IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on March 12, 2012

MICHAEL ETCHEGOINBERRY, et al.,	)	
	)	
Plaintiffs,	)	No. 11-564 L
	)	
v.	)	Judge Marian Blank Horn
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

IGNACIA S. MORENO
Assistant Attorney General

E. BARRETT ATWOOD
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
301 Howard St., Suite 1050
San Francisco, CA 94105
Email: Barrett.Atwood@usdoj.gov
Telephone: (415) 744-6480
Fax: (415) 744-6476

Counsel for the United States

Of Counsel:

Shelly Randel
Attorney/Advisor
U.S. Department of the Interior
Office of the Solicitor
1849 C Street, N.W. - MS 5524
Washington, D.C. 20240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Pursuant to Rules of the United States Court of Federal Claims 12(b)(1) and 12(h)(3), on December 8, 2011, the United States moved to dismiss the Complaint ("Motion"). As explained in that Motion, Plaintiffs' claim accrued more than six years prior to the filing of the instant complaint and, therefore, the Complaint must be dismissed pursuant to the applicable statute of limitations, 28 U.S.C. § 2501. ECF No. 9. Alternatively, as set forth in that Motion, Plaintiffs' claim accrued before each Plaintiff acquired their property and thus, lack standing to bring this lawsuit. *Id.* Pursuant to this Court's Order of December 15, 2011 (ECF No. 13), the United States filed a Supplemental Brief in Support of its Motion to Dismiss on January 9, 2012 ("Supplemental Brief"). ECF No. 15. On February 8, 2012, Plaintiffs filed their Response to United States' Motion to Dismiss ("Response"). ECF No. 19. Pursuant to the Court's Order dated February 22, 2012 (ECF No. 28), the United States hereby files this reply brief in support of its Motion.

I. INTRODUCTION

In their Response, Plaintiffs do not argue that they had been unaware until recently of the seepage occurring beneath their farmlands from decades of irrigation without drainage, or that they were unaware until recently of harmful salts accumulating in the soils beneath their farmlands. Indeed, Plaintiffs concede that they have always known that irrigation without drainage damages their farmlands. Compl. ¶¶ 2, 64 (ECF No. 1); Resp. at 3. Plaintiffs also aver that since June 1986, the United States has failed to provide them drainage service. Compl. ¶ 63. And Plaintiffs do not dispute that similarly situated landowners – putative class members here – brought a nearly identical takings claim against the United States in 1991. Supp. Br. at 7, 9 (citing Mot. at 13-15). These facts demonstrate that Plaintiffs knew or should have known that their takings claim accrued roughly two decades before their Complaint was filed.

Plaintiffs, however, attempt to rely on the stabilization doctrine to argue that events of the last decade created enough justifiable uncertainty for the Court to find their claim accrued after September 2, 2005 (six years before the filing of the Complaint). Resp. at 2. In support, they argue the United States has been either pursuing a solution to the drainage issue, allegedly as recently as July 2008, *id.*, when the United States submitted a drainage feasibility report to Congress, *id.* at 7-10, or litigating its drainage obligation, *id.* at 2, allegedly ending sometime in 2000. *Id*. at 6-7. Alternatively, they argue their claim "only recently accrued" because only then were Plaintiffs able to ascertain the extent of the damage to their farmlands in the Westlands Water District ("Westlands"). *Id*. at 2. In support, they argue that events occurring between 2009 and 2010, *id.*, allegedly ending with a September 2010 letter from the United States to a United States Senator which allegedly proposed an alternative strategy where Westlands and other water districts should assume responsibility for drainage service, *id.* at 10-12, made it clear that the United States would not provide drainage service to Plaintiffs' farmlands. *Id.* at 2-3. However, the indisputable facts show that multiple court decisions consistently found, at multiple times in the past and long outside the limitations period, that the United States had made the policy decision not to provide drainage service to the farmlands in Westlands as required by the San Luis Act and that failure was known to be causing irreparable injury there. Supp. Br. at 9-10; Mot. at 15-19. For this Court to hold otherwise would require it to collaterally review the findings of other courts, and for this Court to reverse those findings. Further, subsequent government promises of mitigation – made only after being court-ordered – on which Plaintiffs rely, cannot revive their stale claim. Supp. Br. at 8-9 (citing *Banks v. United States*, __ Fed. Cl. __, No. 05-1353, 2011 WL 6812824, at *14 n.13 (Dec. 22, 2011)).[1] Therefore, these subsequent

