notice that the United States claimed an interest in the title to (or perpetual possession of) the City's Land, the United States later abandoned that claim. For example, in 1984, in an agreement broadly resolving plans for the Airport going forward, the FAA released the City from the Instrument of Transfer, and the City agreed to operate the Airport only until July 1, 2015. Notwithstanding that agreement, the FAA asserted in 2008 that the obligations under the Instrument of Transfer are still in effect and will remain so in perpetuity. That gave rise to a new Quiet Title Act cause of action, and the City timely filed thereafter.

C. In any event, the district court should not have dismissed the City's Quiet Title Act claim because the question of subject-matter jurisdiction is integrally intertwined with the merits of that claim. Both questions depend on the correct reading of the Instrument of Transfer and the 1984 agreement. It is well established that when the jurisdictional question and the merits are so inextricably intertwined, the district court must not dismiss on jurisdictional grounds without first reaching the merits. The district court did so here, and that was reversible error.

STANDARD OF REVIEW

“The existence of subject matter jurisdiction is a question of law reviewed *de novo*.” *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir.

2001). The jurisdictional question here depends on whether the City brought suit within the statute of limitations. When the timeliness of an action turns on what a reasonable person should know, it is a mixed question of law and fact. *Shultz v. Department of Army*, 886 F.2d 1157, 1159 (9th Cir. 1989). Here, however, whether the City had notice turns on the interpretation of legal instruments, which this Court reviews de novo. *Glenbrook Homeowners Ass'n v. Tahoe Reg'l Planning Agency*, 425 F.3d 611, 616 (9th Cir. 2005).

To the extent the district court may have resolved factual questions in deciding the Rule 12(b)(1) motion, those factual questions were intertwined with the merits. Where the question of jurisdiction is intertwined with the merits but the district court dismisses under Rule 12(b)(1) before trial, this Court reviews the dismissal “not as a dismissal for lack of subject matter jurisdiction but rather as a grant of summary judgment on the merits.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004). The district court’s decision is thus reviewed de novo. *Id.* at 1040 n.4. The Court views the evidence in the light most favorable to the nonmoving party, determining whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.*

ARGUMENT

A. The Instrument Of Transfer Did Not Provide Notice In 1948 That The United States Claimed An Interest In Title To (Or Perpetual Possession Of) The City's Land

Nothing in the Instrument of Transfer gave notice in 1948 that the United States claimed an interest in the title to the City's Land or the right to possess the City's Land in perpetuity.

1. The Instrument of Transfer's reverter clause could not have put the City on notice because the clause did not extend to rights never held by the United States

A claim under the Quiet Title Act must be brought within 12 years of “the date the plaintiff . . . knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g). “To start the limitations period, the government’s claim must be adverse to the claim asserted by the [plaintiff].” *Michel v. United States*, 65 F.3d 130, 131-32 (9th Cir. 1995) (per curiam); see *Leisnoi, Inc. v. United States* (“*Leisnoi II*”), 267 F.3d 1019, 1025 (9th Cir. 2001) (limitations period triggered when United States claims an “adverse interest”); *Patterson v. Buffalo Nat’l River*, 76 F.3d 221, 224 (8th Cir. 1996) (plaintiffs must have “reasonable awareness that the Government claims some interest adverse to the plaintiffs” (alteration and internal quotation marks omitted)).

It is not enough “that the government claims some interest—any interest—in the property.” *Werner v. United States*, 9 F.3d 1514, 1518-19 (11th Cir. 1993).

This is clear from the text of the Quiet Title Act itself. The Quiet Title Act provides that “[t]he 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.” 28 U.S.C. § 2409a(a) (emphasis added). Thus, for a claim to accrue under the Quiet Title Act, not only must the United States “claim an interest in the property at issue,” there also “must be a disputed title to real property.” *Leisnoi, Inc. v. United States* (“*Leisnoi I*”), 170 F.3d 1188, 1191 (9th Cir. 1999).

Before 2008, there was no dispute over title to the City’s Land. The City has owned all 168 acres of the City’s Land continuously since its purchase for what would now be \$10 million. ER284. The parties were in full agreement in 1948 as to who had what interests. The City owned the City’s Land in fee simple title. ER289; ER195. The United States had only a temporary leasehold interest in the City’s Land. ER285-ER289; ER195. The United States owned the structures and improvements it had erected on the City’s Land (ER318; ER330), except for certain improvements it already had transferred to the City (ER334, ER336). Although the United States previously had been obligated to restore the City’s Land to its original condition upon the leases’ expiration (ER330), the United States had paid the City for the option to leave the remaining structures and improvements on the City’s Land (ER323; ER334). In the Instrument of Transfer,

the United States surrendered back to the City its (now-expired) leasehold interest. ER349-ER350; ER195. The United States also conveyed certain easements and transferred title to the remaining (and now-valueless) improvements and certain chattel. ER347-ER350, ER354; ER208-ER209. As to any other United States-owned chattel on the City's Land, the United States claimed only the right to remove it within a reasonable time. ER209.

