IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on December 21, 2012

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

PLAINTIFFS' RE-FILED RESPONSE TO UNITED STATES' RE-FILED MOTION TO DISMISS AND RE-FILED SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

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PREFACE

Plaintiffs submit the following Re-filed Response to the United States' Re-filed Motion to Dismiss (filed Nov. 16, 2012 [Doc. 56]) (referred to as "Re-filed Initial Brief") and Re-filed Supplemental Brief In Support of Its Motion to Dismiss (filed Nov. 16, 2012 [Doc. 57]) (referred to as "Re-filed Supplemental Brief") pursuant to orders from this Court. *See* Order (filed Oct. 1, 2012 [Doc. 47]); Order (filed Oct. 10, 2012 [Doc. 55]). Per the Court's Orders, Plaintiffs have re-filed their response brief with revised citations to the Joint Stipulation of Facts, the Parties' respective proposed findings of fact, and related appendices. *See* Joint Stipulation of Facts (filed Oct. 10, 2012 [Doc. 50]); Plaintiffs' Proposed Findings of Fact (filed Oct. 10, 2012 [Doc. 51]); Defendant's Proposed Findings of Fact (filed Oct. 10, 2012 [Doc. 53]). In addition, Plaintiffs' Re-filed Response responds to Defendant's new arguments, as appropriate, based on any newly identified facts, cases, or other materials. Except for citations to Defendant's briefs, the supplements or revisions in Plaintiffs' Re-filed Response are highlighted in yellow for ease of reference. Joint Status Report at 1 (filed Oct. 9, 2012 [Doc. 49]).

PLAINTIFFS' RE-FILED RESPONSE TO UNITED STATES' MOTION TO DISMISS

I. QUESTION PRESENTED

The United States ("Government") has promised but failed to provide drainage service to Plaintiffs' farmlands for years under a statutory duty and contractual obligation, which has caused the incremental accumulation of saline groundwater beneath Plaintiffs' properties. 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. The litigation resulted in a 1995 District Court Order to provide drainage affirmed in 2000 by the Ninth Circuit. Under Court Order, the Government continued to pursue a drainage solution over the last decade until very recently when it refused to seek Congressional authorization to pay for the drainage solution it committed to implement and

publicly stated in 2010 that the landowners, through local water districts, should provide the long-promised drainage instead of the Government. One year later, in September 2011, Plaintiffs filed their Complaint against the Government for the uncompensated taking of their properties. Where the permanence of the Government's taking was uncertain through 2008, can the Plaintiffs' Complaint be time-barred by the applicable six-year statute of limitations, 28 U.S.C. § 2501?

II. STATEMENT OF THE CASE

Even though Plaintiffs' takings claim concerns a commitment that the Government was to make good on years ago, the claim is not stale. The commitment—to provide drainage services to Plaintiffs' farmlands—was initially imposed in 1960 with the passage of the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) (Stip. Fact B [App. 02{JA00117-JA00121}]). Since then, the Government has failed to meet this obligation, as the Government repeatedly acknowledges in its motion. High water tables and the continuous accumulation of saline groundwater have resulted, inundating Plaintiffs' properties and diminishing their farmlands' agricultural productivity. Now, Plaintiffs seek just compensation for the taking of their properties in violation of the Fifth Amendment to the United States Constitution, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The timing of Plaintiffs' Complaint—filed on September 2, 2011—is appropriate. Under this Court's six-year statute of limitations, 28 U.S.C. § 2501, Plaintiffs' Complaint is timely if the takings claim did not accrue before September 2, 2005. Under the stabilization doctrine, the test is easily met.

The Federal Circuit and this Court have repeatedly recognized that under the stabilization doctrine, the accrual of a takings claim may be postponed in situations where there is "justifiable uncertainty" regarding the permanence of the taking. *See, e.g., Boling v. United States*, 220 F.3d 1365, 1372 (Fed. Cir. 2000). Plaintiffs have alleged that up to 2008, the Government has pursued a

solution to the drainage problem or has litigated the issue of its drainage obligation. As recently as July 2008, the Government announced that it would implement a drainage service plan. While the Government simply disregards the events of the last decade in its motion, the facts in the Complaint show that accrual before September 2, 2005 was indeed uncertain, which is enough to defeat the Government's motion.

