IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on March 30, 2012

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

PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY TO UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiffs respectfully move this Court for an order allowing them to file Plaintiffs' Surreply to the United States' Reply Brief In Support of Its Motion to Dismiss, which is attached as Exhibit A. Plaintiffs request leave to file the attached Surreply in order to respond to arguments raised by Defendant for the first time in its Reply.

A surreply may be filed by leave of court "to address new matters raised in a reply, to which a party would otherwise be unable to respond." *Flanagan v. Wyndham Intern, Inc.*, 231 F.R.D. 98, 101 (D.D.C. 2005). Defendant has raised new items in its Reply for the first time. For instance, Defendant refers to the United States' continued compliance with the Record of Decision (*see* Reply at 12), which has significant implications for its statute of limitations argument. Plaintiffs have also cited to new case authority in support of its position, including *Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249 (Ct. Cl. 1958) and the recently filed decision *Firebaugh Canal Water District v. United States*, 2011 U.S. Dist. LEXIS 112885 (E.D. Cal. Sept. 30, 2011) (*see* Reply at 8, 12). Because Plaintiffs are otherwise unable to address these new items in any scheduled briefing, leave to file their attached Surreply is proper. *See Flanagan.* 231 F.R.D.

at 101 (district court "routinely grants such motions when a party is unable to contest matters presented to the court for the first time in the last scheduled pleading.").

Plaintiffs are convinced that the Surreply will assist the Court in clarifying Plaintiffs' position as to the jurisdictional issues raised by Defendant's motion to dismiss, especially given Plaintiffs have had only a single opportunity to brief the question relative to the Government's three (i.e., Motion to Dismiss, Supplemental Brief, and Reply). For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' leave to file the attached Surreply.

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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EXHIBIT A

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v.	)	Judge Marian Blank Horn
THE UNITED STATES, Defendant.	)	

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

I. INTRODUCTION

With its third brief, the Government has now narrowed its list of possible accrual dates to five, but still none of them triggers Plaintiffs' takings claim. The 1991 *Sumner Peck* complaint cannot accrue the claim because later that same year the Government released its initial Draft Environmental Impact Statement laying out its long-term solution to address the drainage needs of Westlands farmers through 2007. And the isolated factual findings made by various courts in 1993, 1994, 1995 and 2000 that the United States failed to fulfill its drainage duty can hardly be understood as a trigger to Plaintiffs' claim, which is based on the United States' recent abandonment of its drainage duty. These factual findings were the product of litigation that tangled the Government's drainage obligation in uncertainty. Plus, the United States completely overlooks the ultimate rulings made by those courts that actually steered the Government on a path to comply with its statutory duty to provide drainage and the Government's acquiescence to this by continuing Court-supervised efforts to implement a drainage solution.

Moreover, with its newly tendered claim that it is actually en route to providing drainage – which is completely incongruous with its claim that it had made a policy decision to do the opposite – the Government cannot do away with the stabilization doctrine, which it must do in order for it to prevail on its motion to dismiss. The rising groundwater levels of Plaintiffs' farmlands, Interior's ongoing efforts to pursue drainage under the San Luis Act, and the litigation and Court orders that spurred the United States to continue to take action all made Plaintiff's claim demonstrably uncertain through the last two decades and make the stabilization doctrine fully applicable now. The Government cannot today circumvent the stabilization doctrine with its incompatible assertions that (1) it had made a "policy decision" in the 1990s to not provide drainage while (2) simultaneously contending that it continues to pursue drainage in response to Plaintiffs' more recent accrual date. Nor can it avoid the stabilization doctrine by improperly disregarding how the litigation in the 1990s *resulted* in Interior's efforts to fulfill its drainage duty in the 2000s. The United States' argument that it must be sued based on a litigated finding that it has a drainage obligation that it will satisfy makes no sense. Plaintiffs are therefore legitimately before this Court.

II. ARGUMENT

1. The Stabilization Doctrine Is Fully Applicable.

In its Reply, the Government at first takes the position that Plaintiffs' claim accrued in the 1990s because the United States then made the policy decision to not provide drainage to Westlands farmers. Reply at 2, 4, 8. But pages later, in responding to Plaintiffs' specific contention that their takings claim accrued much more recently, the Government seeks to assure the Court that it is indeed carrying out its drainage obligation. Reply at 12. In effect, the Government has taken the remarkable position that it decided to withhold drainage and to provide drainage. It

claims to have a "no drainage" policy while it nonetheless endeavors to implement a drainage system. This inconsistency undermines the Government's argument that Plaintiffs' takings claim accrued long ago and further exemplifies the uncertainty that has justifiably delayed accrual of Plaintiff's claim.

The fact that the Government is even able to reference contemporaneous efforts to provide drainage makes the stabilization doctrine applicable and fully relevant to this case, not some inappropriate expansion of the doctrine. Interior's work in the 2000s to implement drainage is wholly intertwined with the litigation in the 1990s, but the Government's myopic view of the litigation ignores the connection. While the United States does not dispute that Interior's drainage plan of the last decade justifies uncertainty as to Plaintiffs' claim, it mischaracterizes these recent actions as wholly detached from the earlier litigation. Reply at 9. This is a futile attempt to erect false walls where none exist. Interior's work to implement a drainage plan commencing with its Plan of Action in 2000 and continuing through its Record of Decision in 2007 are direct outcomes of the 1990s litigation and, specifically, Judge Wanger's 1995 Order issued to Interior to "without delay . . . comply with . . . the San Luis Act to provide drainage to the San Luis Unit." *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048, at 11-12 (Mar. 12, 1995) (Partial Judgment) (Pl. App. Ex. 19); *see also Firebaugh Canal Water District v. United States*, 2012 U.S. Dist. LEXIS 33591, at *11-*14 (E.D. Cal. Mar. 12, 2012) (chronology tracing "slow" progress towards drainage solution from drainage litigation). Thus, by 1995, the litigation did not just embody a "subjective hope[] that government mitigation may eventually surface" (Reply at 9); rather, it had produced an enforceable Court order requiring Interior to make good on its drainage obligation, which was a basis for uncertainty. Accordingly, in the 1990s, Plaintiffs' claim never went stale and never needed revival.