Although the reverter clause in the Instrument of Transfer provided that that leasehold interest, and those easements, improvements, and chattel could revert to the United States if the City stopped using them for airport purposes, nothing in the reverter clause created a dispute over title to the City's Land. By its very terms (and as its name suggests), the reverter clause applied only to the interests that the United States had transferred to the City under the Instrument of Transfer. Specifically, the reverter clause provides that "the title, right of possession and all other rights *transferred by this instrument . . .* , or any portion thereof, shall . . . revert" to the United States. ER352 (emphasis added). As the United States *never* owned the title to the City's Land, the reverter cause did not implicate title to the City's Land, and thus the reverter clause could not plausibly have put the City on notice of any claim that title to the City's Land could somehow "revert" to the United States. Moreover, any right of the United States to possess the City's Land under the leasehold interest has long since expired by the leases' terms, and the

easements, improvements, and chattel either had been conveyed to the City before 1948 or have no remaining useful value.

To conclude that the City was required to sue within 12 years of 1948 would mean that the City was required to file a premature, potentially pointless claim to quiet title at a time when there was no dispute over that title. The City would have been “compelled to sue to protect against the possibility, however remote, that the government might someday” claim that it had a right to the title to the City’s Land. *Michel*, 65 F.3d at 132. As this Court has long recognized, such speculative suits are not required. *Id.*

Nevertheless, that is what the United States argues and the district court held. ER10. The district court latched onto the word “title” in the reverter clause, concluding “that the use of the term ‘title’ in the Instrument of Transfer would have, or at least should have, alerted a reasonable landowner that the government claimed an interest in the title to the land.” ER11. That conclusion cannot be squared with either the plain language of the reverter clause or the Instrument of Transfer as a whole.

The plain and ordinary meaning of “revert” involves previously held property interests being returned to its former owner. American Heritage Dictionary of the English Language, <https://www.ahdictionary.com/word/search.html?q=revert> (“To be returned to the former owner or to the former owner’s

heirs.”); Oxford English Dictionary, <http://www.oed.com> (“to return to the original owner, or to his or her heirs, after the expiry of a grant, or a grantee’s death; to return by reversion”); Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/revert> (“to return to the proprietor or his or her heirs at the end of a reversion”). The only interest in the City’s Land that the United States previously held was a limited-term leasehold interest. That is the only interest in the City’s Land that potentially could have reverted to the United States under the Instrument of Transfer, and any such reversion could have occurred only if the City had defaulted on the Instrument’s obligations before the leases expired in 1953. Because the United States never held title to the City’s Land, such title could never “revert” to the United States.

Indeed, the reverter clause explicitly states that the only rights that could revert are rights that were “transferred by this instrument.” ER352. The reverter clause applies to “the title, right of possession and all *other* rights transferred by this instrument.” ER352 (emphasis added). The word “other” makes clear that “title” and “right of possession” are specific examples of the category of “rights transferred by this instrument.” *Shultz v. Hinojosa*, 432 F.2d 259, 267 (5th Cir. 1970) (“the words ‘other facilities’ are to be considered as being in *pari materia* with the preceding words ‘board and lodging’”). Thus, the reverter clause applies only to any “title . . . transferred by this instrument,” any “right of possession . . .

transferred by this instrument,” and any “other rights transferred by this instrument.” ER352. Because title to the City’s Land was not transferred by the Instrument of Transfer, the reverter clause did not give the City notice that the United States would claim, decades later, that title to the City’s Land could somehow “revert” to the United States. *Michel*, 65 F.3d at 132.

This reading of the reverter clause is confirmed by the Surplus Property Act. The Instrument of Transfer was entered into “under and pursuant to” the Surplus Property Act, and therefore the Surplus Property Act informs the meaning of language in the Instrument of Transfer. ER347. The Surplus Property Act required that every instrument of transfer for airport property contain a clause requiring the transferred property to be used for airport purposes. Pub. L. No. 80-289, sec. 2, § 13(g)(2), 61 Stat. at 678-80. The Surplus Property Act also required that all instruments of transfer contain reverter clauses providing that if the conditions in the agreement are not met, “all of the *property so disposed of* or any portion thereof, shall, at the option of the United States, revert to the United States in its then existing condition.” *Id.* sec. 2, § 13(g)(2)(H), 61 Stat. at 680 (emphasis added). By the statute’s terms, the only property that could revert to the United States in a Surplus Property Act instrument of transfer is “property so disposed of” in the instrument. *Id.* Indeed, the Surplus Property Act defines “property” as “any interest, *owned by the United States* or any Government agency, in real or personal