[1] For purposes of this Motion, the United States concedes that Plaintiffs' claim may not have

events on which Plaintiffs focus are irrelevant. The other arguments raised by Plaintiffs and discussed further below, are similarly meritless. Accordingly, the Complaint should be dismissed in its entirety.

II. ARGUMENT

A. PLAINTIFFS CANNOT PROVE THEIR CLAIM IS TIMELY GIVEN THE LITIGATION HISTORY OF THE DRAINAGE ISSUE.

There are at least five historical litigation events which undeniably show that there could be no justifiable uncertainty that the United States previously refused to provide drainage service to farmlands within Westlands as required by the San Luis Act, thus accruing Plaintiffs' claims more than six years before the filing of the Complaint.

First, no later than January 1991, the plaintiffs in *Sumner Peck* – which Plaintiffs do not dispute are similarly situated to the putative class here, Supp. Br. at 9 (citing Mot. at 13-15) – were so certain that the United States had breached its duty to provide drainage service that they brought, *inter alia*, inverse condemnation claims against the United States and Westlands which mirror the claim brought against the United States here. Mot. at 14-15, 24-25.[2] Second, in May 1993, Judge Wanger of the United States District Court for the Eastern District of California found that, unless otherwise excused, the United States breached its statutory duty to provide

---

stabilized prior to September 1990. While the United States forsook its obligation to solely provide drainage service in 1985, Supp. Br. at 9, it was not until the issuance of the final report (Pl.'s Ex. 10 / Ex. 1; portions of the "Rainbow Report") of the federal and state interagency program addressing drainage, the San Joaquin Valley Drainage Program, Mot. at 3, 3 n.2, that affected landowners in Westlands concluded that the United States would not provide drainage service as required by the San Luis Act. *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) ("*Sumner Peck*") Compl. ¶¶ 92-93 (Pl.'s Ex. 14). However, for Plaintiffs' claim to be untimely, the Court only need find that it accrued before September 2, 2005. Supp. Br. at 2-4; Mot. at 22-26.

[2] The Motion and Supplemental Brief cite the *Sumner Peck* Amended Complaint, filed in April 1991. Exs. 9 (ECF No. 9-10), 9-S (ECF No. 11-1). Plaintiffs' Exhibit 14 is the original *Sumner Peck* complaint, filed January 31, 1991, and the United States cites to it accordingly.

drainage. *Id.* at 15; *see also generally* Pl.'s Ex. 17 (Judge Wanger's opinion finding that the duty to provide drainage existed and the United States had failed to fulfill its duty). Third, in December 1994, Judge Wanger found that the United States was not excused from performing its duty, had failed to provide drainage service for years, was unlikely to provide drainage service absent court order, and that these similarly situated plaintiffs had been irreparably damaged by the United States' failure to provide drainage. Mot. at 15-16; Ex. 10 at 34201, 34232. Fourth, in March 1995, Judge Wanger entered partial summary judgment on these findings and held that "[b]ecause of the [United States'] failure to provide drainage for the San Luis Unit in violation of law, [these similarly situated plaintiffs] are suffering irreparable injury." Pl.'s Ex. 19 at 10. Fifth, in February 2000, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), in largely affirming Judge Wanger, held that by "ma[king] the policy decision not to provide drainage service in violation of section 1 of the San Luis Act," for the prior 13 years, the United States had been making these similarly situated plaintiffs' farmlands sterile and causing irreparable injury. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577-78 (9th Cir. 2000). This Court must accept these findings of Judge Wanger and the Ninth Circuit because the Court of Federal Claims does not have jurisdiction to review collaterally the decisions of district courts. *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). "This means that the Court of Federal Claims cannot entertain a taking claim that requires the court to 'scrutinize the actions of' another tribunal." *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (citation omitted).