Alternatively, the Government's motion fails because Plaintiffs' claim has only recently accrued. Plaintiffs allege that they have been able to ascertain the extent of the damage to their farmlands only within the last few years. Between 2009 and 2010, the Government has made clear that it will not provide drainage to Plaintiffs' farmlands and that local water districts should somehow bear the burden. *Now* (within six years of the Complaint), this has made the extent of damage to Plaintiffs' farmlands reasonably foreseeable for a "final account [to] be struck." *See United States v. Dickinson*, 331 U.S. 745, 749 (1947). Since the Government neglects to account for this, the seven options it offers for possible accrual dates from the 1960s through 2000 are simply wrong. For these reasons, too, the Government's motion must be denied.

III. FACTUAL BACKGROUND

Though extensive, the factual background set forth by the Government is glaringly incomplete. Plaintiffs do not dispute the Government's acknowledgment that Plaintiffs' farmlands require drainage, *see* United States Re-filed Motion to Dismiss and Memorandum in Support ("Re-filed Initial Brief") at 3-4, and Plaintiffs do not quarrel with the Government's overview of the legislative history of the San Luis Unit and its construction. *Id.* at 4-7. Plaintiffs certainly do not disagree with the United States' multiple admissions of its failure to provide drainage to the owners of drainage-impaired farmlands. *Id.* at 9-10, 27, 29.

Plaintiffs do, however, take issue with how the Government has omitted relevant facts and shaved off a decade from the story. The Government's lopsided picture of its efforts to provide

drainage to Plaintiffs' farmlands conveniently serves the motion (by ignoring facts that go toward delayed accrual), but it is simply inaccurate. Plaintiffs are thus compelled to fill in important gaps and then pick up the story where the Government left off.

A. Drainage to the San Luis Unit Was to be Provided in Phases.

To begin with, the Government did not explain that the initial drainage system it was tasked with constructing was to be completed in phases. The 1965 "Contract Between the United States and Westlands Water District Providing for Construction of a Water Distribution and Collection System ('1965 Contract')" paved the way for the construction of a distribution system for Central Valley Project water to be delivered to landowners and for drainage to be carried out. Compl. ¶¶ 36-39; *see also* 1965 Contract at 2 (Stip. Fact D [App. 04 {JA00182}]). The 1965 Contract provided that construction of distribution and accompanying drainage facilities would take place in construction groups under a phased approach. Compl. ¶¶ 38-39; 1965 Contract at 4-5 (Stip. Fact D [App. 04 {JA00184-JA00185}]). The drainage collector system that was to serve the 42,000 acres in the northeastern part of the Westlands Water District ("Westlands") constituted the project's first phase, with subsequent phases to follow. Compl. ¶¶ 46-51.

Further, when it was determined that the ceiling for the distribution systems and drains was insufficient to cover expected future costs, Congress provided additional funds "for continuation of construction of distribution systems and drains on the San Luis Unit." Compl. ¶¶ 49-51; *see also* Public Law 95-46 (1977) (Stip. Fact M [App. 12 {JA00447}]); Bureau of Reclamation, San Luis Drainage Feature Re-evaluation Feasibility Report at 49 (Mar. 2008) (Stip. Fact NNN [App. 07 {JA00308}]).

B. Following the Closure of the Kesterson Reservoir, the United States Continued to Pursue Its Drainage Obligation.

The ultimate closure in 1986 of the Kesterson Reservoir to drainage by no means concluded the Government's efforts to supply drainage to the San Luis Unit. Prior to closure, the Secretary of the Department of Interior ("Interior") issued the following statement:

> [Interior] recognizes it has responsibilities to those with whom it has contracted for the delivery of irrigation water. Irrigated agriculture clearly is important to the economy of California and the Nation. We have been and we will continue to diligently seek scientific solutions to this issue. . . . The Secretary [of Interior] remains committed to seeking a permanent solution.