property, of any kind, wherever located.” Surplus Property Act § 3(d), 58 Stat. at 767 (emphasis added). The Surplus Property Act therefore makes clear that reverter clauses in instruments of transfer apply only to interests of the United States that were being disposed of in the instrument. Here, that does not include title to the City’s Land, which was never owned by the United States nor disposed of in the Instrument of Transfer.

This also is confirmed by the FAA’s Airport Compliance Manual. Chapter 23 of that manual, titled “Reversions of Airport Property,” discusses reverter clauses in instruments of transfer under various federal laws, including the Surplus Property Act. ER107-ER108. According to the manual, when the United States disposes of airport property under such laws, “[t]he instrument of conveyance from the federal government must specify the right to have property interest revert to a federal agency and title revert in the United States.” ER107. But “[t]his right extends only to the title, right of possession, or other rights vested in the United States at the time the federal government transferred the property described in the instrument to the grantee.” ER107. Under that guidance, the right of reverter does not extend to title to the City’s Land because such title was not “vested in the United States” at the time of the Instrument of Transfer. Accordingly, the reverter clause could not have put the City on notice that the

United States would, decades later, claim that such title would “revert” to the United States should Airport operations cease.

The district court discounted the FAA Airport Compliance Manual’s guidance because the version of the manual included in Santa Monica’s opposition to the motion to dismiss was published in 2009. ER11 n.5. But the FAA’s Airport Compliance Manual has included this guidance for at least 20 years. *See* Airport Compliance Requirements, FAA Order No. 5190.6A § 8-2 (Oct. 2, 1989). In 1947, a regulation promulgated by the FAA’s predecessor similarly interpreted reverter clauses, requiring that instruments of conveyance “include a provision that the conveyance is made on the condition that *the property interest conveyed* shall automatically revert to the United States” if certain conditions in the instrument are not met. 14 C.F.R. § 555.11(3) (1947) (emphasis added). That the FAA consistently has interpreted reverter clauses as extending only to rights transferred in the instrument of conveyance confirms that no reasonable landowner would have understood the Instrument of Transfer’s reverter clause to extend to the title to the City’s Land.

Indeed, because the reverter clause was not drafted specifically for this transaction, there was no reason for the City to have believed that inclusion of the word “title” extended the clause to the title to the City’s Land. The Instrument of Transfer used boilerplate language that also was used for numerous other post-war

transfers, including transfers of property to which the United States did have title. ER171. Indeed, a War Assets Administration regulation provided that “[d]eeds or instruments of transfer shall be in the form approved by the Attorney General.” ER171 (War Assets Administration Regulation 16, § 8316.20). Much of the language of the Instrument of Transfer was dictated by the Surplus Property Act and the War Assets Administration Regulation. Pub. L. No. 80-289, sec. 2, § 13(g)(2), 61 Stat. at 678-80; ER170-ER171 (§§ 8316.13, 8316.21).

Moreover, the word “title” in the Instrument of Transfer was appropriate here, but was limited to a specific purpose. The United States transferred title of *other* property to the City, including title to certain improvements and chattel that no longer have useful value. ER302-ER303; ER349, ER354; *see* ER209 (1947 War Assets Administration letter observing that “title to the improvements and facilities” would be transferred to the City). But again, the word “[t]itle” could not have referred to title to the City’s Land which was never owned by the United States and thus could not have been transferred back to the City.

In short, given the way the United States structured the Instrument of Transfer, the United States’ reversionary interest in the City’s Land was limited to the United States’ right to take possession during the remaining period of its transferred leasehold interest. That protected the United States against a default by the City only during that limited period. That makes sense: as long as the City

was enjoying the remainder of the United States' leasehold term, the City was subject to the United States reclaiming possession if the City breached its obligations. But once the limited term of that transferred leasehold interest expired, so did the United States' reversionary interest in possession of the City's land. Vastly different language would have been required for the Instrument of Transfer to put a reasonable property owner on notice of the remarkable claim the United States asserts here: that it has a *greater* interest in the City's Land than it ever held—i.e., title to the City's Land or a right to possess the City's Land in perpetuity. It is too late for the United States to re-write the Instrument of Transfer. No reasonable property owner in the 1940s and 1950s would have understood “revert” to have the effect the United States claims here.