While Plaintiffs appear correct that the Court of Federal Claims has never adjudicated a takings claim on the merits which was predicated on Plaintiffs' alleged right to drainage, Resp. at 12-14, that is irrelevant to the question whether that claim accrued outside the limitations period.

Based on the indisputable facts found by Judge Wanger and the Ninth Circuit, and as empirically shown by the *Sumner Peck* and *Firebaugh Canal Co. v. United States*, No. CV-F88-634 (E.D. Cal. filed Dec. 9, 1988) ("*Firebaugh*") lawsuits, that claim accrued no later than the 1990s.[3] Despite these repeated court findings that the United States had not, and would not, provide drainage service to Plaintiffs' farmlands in Westlands, and the subsequent settlement of the nearly identical *Sumner Peck* claims, Plaintiffs rely heavily on the "justifiable uncertainty" doctrine, claiming that, before 2009 or 2010, they did not know whether the United States would provide drainage to their farmlands within Westlands.[4]

B. PLAINTIFFS' THEORY OF JUSTIFIABLE UNCERTAINTY IS UNSUPPORTED BY FACT AND CONTRARY TO LAW.

In support of their theory, Plaintiffs fail to identify any promises of mitigation, i.e., commitments by the Bureau of Reclamation ("Reclamation") to provide drainage service to Westlands, during the 1990s.[5] Instead, Plaintiffs invite the Court to expand application of the

[3] While not adjudicated in this Court, the United States did settle the *Sumner Peck* lawsuit, including those plaintiffs' inverse condemnation claims that were transferred to the Court of Federal Claims but presumably not pursued there. Pl.'s Exs. 34 (Judge Wanger order, dated Oct. 24, 2002, transferring claims to the Court of Federal Claims), 35, Exhibit A at 1, 16, 23 (*Sumner Peck* settlement, dated Dec. 11, 2002, citing this same order and settling the inverse condemnations claims transferred to the Court of Federal Claims). The *Firebaugh* plaintiffs, however, filed their transferred takings claim in the Court of Federal Claims in February 2005, but it was dismissed pursuant to 28 U.S.C. § 1500. Resp. at 13; Mot. at 20-21 (citing *Firebaugh Canal Water Dist. v. United States*, 70 Fed. Cl. 593, 597-99 (2006)).

[4] Plaintiffs' Response cites to events in 2009 and 2010 as accruing their claim. Resp. at 2, 11-12. Plaintiffs also assert that their claim accrued "no earlier than September 2010." *Id.* at 26; *see also id.* at 27 ("if the Court agrees that Plaintiffs' taking stabilized no earlier than September 2010…"). According to Plaintiffs, this is when the United States sent a letter to United States Senator Diane Feinstein to propose to Congress an alternative drainage strategy where Westlands and other water district should assume the responsibility from the United States for providing drainage to Westlands. *Id.* at 2, 12 (citing Pl.'s Ex. 33).

[5] Plaintiffs do cite Reclamation's Draft Environmental Impact Statement ("1991 DEIS"), (excerpts contained in Pl.'s Ex. 12 / Ex. 6), issued in 1991, in support of their argument. However, contrary to Plaintiffs' assertions, its issuance did not promise the United States would

justifiable uncertainty doctrine beyond promises of mitigation by the United States to include the uncertainty caused by litigation with the United States. Resp. at 20-22. The Court should decline Plaintiffs' invitation. First, while the stabilization doctrine originated in *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947), the Supreme Court has narrowly construed the doctrine and the Federal Circuit, as stated by its predecessor court, must follow suit. *See United States v. Dow*, 357 U.S. 17, 27 (1958) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."); *Kabua v. United States*, 546 F.2d 381, 384 (Ct. Cl. 1976) (*Dow*, 357 U.S. at 27, more or less limited *Dickinson* to the class of flooding cases "to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking"); *Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556, 656 (1966) (broad interpretation of *Dickinson* would result in an "unending conflict with the statute of limitations"). This Court should refrain from expanding application of the stabilization doctrine to circumstances not expressly embraced by either the Supreme Court or the Federal Circuit.