The Government also improperly attempts to impose a "one-size-fits-all" application of the stabilization doctrine, but "[t]he point at which [a] taking becomes sufficiently certain to give rise to a claim for compensation varies in each case," (*Cooper v. United States*, 827 F. 2d 762, 764 (Fed. Cir. 1987)), and is a fact-intensive inquiry. *See Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). On these facts – where years of litigation have resulted in Court orders mandating mitigation and where the Government has embarked ever so slowly to pursue such mitigation – the Government's authorities simply have no bearing. There is nothing in *Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249 (Ct. Cl. 1958), that suggests any governmental action that caused the plaintiff landowner to be uncertain of his claim. *See id.* at 93-96. The same goes for *Duncan v. United States*, 2011 U.S. App. LEXIS 22672 (Fed. Cir. Nov. 9, 2011), which the Government cites for the second time even though the case contains no facts involving uncertainty and no analysis of the stabilization doctrine. *See id.*

2. Plaintiffs' Takings Claim Did Not Accrue in the 1990s.

Moreover, the Government's claim that "indisputable evidence" shows Plaintiffs' takings claim accrued in the 1990s – before any of the Plaintiffs even owned the farmlands for which they seek just compensation – ignores important evidence that warrants just the opposite conclusion.

First, the case authorities the Government cites to as evidence of the United States policy decision to not provide drainage (Reply at 3-4) are the same authorities that set the Government on its path to provide drainage. For example, Judge Wanger's December 1994 Order – which the Government cites for its finding that Interior failed to provide drainage – ultimately ordered the Government to apply for a permit for the drainage services it had been deemed obligated to provide. *Sumner Peck*, No. CV-F-91-048, at 47-48 (Dec. 16, 1994) (Findings of Fact) (Pl. App. Ex. 18). The Court plainly stated that the Court "will not presume that [Interior] will ignore its

obligation." *Id.* Nonetheless, the United States' position is that private parties were bound to presume, contrary to the District Court, that the Government would ignore its duty. Judge Wanger's 1995 Order, which the Government cites for its finding on the irreparable injury to the plaintiffs as a result of Interior's failure to provide drainage, actually ordered Interior to secure necessary permits "without delay" in order "to comply with . . . the San Luis Act to provide drainage to the San Luis Unit." *Sumner Peck*, No. CV-F-91-048, at 11-12 (Mar. 12, 1995) (Pl. App. Ex. 19). Even the Ninth Circuit's 2000 Order, which the Government cites for its holding that Interior made a policy decision not to provide drainage, ultimately affirmed that Interior "must act promptly to provide drainage service." *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000) (Pl. App. Ex. 16). The ultimate rulings of these courts matter, not the collateral facts found along the way.

Second, in addition to the Government's extensive efforts to pursue drainage in Westlands – from its 1991 Draft Environmental Impact Statement through its adoption of the Record of Decision in 2008 – existing valid contracts between the United States and Westlands Water District involving drainage for farmlands have been in place since the 1960s and through the present day. Complaint ¶¶ 29-42. In 1963, the United States entered into an agreement with Westlands whereby it agreed to provide drainage to Westlands, and, in turn, landowners were assessed a drainage service fee. *Id.* ¶¶ 32, 34. In 1965, the United States entered into another contract to construct these drainage facilities for the benefit of farmlands in Westlands. *Id.* ¶ 29, 36-38; *see also*1965 Contract at 2-5 (Pl. App. Ex. 4). Interim contracts extending these services and commitments to drainage followed. (*Id.* ¶¶ 41-42). Throughout the 1990s, when the Government claims to have made its policy decision to no longer provide drainage, despite all the Court Orders to the contrary, these contracts remained valid, including those provisions that have obligated

Westlands landowners to pay drainage service fees to the United States for a drainage system never completed.

Given the Court orders to pursue drainage and the ongoing exchange of drainage-related payments under continuously operating contracts, Plaintiffs' takings claim could not have accrued in the 1990s based on any purported United States "policy decision" to forego drainage to Westlands' farmlands. Rather, 2010 – when Interior made clear that it will not provide drainage to Plaintiffs' farmlands – is the correct year for accrual. The recent decision by Judge Wanger noting that Interior is complying with the Record of Decision has no bearing on when Plaintiff's takings claim accrued because it only determined whether there was a violation of the Administrative Procedure Act. *See Firebaugh Canal Water District v. United States*, 2011 U.S. Dist. LEXIS 112885, at *47-*48 (E.D. Cal. Sept. 30, 2011). And in any event, the United States cannot hope to prevail on a statute of limitations motion based on evidence suggesting that the takings claim is not yet ripe. That evidence only serves to defeat the motion now before the Court.

By 2010, Interior's position on drainage made the damage to Plaintiffs' farmlands reasonably foreseeable and then triggered their takings claim. Their 2011 complaint is therefore timely.

III. CONCLUSION

Based on these facts, jurisdiction with this Court is proper. For these reasons, Plaintiffs have asserted a timely takings claim against the United States, whose motion to dismiss should be denied.

Respectfully submitted,

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