2. *Any ambiguity in the reverter clause precludes it from triggering the statute of limitations*

Even if the district court were correct that “title” in the reverter clause could be read to extend to title to the City's Land, that is not the only plausible reading. An ambiguous contractual provision cannot provide notice sufficient to begin the limitations period under the Quiet Title Act. “The statute of limitations is not triggered . . . when the United States' claim is ambiguous or vague.” *Shultz*, 886 F.2d at 1160. The provision on which the United States relies as purportedly providing notice “must be so clear that it would have been unreasonable for the plaintiff to believe” that the United States did not claim the interest at issue.

Poverty Flats Land & Cattle Co. v. United States, 706 F.2d 1078, 1079 (10th Cir. 1983); see *Patterson*, 76 F.3d at 224 (“we think that the restrictions contained in the 1976 deed were at best too ambiguous to place the Halls on notice of the government’s claims” because although the United States’ reading was plausible, the plaintiffs’ reading “is more plausibl[e]”). To require plaintiffs to file suit to quiet title over claims of the United States that are at best vague or ambiguous would have the perverse effect of compelling plaintiffs to bring suits that would often turn out to be unnecessary. *Michel*, 65 F.3d at 132.

Here, the reverter clause was at best ambiguous. The City’s reading of the reverter clause as permitting reversion only of the (now-expired) leasehold interest and specific easements, improvements, and chattel transferred in the Instrument of Transfer is at least as reasonable as the district court’s reading. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1285 (9th Cir. 2009) (“[i]f a contract is capable of two different reasonable interpretations, the contract is ambiguous” (alteration in original) (quoting *Oceanside 84, Ltd. v. Fidelity Fed. Bank*, 56 Cal. App. 4th 1441, 1448 (1997))). The reverter clause therefore could not have given the City the requisite notice.

3. *Recordation of the Instrument of Transfer did not provide notice of the United States’ claim to title of the City’s Land*

The district court likewise erred in concluding that “the City had constructive notice of the United States’ reversionary interest in the title to the land

because the Instrument of Transfer was recorded as a quitclaim deed with the County Recorder for the County of Los Angeles in 1948.” ER10. Recording an instrument as a quitclaim deed does not suggest that the instrument is concerned with title. Quitclaim deeds can be used to transfer interests in land less than fee simple, including leasehold interests. *E.g.*, 32 C.F.R. § 644.428(k) (“quitclaim deed can be used to surrender leased land and convey the improvements and related personal property”). A quitclaim deed “transfers only such interest as the grantor may have at the time the conveyance is executed.” 1 Melvin B. Ogden, *Ogden’s California Real Property Law* § 8.2 (1956); *Hagan v. Gardner*, 283 F.2d 643, 646 (9th Cir. 1960) (“By the sale and the execution and delivery of the quitclaim deed to Lenz, the trustee did not and could not effect appellant’s title. He merely transferred such interest as he had and such deed created no right, estate or interest in appellant.”).

To be sure, recordation of a deed can, in some circumstances, provide constructive notice of a claim, on the theory that “a party who neglects a duty to search a title record should be imputed with notice of anything that would have been discovered upon a proper search.” *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1388 n.3 (10th Cir. 1980); *see California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 396 (9th Cir. 1985). But that theory is based on the notion that what is recorded, if reviewed by the landowner, would provide sufficient notice. Here, as

explained, the Instrument of Transfer provided no notice that the United States claimed an interest in the title to the City's Land. Recording that insufficient Instrument of Transfer could not fix that problem.

4. *The reverter clause is consistent with the City's title to the Land and does not create a cloud on the title*

The district court additionally concluded that "even if the Instrument of Transfer did not provide notice that the United States claimed an interest in the *title* to the land, it certainly put the City on notice that the United States claimed a substantial property interest in the land sufficient to create a cloud on title." ER11. But the reverter clause is not inconsistent with the City's title to its Land and did not legally or factually create any adverse cloud on the title.

A "clouded" title is created only when the United States claims an "adverse interest" to the plaintiff's claim. *Leisnoi II*, 267 F.3d at 1025. The mere fact that both the United States and the plaintiff claim some interest to the same land does not alone make the claims adverse because the two claims may be consistent with each other. For example, "when the plaintiff claims a non-possessory interest such as an easement, knowledge of a government claim of ownership may be entirely consistent with a plaintiff's claim." *Michel*, 65 F.3d at 132; *see McFarland v. Norton*, 425 F.3d 724, 726-27 (9th Cir. 2005). When the United States and a plaintiff claim potentially consistent interests in the same property, a Quiet Title Act cause of action accrues only "when the government, 'adversely to the interests

of plaintiff[], denie[s] or limit[s]” the plaintiff’s claimed interest. *Michel*, 65 F.3d at 132 (quoting *Werner*, 9 F.3d at 1516).