---

provide drainage service to affected lands within Westlands as contemplated by the San Luis Act. Mot. at 10-11; *see also* Pl.'s Ex. 18 at 15-16 (despite the issuance of the 1991 DEIS, Judge Wanger found that the United States "failed to take necessary steps to provide drainage for a number of years" and it "is unlikely to undertake efforts to provide drainage service unless ordered to do so by the Court"). In any event, subsequent events and Judge Wanger's finding that it was the policy decision of the United States to not provide drainage service, unwound any alleged uncertainty brought about by the issuance of the DEIS. Notably, in the 1990s, Reclamation did not proceed to finalize the 1991 DEIS or issue a final decision based on that document. Instead, after 2000, Reclamation developed the San Luis Drainage Feature Re-evaluation, developed a new Environmental Impact Statement, and adopted that action in its March 2007 Record of Decision. Resp. at 7-10; *see also generally* Pl.'s Exs. 22-27 (excerpts of various documents from Reclamation's San Luis Unit Feature Re-evaluation).

Second, while the Supreme Court has not addressed this issue, Federal Circuit precedent does not hold that litigation uncertainty is a basis for finding justifiable uncertainty exists. Rather, in the Federal Circuit, such a finding requires a gradual physical process coupled with promises of mitigation by the United States. *See, e.g., Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1291 (Fed. Cir. 2006) (holding that takings claim did not stabilize until aquatic weeds had grown to harmful levels and the Army Corps of Engineers (the "Corps") had refused to take mitigating action); *Banks v. United States*, 314 F.3d 1304, 1310 (Fed. Cir. 2003) (holding that gradual erosion process coupled with decades of promised mitigation efforts by the Corps made claim accrual uncertain); *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994) (holding that "[t]he gradual … process set in motion by the Corps, compounded by the Government's promises [of mitigation] … have indeed made accrual of the landowner's claim uncertain"). Plaintiffs fail to cite any authority, from the Federal Circuit or elsewhere, in support of their proposition that litigation justifies uncertainty in this context. In addition, the cases that do find justifiable uncertainty make that finding based upon promises of mitigation by the United States, not hopes that a court will order the United States to offer mitigation, Resp. at 21-22, or joint efforts with interested stakeholders to study mitigating plans. *See* Supp. Br. at 6-7 (recounting how, from April 1985 through 2000, the United States has not offered to provide drainage service without the joint assistance of the State of California, Westlands, landowners, and other stakeholders). And the only Court of Federal Claims decision which considered postponing the accrual of a takings claim where a legal situation, rather than a factual one, allegedly concealed the claim's existence, rejected application of the stabilization doctrine. *Banks*, 2011 WL 6812824, at *21-25 (citing *Boling v. United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000) as binding precedent on this issue) (remaining citations omitted).