Thus, in *Shultz*, where the plaintiff claimed a right of access to a public road, the government’s erection of a gate, fence, and guardhouse along the road did not provide notice of an adverse claim because the government had not actually precluded access to the roadway. 886 F.2d at 1160-61; *see McFarland*, 425 F.3d at 727-28 (same). Similarly, in *Michel*, where the plaintiffs claimed a right of access to roads and trails across a government-owned refuge, the Quiet Title Act claim “did not accrue until the Michels knew or should have known the government claimed the exclusive right to deny their historic access to the trails and roads across the refuge.” 65 F.3d at 132; *see Narramore v. United States*, 852 F.2d 485, 492 (9th Cir. 1988); *Kinscherff v. United States*, 586 F.2d 159, 161 (10th Cir. 1978) (per curiam).

Likewise, where the United States has conveyed land to the plaintiff subject to easements retained by the United States, the mere fact that the United States claims some interest in the plaintiff’s land does not necessarily accrue a claim to quiet title. *Leisnoi I*, 170 F.3d at 1191-92. The United States’ retention of a property interest in the plaintiff’s land may be entirely consistent with the plaintiff’s title to the land. Without a “conflict in title between the United States and the plaintiff,” there is no cause of action under the Quiet Title Act. *Id.* at 1192.

Nor does a conflict over title to one portion of land necessarily cloud the title to the land as a whole. For example, in *Fadem v. United States*, this Court held that the plaintiffs' dispute with the United States over the eastern section of an area of land demonstrated that the plaintiffs had notice of the United States' claim as to the eastern area. 52 F.3d 202, 204, 206 (9th Cir. 1995). But that dispute did not cloud the plaintiffs' title to the land as a whole. Until the United States had a survey conducted, "[t]here was no evidence . . . to give the Fadems notice the Government would assert a claim to the western section." *Id.* at 207.

Under these principles, the reverter clause did not cloud the title to the City's Land. The possibility that the leasehold interest (until it expired in 1953) and certain easements, improvements, and chattel (which are now no longer valuable) could revert to the United States was entirely consistent with the City's title. Under the reverter clause, if the City had ceased operating the Airport as an airport during the life of the United States' now-expired leases, the United States could have retaken possession for the then-remaining duration of the leases' terms. But nothing about those facts called into question the City's title to the City's Land or suggested the United States could take possession after expiration of its leasehold interest. The United States first made that claim in 2008 when the FAA asserted that if the City did not operate the Airport "in perpetuity" the City's Land could somehow "revert" to the United States. ER99.

Indeed, as this Court has recognized, if the statute of limitations were deemed to trigger before then, that would create “an undesirable result.” *Michel*, 65 F.3d at 132. Such a holding would mean that the City needed to sue by 1960, even though there was no indication that title to (or possession of) its Land was in jeopardy. But it “makes no sense to start limitations running because of an event that creates no dispute.” *Leisnoi II*, 267 F.3d at 1025. The City should not have had to predict (and no reasonable landowner would have) that the United States would decades later make this extraordinary claim about the reverter clause. *Michel*, 65 F.3d at 132.

5. *The City’s conduct after entering into the Instrument of Transfer does not support the district court’s conclusion*

The district court also reasoned that the City must have had notice of the United States’ claim because “the City’s statements and conduct since agreeing to the terms of the Instrument of Transfer demonstrate the City’s awareness that the United States had a continuing and substantial interest in the Airport Property.” ER11. In particular, the district court pointed to the City’s purported requests for release from the Instrument of Transfer’s restrictions on the use of the City’s Land in 1952, 1956, and 1984, as well as the City Attorney’s 1962 legal opinion. ER11-ER12 & n.6. At most, however, these documents showed that the City knew it had agreed to certain restrictions on the use of the Airport. Nothing in these documents

demonstrated that the United States claimed any reversionary interest in the *title* to the City's Land.

Obtaining the 1952 and 1956 releases was consistent with the City's view that the United States had no claim to the title to the City's Land. In 1952 the Runway Lease and Golf Course Lease had not yet terminated by their terms—that occurred in 1953. ER300. Thus, if any of the conditions imposed by the Instrument of Transfer were breached in 1952, the United States could have demanded that its leasehold interest revert to the United States for their remaining term. Although the leases had expired by 1956, there were other property interests that could have reverted to the United States had the Instrument of Transfer's conditions been breached, including the easements, improvements, and chattel. The releases allowed the City to use parcels known as the George Tract and Runway 1 for non-airport purposes without risking reverter of those specific items of property enumerated in the Instrument of Transfer. There is no indication that the City thought the release was necessary to preclude reverter of title to the City's Land. Moreover, the 1956 release itself states that it was obtained not only because of the Instrument of Transfer but also because of similar restrictions contained in a separate (since-expired) grant agreement. A271.

Nor does the 1962 Opinion of the City Attorney suggest that the City had notice of the United States' claim to title to the City's Land. The Opinion

answered the question: “Can the City, unilaterally, on motion of the City Council, abandon the use of the Santa Monica Municipal Airport as an airport?” ER173. The Opinion quoted extensively both from the Instrument of Transfer and from then-in-force grant agreements. ER176-ER182. The City Attorney concluded that under those agreements, the City could not unilaterally close the Airport. ER176-ER182. The Opinion did not, however, consider whether, under the Instrument of Transfer alone, title to the City’s Land could “revert” to the United States if the City ceased operating the Airport as an airport. At most, the Opinion shows that the City knew it had obligations under multiple agreements; it does not show that the City had notice of a claimed interest in title to the City’s Land.

The 1984 Settlement Agreement’s “Consent to Use of Land” also was consistent with the view that the United States had no claim to the title to the City’s Land. The 1984 Settlement Agreement “release[d] the City and this parkland and residual land from any and all conditions, covenants, and restrictions imposed by the Instrument of Transfer” and approved “the use of land designated as parkland and residual land” in the Airport Layout Plan “for other than airport and aviation purposes.” ER371. Nothing in the 1984 Settlement Agreement indicates that the City believed title to the City’s Land could revert.

Accordingly, for all these reasons, the district court legally erred in interpreting the Instrument of Transfer as providing notice of the United States’

claim to the title to the City's Land. To the extent the district court's decision rested on factual findings, those findings were clearly erroneous for all the same reasons and should be set aside.

B. Even If The 1948 Instrument Of Transfer Notified The City Of The United States' Claim, The United States Later Disclaimed Its Interest, And The Limitations Period Began Anew In 2008

Even if the district court were correct (and it is not) that the Instrument of Transfer gave the City notice of the United States' claim and triggered the statute of limitations in 1948, the United States later abandoned that claim. The statute of limitations started anew when the United States in 2008 reasserted an interest in the title to the City's Land.

“The statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred.” *Shultz*, 886 F.2d at 1161. “If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted.” *Id.*; see *Michel*, 65 F.3d at 133. As the district court recognized, the “‘key inquiry’ is whether the United States’ actions would give the City ‘reason to believe the government did not continue to claim an interest.’” ER12 (quoting *Kingman Reef*

Atoll Invs., LLC v. United States, 541 F.3d 1189, 1200 (9th Cir. 2008)); *see Shultz*, 886 F.2d at 1161 (same).

For example, in *Michel*, the plaintiffs claimed a right to access roads and trails in a national wildlife refuge to access their property. 65 F.3d at 131. Over several decades, the government disputed the plaintiffs' right of access, and the plaintiffs negotiated with the government, reaching several agreements. *Id.* The plaintiffs finally sued to quiet title in 1992. *Id.* The district court concluded that the plaintiffs had notice of the government's claim of an exclusive right to control access to the roads as early as 1960, and thus dismissed the action as time barred. *Id.* at 132.

This Court reversed. The government had recognized in a 1970 letter that the plaintiffs had a "historic right of access." *Id.* at 133. This Court observed that the "government's acknowledgement of the Michels' 'historic right of access' appears to abandon any previously asserted claim of exclusive control of that right." *Id.* Although there were renewed disputes after 1970, the parties reached another agreement in 1984 that "expressly incorporat[ed] the 1970 letter recognizing the Michels' 'historic right of access.'" *Id.* This Court held that "the 1984 agreement could be construed as an abandonment of the government's claim that it had the exclusive right to control access." *Id.*

Here, as in *Shultz* and *Michel*, the United States' actions after the 1948 Instrument of Transfer gave the City ample "reason to believe the government did not continue to claim an interest." *Shultz*, 886 F.2d at 1161. In the 1984 Settlement Agreement, the United States abandoned any claim to the City's Land that the Instrument of Transfer may have given it. ER303. The Settlement Agreement provided a new, comprehensive framework for the operation of the Airport going forward. ER369. The Agreement expressly "resolve[d] all existing legal disputes among the parties." ER369. It further "release[d] *the City* and this parkland and residual land from any and all conditions, covenants, and restrictions imposed by the Instrument of Transfer." ER371 (emphasis added). The 1984 Settlement Agreement also provided that "[a]ll prior agreements between the parties concerning the Airport, and all actions of the parties during the duration of this Agreement, shall be interpreted consistently with this Agreement." ER369. The Agreement paired the release of the City from its obligations under the Instrument of Transfer with a new 30-year obligation to operate the redesigned Airport, but only until July 1, 2015. ER371-ER373. After entering into the 1984 Settlement Agreement, the City reasonably believed that it could close the Airport when the Settlement Agreement expires in 2015.