Third, Plaintiffs' protestations of uncertainty are meritless. From the time of Judge Wanger's orders through the Ninth Circuit's 2000 ruling in the consolidated *Sumner Peck* and *Firebaugh* lawsuits, there was nothing but certainty that the courts found: (1) the United States was not providing drainage service to farmlands within Westlands; (2) it was the policy decision of the United States not to provide drainage service to those farmlands as required by the San Luis Act (while the United States asserted its drainage obligation had been excused or rendered legally impossible); and (3) those farmlands were being damaged by the failure to provide drainage. *Supra* at 3-4. Plaintiffs argue that the United States' "fiercely contested" litigation position – that its failure to provide drainage was excused or legally impossible – created uncertainty whether the United States had in fact failed to provide drainage. Resp. at 6, 20. Beyond being circular, this argument ignores the facts. Regardless of how the Ninth Circuit was to rule, Judge Wanger found that it was the policy decision of the United States not to provide drainage service as required by the San Luis Act and the effects of that failure were known and certain enough to landowners in Westlands that they filed suit in 1991. *See generally Sumner Peck* Compl.; Pl.'s Exs. 17-19. Under such circumstances, there is no justifiable uncertainty and the stabilization doctrine cannot apply. *See Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 251 (Ct. Cl. 1958) (rejecting application of the stabilization doctrine when "[t]he very same suit, on the same grounds and for the same damages, could have been brought by the plaintiff at least [twenty years] ago"); *cf. Duncan v. United States*, No. 2011-5095, 2011 WL 5400117, at *1-2 (Fed. Cir. Nov. 9, 2011) (per curiam) (affirming dismissal of takings claim as time-barred when litigation concerning the existence of property interests at issue should have alerted plaintiff to accrual of takings claim).

Yet, Plaintiffs claim this ongoing litigation somehow delayed their claim's accrual. Resp. at 20. Plaintiffs' argument strains credibility. Plaintiffs point to no evidence during this 1990s litigation history which in any way hints at, much less proves, that the United States was promising mitigation (i.e., providing drainage service to farmlands within Westlands). *See also* Resp. at 1 ("Up to 2008, the Government has either pursued a solution to the drainage problem, however slowly, or has litigated the issue of its drainage obligation.") (emphasis added), 19-20 (discussing events allegedly justifying uncertainty, but failing to cite any events during the 1990s other than ongoing litigation or the issuance of the 1991 DEIS). Plaintiffs merely conclude that because the United States was never relieved of its statutory duty to provide drainage, Resp. at 10, 25 n.4, there was "ongoing uncertainty as to the permanence of the taking here." *Id.* at 25. This is a non-sequitur. Regardless of whether that duty existed or that the United States' nonperformance was excused, it was known that the United States had failed to, and would not, deliver the mitigation measures that Plaintiffs now, and the *Sumner Peck* plaintiffs then, allege were necessary to fulfill that duty. *Compare* Compl. ¶¶ 93-103 (allegations that the United States' drainage efforts inadequately serve subparts of Westlands, fail to obtain necessary appropriations, and otherwise fail to implement a drainage solution for Plaintiffs' farmlands) *with Sumner Peck* Compl. ¶¶ 92, 97 (allegations that the United States' drainage efforts inadequately served subparts of Westlands, failed to properly spend appropriations, and otherwise failed to provide a drainage solution for the plaintiffs' farmlands). Plaintiffs' subjective hopes that government mitigation efforts may eventually surface, whether by court order or otherwise, are insufficient to justify their alleged uncertainty. *Gary v. United States*, 67 Fed. Cl. 202, 210 (2005) (when analyzing claim accrual, "'[t]he court determines whether the

pertinent events have occurred under an objective standard'") (quoting *McDonald v. United States*, 37 Fed. Cl. 110, 114 (1997)).

Fourth, the Court should not expand application of the justifiable uncertainty doctrine to this case because the premise upon which it rests, the stabilization doctrine, is itself inapposite. Supp. Br. at 5. Whether intermittent flooding is "inevitably recurring" is dependent on many individualized facts. *See The George Family Trust ex rel. George v. United States*, 91 Fed. Cl. 177, 192-95 (2009) (analyzing the facts of various takings cases predicated upon flooding); *Bagwell v. United States*, 21 Cl. Ct. 722, 725-27 (1990) (same). Conversely, the effect of the failure to provide drainage to Plaintiffs' farmlands is immediately knowable. Compl. ¶ 2; Resp. at 3. Thus, the reasoning behind the stabilization doctrine – that it takes time for the damage caused by gradual physical processes to become known to the landowner – is absent here, making that doctrine inapplicable.