The FAA confirmed the City's understanding in the 1998 Director's Determination. The Director explicitly stated that the 1984 "Settlement Agreement

makes clear that the City is obligated to operate the Airport only for the duration of the [1984] Agreement (through July 1, 2015).” ER294. To the extent others “seek to prevent the future closure of the Airport or require the City to operate the Airport beyond July 1, 2015, that is a *local land use matter*.” ER294-ER295 (emphasis added).

Even before the 1984 Settlement Agreement, the FAA acknowledged in 1971 that the City could use the City’s Land for non-airport purposes. ER47. The only recourse that the FAA identified if the City “should move to close the airport” would be to “declare the City in default of its obligation of its Grant Agreements” and to bring “suits for damages” to force “repayment for airport improvement funds expended.” ER47-ER48. The City could reasonably believe based on this language that the United States in 1971 no longer claimed (to the extent it ever had) any reversionary interest in the City’s Land.

Under *Shultz* and *Michel*, these documents stopped the running of the 12-year limitations period. Each of these documents led the City “reasonably to believe that the government did not continue to claim an interest” in the City’s Land. *Shultz*, 886 F.2d at 1161. After the United States explicitly released the City from the Instrument of Transfer and expressly represented that the City could close the Airport, there was no reason for the City to try to quiet title to the City’s Land. Indeed, there would not have been any basis for the City to bring a Quiet

Title Act claim, as there was no “dispute” over the City’s Land that needed to be settled. *Leisnoi I*, 170 F.3d at 1193 (no Quiet Title Act jurisdiction where “there was no colorable conflict between an interest of the United States and an interest of” the plaintiff). The United States’ assertion in 2008 thus was a “new claim,” and the statute of limitations for an action based on that claim began running in 2008. *Shultz*, 886 F.2d at 1161. The City brought suit well within the 12-year statute of limitations.

Citing *Kingman Reef*, the district court concluded that the United States did not “clearly and unequivocally abandon[] its interest, as evidenced by documentation from a government official with authority to make such decisions on behalf of the United States.” ER12 (quoting *Kingman Reef*, 541 F.3d at 1201) (internal quotation marks omitted). That was incorrect, and *Kingman Reef* is nothing like this case.

In *Kingman Reef*, this Court held that informal statements by low-level employees could not abandon a claim made in a Presidential Executive Order. 541 F.3d at 1200. There, the President had issued an Executive Order declaring certain property under the control of the Navy. *Id.* at 1192-93. But due to “confusion and mistake,” certain government employees informally acknowledged that the plaintiffs owned the property. *Id.* at 1201. The plaintiffs argued that this constituted abandonment of the United States’ claim. This Court disagreed,

concluding that “where the United States’s claim of interest in property stems from formal actions of the legislative or executive branch, a person could not reasonably conclude that informal remarks of agency personnel or internal agency memoranda could eliminate the cloud upon the property’s title.” *Id.* at 1200.

That is a far cry from the facts here, which involve senior agency officials taking agency actions in clear and unequivocal terms. The 1984 Settlement Agreement was an official agreement between the FAA and the City, providing a comprehensive framework for the operation of the Airport, resolving all prior disputes, and unequivocally releasing the City from its obligations under the Instrument of Transfer and imposing new obligations that last only until July 2015. ER371-ER373. The 1998 Director’s Determination was an official decision resolving administrative proceedings within the FAA involving a dispute over the City’s refusal to offer leases to Airport tenants beyond 2015. ER294. Similarly, the 1971 letter recognizing the City’s ownership of the City’s Land was an FAA Director’s written response to users of the Airport (ER47-ER48), not an informal act by relatively low-level employees lacking authority to bind the agency as in *Kingman Reef*.

The district court also concluded that the 1984 Settlement Agreement did not constitute “clear and unequivocal abandonment” because it purportedly did not address “whether the City is obligated to operate SMO as an airport after July 1,

2015 or whether title would revert to the United States if the City ceases to operate SMO as an airport after July 1, 2015.” ER13. But that is not so. The 1984 Settlement Agreement expressly “resolve[d] all existing legal disputes among the parties” and “release[d] the City . . . from any and all conditions, covenants, and restrictions imposed by the Instrument of Transfer.” ER369, ER371. There are now no obligations under the Instrument of Transfer that can be breached, and therefore the reverter clause can have no effect.