Plaintiffs conclude their justifiable uncertainty argument by asserting that Reclamation's promises of mitigation between 2000 and 2008, did not stabilize the accrual of their claim until sometime in 2009 or 2010. Resp. at 7-12, 20-22. As discussed in the Supplemental Brief, these subsequent events cannot revive Plaintiffs' stale claim, Supp. Br. at 8-9 (citing *Banks*, 2011 WL 6812824, at *14 n.13), and Plaintiffs present no argument to the contrary. Instead, Plaintiffs rely on the uncertainty allegedly caused by the litigation discussed above, or, in the alternative, they argue that their claim did not accrue until sometime between 2009 and 2010 because the extent of the damage to their farmlands was not reasonably foreseeable until then. Resp. at 2, 22-26.

C. PLAINTIFFS' "ALTERNATIVE" THEORY THAT THE DAMAGE TO THEIR FARMLANDS WAS NOT FORESEEABLE IS BASELESS.

Plaintiffs' "alternative" theory of claim accrual is similarly without merit. As an initial matter, Plaintiffs' alternative theory does not appear to be distinct from their justifiable

uncertainty theory. Their argument relies on the same facts discussed above, and the same cases which found justifiable uncertainty when applying the stabilization doctrine, Resp. at 22-24 (citing *Nw. La.*, 446 F.3d at 1291-92; *Banks*, 314 F.3d at 1310), and it should be rejected for those same reasons discussed above. Both Judge Wanger and the Ninth Circuit have held that the United States' failure to provide drainage in Westlands has caused sterilization of farmlands there and irreparable injury. *Supra* at 3-4. This alone is grounds to reject Plaintiffs' post-hoc rationalization that until 2009 or 2010, the extent of the damage to their farmlands could not be reasonably foreseen. *See Boling*, 220 F.3d at 1372 ("the touchstone for any stabilization analysis is determining when the environmental damage has made such substantial inroads into the property that the permanent nature of the taking is evident and the extent of the damage is foreseeable").

In support of their rationalization, Plaintiffs claim that *Northwest Louisiana* is instructive here. Resp. at 22-23 (citing *Nw. La.*, 446 F.3d at 1291-92). Plaintiffs claim that up until 2009, when Reclamation allegedly refused to implement its drainage plan, Plaintiffs could not know the extent of the harm to their farmlands. *Id*. at 22-26. Plaintiffs attempt to analogize this event to the Corp's refusal of mitigation in *Northwest Louisiana. Id.* at 23. Plaintiffs' argument may have merit if one closes one's eyes to the history of the drainage issue through 2000. As discussed above, in the 1990s, the United States was repeatedly found to have made the policy decision not to provide drainage service to farmlands in Westlands as required by the San Luis Act. *Supra* at 3-4. This was so evident at the time, the *Sumner Peck* plaintiffs made many of the exact same allegations, and asserted the same claim, which Plaintiffs allege here. Mot. at 24-25. Under these facts, Plaintiffs' alleged ignorance of the extent of the damage occurring to their farmlands prior to 2009 is specious.

Further, Plaintiffs' argument that the extent of their claimed damage only became foreseeable after the occurrence of certain events in 2009 and 2010, when the United States allegedly made it clear that it was not providing drainage to their farmlands in Westlands, Resp. at 2, 10-12, 23, is based on allegations which Judge Wanger found incorrect as a matter of law. *See Firebaugh*, __ F. Supp. 2d __, No. CV-F88-634, 2011 WL 4590810, at *5, *17-19 (E.D. Cal. Sept. 30, 2011) (holding that from 2000 through at least June 15, 2011, the United States has, despite its slow progress, indisputably complied with its duty to provide drainage under the San Luis Act). Notably, Judge Wanger's analysis of this issue includes events subsequent to the letter Reclamation sent to Senator Feinstein in September 2010, attached as Ex. 1 to Pl.'s Ex. 33, which Plaintiffs allege capped off these series of claim-accruing events. Resp. at 10-12. Plaintiffs cite that letter as evidence that the United States had rejected implementation of the Record of Decision it adopted in March 2007, *id.* at 9 (citing Compl. ¶¶ 84-85; Pl.'s Ex. 27), and as late as July 2008, had continued to implement by submitting its feasibility report to Congress. *Id.* at 2, 10 (citing Compl. ¶ 87; Pl.'s Exs. 6, 28).[6] Because Judge Wanger found that, as a matter of law, the United States is complying with the Record of Decision and therefore, satisfying its duty to provide drainage under the San Luis Act, *Firebaugh*, 2011 WL 4590810, at *17-19, Plaintiffs' theory of claim accrual must be rejected. Put another way, because the United States