The district court additionally believed that the 1998 Director’s Determination did not “constitute a clear and unequivocal abandonment” because the FAA “did not consider the 1948 Instrument of Transfer in the Director’s Determination or the Final Decision and Order, as the Instrument of Transfer was not part of the administrative record.” ER13. But the Director’s Determination was interpreting the 1984 Settlement Agreement (ER13), and the Settlement Agreement released the City from its obligations under the Instrument of Transfer. ER371. That is enough to constitute abandonment. *Michel*, 65 F.3d at 133 (“By expressly incorporating the 1970 letter recognizing the Michels’ ‘historic right of access,’ the 1984 agreement could be construed as an abandonment of the government’s claim that it had the exclusive right to control access.”).

In short, the FAA’s actions after the Instrument of Transfer disclaimed any interest in the title to (or possession of) the City’s Land. The United States

reasserted its claim in 2008, giving rise to a new Quiet Title Act cause of action. Because the City sued five years later, its suit is not time barred.

C. The City’s Quiet Title Act Claim Should Not Have Been Dismissed Because Whether That Claim Is Time Barred Depends On Resolution Of Factual Issues Going To The Merits

At the very least, it was reversible error for the district court to dismiss the City’s Quiet Title Act claim because the statute-of-limitations issue is inextricably intertwined with the merits.

To the extent factual determinations were required to decide the motion to dismiss under Rule 12(b)(1), the district court was required to defer deciding the factual questions until it considered the merits of the City’s claim. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). “[W]here 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, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.” *Id.*; see *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983); 5B Charles Alan Wright et al., *Federal Practice & Procedure* § 1350 (3d ed. 2012). “In such cases it is both proper and necessary for the trial court first to resolve the merits of the claim to the extent necessary to allow the court to properly determine its own jurisdiction.” *Augustine*, 704 F.2d at 1079. The grant of a Rule 12(b)(1) motion before trial on

the merits is permissible only if the moving party is also entitled to “a grant of summary judgment on the merits.” *Id.*

The jurisdictional statute-of-limitations question here is closely intertwined with the merits of the City’s Quiet Title Act cause of action. Among the contentions that the City will make on the merits is that the Instrument of Transfer cannot cause title to the City’s Land to revert to the United States because the United States never transferred such title to the City. That is the same contention that the City makes to show that the reverter clause did not give the City notice of the United States’ claim to title to the City’s Land. *See supra* Argument Part A.1. Both the merits question and the statute-of-limitations question involve interpreting the reverter clause.

Another merits contention is that the Instrument of Transfer cannot cause title to the City’s Land to revert because the 1984 Settlement Agreement resolved all prior disputes and released the City from any remaining obligations under the Instrument of Transfer to operate the Airport after July 1, 2015. ER303. Because of that release, no property can revert as the result of any breach of the Instrument of Transfer’s now-terminated obligations. The City makes that same contention for statute-of-limitations purposes to show that the United States abandoned any interest it may have had in the title to the City’s Land. *See supra* Argument Part B.

Both the merits question and the statute-of-limitations question involve interpreting the 1984 Settlement Agreement.

The district court nevertheless concluded that “the statute of limitations issue is not inextricably intertwined with the ultimate merits of the Quiet Title Act claim because “[t]he crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid.” ER13-ER14 (quoting *Kingman Reef*, 541 F.3d at 1196-97). But that is true of every statute-of-limitations issue. Yet this Court has instructed that when the notice and merits questions are intertwined, dismissal without resolving the merits question is reversible error. *Augustine*, 704 F.2d at 1079. Here, the factual disputes concerning whether the City had notice of the United States’ claim “go to the heart of” the merits of the City’s Quiet Title Act claim. *Id.* at 1078. It was therefore erroneous for the district court to dismiss on jurisdictional grounds without first “resolv[ing] the merits of” the City’s Quiet Title Act claim “to the extent necessary to allow the court to properly determine its own jurisdiction.” *Id.* at 1079. The district court should have waited to resolve the jurisdictional issues after considering the merits either at trial or at summary judgment. *Id.*

CONCLUSION

The order dismissing the City’s Quiet Title Act claim should be reversed, and the case remanded for consideration of the merits of that claim.

Respectfully submitted,

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**STATEMENT OF RELATED CASES PURSUANT TO
CIRCUIT RULE 28-2.6**

Counsel for plaintiff-appellant is unaware of any related cases pending in
this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 14, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 14, 2014

s/ Deanne E. Maynard

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 13,980 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: October 14, 2014

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