[6] While not dispositive of this Motion, the United States disputes Plaintiffs' reading of Reclamation's letter sent to Senator Feinstein. Ex. 1 to Pl.'s Ex. 33. After negotiations, between Reclamation and affected parties in 2007 and 2008, failed to reach consensus on a draft bill to address drainage, Reclamation sent this letter in response to a request from the Senator that it provide the outlines of a drainage plan that it could support as an alternative legislative approach. *Id.* at 1-2. Contrary to Plaintiffs' allegations, Resp. at 10-12, this letter in no way rejected implementation of the March 2007 Record of Decision. Rather, it acknowledged that Congress had taken no action to date on the legislative steps that were necessary to allow Reclamation to fully implement the plan selected in the Record of Decision. Ex. 1 to Pl.'s Ex. 33 at 2. Judge Wanger subsequently found that Reclamation's actions were not in violation of the Record of Decision. *Firebaugh*, 2011 WL 4590810, at *17-19.

is implementing the Record of Decision, which Plaintiffs agree satisfies the United States' obligation to provide drainage to the San Luis Unit, Resp. at 10, there has been no change of circumstances since 2000 which prove that Plaintiffs' claim accrued after September 2, 2005.

Plaintiffs also build a strawman argument which they readily quash: that the United States' position is that Plaintiffs' claim accrued "in the 19th century based on general knowledge of soil conditions, or in the 1970s at the start of irrigation services…" Resp. at 24. That is a mischaracterization. Rather, the United States' position is that because Plaintiffs knew that their farmlands could be irreparably damaged without drainage when irrigation began, once the United States' drainage service ceased in the 1980s, and when the courts subsequently found that the United States had failed to, and would not, undertake mitigation efforts, Plaintiffs' claim accrued in the 1990s. *See Boling*, 220 F.3d at 1371 ("The contention that *Dickinson* stands for the proposition that the filing of a lawsuit can be postponed until the full extent of the damage is known has been soundly rejected."); *Nadler*, 164 F. Supp. at 251 ("the *Dickinson* doctrine does not permit a plaintiff to wait until any possibility of further damage [has] been removed") (internal quotation omitted). As the indisputable evidence shows, there is no plausible basis to conclude that Plaintiffs' claim did not accrue well before September 2, 2005. And there can be no doubt that Plaintiffs' claim is untimely when the United States was found to have refused mitigation efforts, just like similar refusals in *Mildenberger v. United States*, 643 F.3d 938, 947-48 (Fed. Cir. 2011) and *Banks*, 2011 WL 6812824, at *11-14, and, in 1991, similarly situated plaintiffs brought the same claim against the United States as Plaintiffs do today.[7]

[7] With respect to *Mildenberger*, 643 F.3d at 946, Plaintiffs ignore that, like the plaintiffs there, affected citizens here have long been organized around the salient issue. *See, e.g.*, Rainbow Report (Ex. 1) at 38344 (identifying members of San Joaquin Valley Drainage Program's Citizens Advisory Committee). Plaintiffs assert, without citation, that "no Plaintiff here has ever organized around the drainage issue prior to filing this lawsuit." Resp. at 25. The United States

D. POLICY REASONS SUPPORT APPLICATION OF THE STATUTE OF LIMITATIONS AND DISMISSAL OF THE COMPLAINT.

For the same reasons discussed above, Plaintiffs' policy arguments are without merit. Resp. at 26-27. Contrary to their assertion, piecemeal litigation would not be encouraged by appropriately ruling that Plaintiffs' claim accrued in the 1990s. As an initial matter, this assertion is one of the rationales behind *Dickinson*'s stabilization doctrine and breaking it out here as a separate argument is redundant. Further, as discussed above, there was no justifiable uncertainty then and just like the *Sumner Peck* plaintiffs, Plaintiffs could have brought their claim in 1991. Accordingly, piecemeal litigation is not encouraged. With respect to Plaintiffs' second "policy" argument urging the Court to find their claim timely, to the extent that bringing a lawsuit in the midst of Reclamation determining how to implement a drainage solution is irrational, Resp. at 26, Plaintiffs' lawsuit – brought in the midst of Reclamation determining how to implement its drainage solution when hampered by a lack of appropriations – is also irrational.

Further, policy reasons support dismissal here. If Plaintiffs had timely brought their claims when they accrued, such as done by the *Sumner Peck* and *Firebaugh* plaintiffs, "questions of fact the solution of which is difficult on the present record would or might have been easier to solve. The purpose as well as the period of the statute of limitations argue against the [Plaintiffs]." *Nadler*, 164 F. Supp. at 251. In addition, instead of being further hampered by yet another lawsuit, dismissal would assist Reclamation in its efforts to solve the difficult task at hand. As stated in the Motion, the time for bringing takings claims related to drainage should finally come to an end.

---

will take this assertion at face value because, according to the Complaint, the named Plaintiffs here were not landowners in Westlands prior to 2007. *See* Mot. at 12 (describing the dates Plaintiffs' allege they acquired their property) (citing Compl. ¶¶ 11-14). However, because they allege a class action, this assertion does not dispute the existence of putative class members having previously organized around the drainage issue.

E. THE PARTIES AGREE THAT STANDING IS NOT IMPLICATED UNDER THEIR RESPECTIVE THEORIES OF CLAIM ACCRUAL.

Assuming the Court is persuaded by either the United States' or Plaintiffs' theories of claim accrual, the United States' argument that Plaintiffs lack standing is not at issue. Mot. at 26-27; Resp. at 27. Under the parties' respective theories, Plaintiffs either owned their property when their "timely" claim accrued, or they did not own their property when their untimely claim accrued. However, in the event the Court finds that Plaintiffs' claim accrued between September 2, 2005, and the time each Plaintiff acquired their property, *see* Mot. at 26-27 (citing Compl. ¶¶ 11-14) (the named Plaintiffs acquired their property on four dates between July 12, 2007, and April 23, 2008), then the parties agree that each such Plaintiff lacks standing to pursue its takings claim here. Resp. at 27.

III. CONCLUSION

For the foregoing reasons and those discussed in the Motion and Supplemental Brief, Plaintiffs have failed to meet their burden to prove that their claim accrued since September 2, 2005. Therefore, their claim is time-barred pursuant to 28 U.S.C. § 2501 and this Court lacks jurisdiction over this lawsuit. Alternatively, Plaintiffs have failed to meet their burden to prove that their claim accrued since each Plaintiff acquired their affected property. Thus, they lack standing to bring their claim. Accordingly, the Complaint should be dismissed in its entirety.

Dated: March 12, 2012

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/s *E. Barrett Atwood*
E. BARRETT ATWOOD
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
301 Howard Street
Suite 1050
San Francisco, CA 94105
Email: Barrett.Atwood@usdoj.gov
Telephone: (415) 744-6480
Fax: (415) 744-6476

Counsel for United States

Of Counsel:

Shelly Randel
Attorney/Advisor
U.S. Department of the Interior
Office of the Solicitor
1849 C Street, N.W. - MS 5524
Washington, D.C. 20240