Compl. ¶ 58; *see also* Statement of Secretary of Interior on Kesterson National Wildlife Refuge, Mar. 15, 1985 (Stip. Fact W [App. 18{JA00575-JA00576}]). Moreover, in separate legal proceedings, the Government acknowledged that since the closure of the Kesterson Reservoir, it "has supported efforts made to provide drainage." Compl. ¶ 67; *see* Memorandum of Points and Authorities in Support of Federal Defendants' Motion to Dismiss at 3:6-7, *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. Apr. 20, 1992) ("Federal Defendants' 4/20/1992 Brief") [Pl. Fact P-F [App. P01{PA00003}]).

This commitment for a permanent solution manifested itself in programs and reports that emerged in the late 1980s and early 1990s. In 1989, Interior's Bureau of Reclamation ("Bureau") formed the San Luis Unit Drainage Program, which sought to "achieve a long-term solution to the drainage problem in the San Luis Unit." *See* M. Delamore Decl. at 2, *Firebaugh Canal Co. v. United States*, No. CV-F-88-634 (E.D. Cal. Feb. 11, 1991) (Pl. Fact P-B [App. P02 {PA00021}]). In March 1990, the Bureau released a Plan of Study for the San Luis Unit Drainage Program, which echoed its intent to "to identify and implement a long-term solution to the drainage problem of the [San Luis Unit]" and affirmed the Bureau's commitment to comply with the drainage requirements of the stipulated judgment in *Barcellos & Wolfsen, Inc. v. Westlands Water District*

("*Barcellos* Judgment"). Reclamation, San Luis Unit Drainage Program Plan of Study (March 1990), at 1-4 (Pl. Fact P-C [App. P03 {PA00029}]). The Bureau contemplated it would satisfy its drainage obligations through "planning and implementing facilities that provide only short or intermediate term drainage services, while long-term solutions are being developed." *Id.* (PA00029). Its Plan of Study even set forth a schedule of work activities through which these tasks would be accomplished. *Id.* (PA00031-PA00033).

In 1990, the federal-state interagency program, the San Joaquin Valley Drainage Program, issued "A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley" ("1990 Management Plan"). *See* 1990 Management Plan (Stip. Fact EE [App. 24 {JA00719-JA00782}]). The program's purpose was to "to identify measures to help solve immediate drainage-related problems on the west side of the San Joaquin Valley and to develop a comprehensive plan for their long-term management." Bureau of Reclamation, San Luis Unit Drainage Program Plan of Study (March 1990), at 1-4 (Pl. Fact P-C [App. P03 {PA00029}]).

In 1991, pursuant to the *Barcellos* Judgment and as part of its continuing efforts to provide drainage to the San Luis Unit, the Bureau submitted a Draft Environmental Impact Statement ("DEIS"), under the National Environmental Policy Act ("NEPA"), for the San Luis Drainage Program. Compl. ¶ 66; *see also* Judgment, *Barcellos*, No. CV-79-106 (E.D. Cal. Dec. 30, 1986) (Stip. Fact BB [App. 21 {JA00591-JA00648}]); San Luis Unit Drainage Program, Central Valley Project, California, DEIS (Dec. 20, 1991) (Stip. Fact GG [App. 23{JA00667, JA00672-JA00679}]). The DEIS's first page states:

> [T]he San Luis Drainage Program . . . will, at least, address drainage needs **through the year 2007** . . . and be compatible with potential long-term solutions. The ultimate goal of the Program is to provide a long-term solution to the agricultural drainage problem in the San Luis Unit.
>
> . . . .

> A long-term solution denotes a balanced condition in which water or salts do not further accumulate in the agricultural environment so that irrigated agriculture can continue indefinitely.

Id. (Stip. Fact GG [App. 23{JA00667}]) (emphasis added). In litigation, the Government took the position that through the DEIS, the Bureau "formally endorsed the preferred alternative . . . as its current best 'plan' to satisfy the criteria of the [*Barcellos*] Judgment and **to solve the drainage problem**." *See* Compl. ¶ 67; *see also* Federal Defendants' 4/20/1992 Brief, at 9, *Sumner Peck*, No. CV-F-91-048 [Pl. Fact P-A [App. P01 {PA00009}]) (emphasis added).

C. The United States' Obligation to Provide Drainage Under the San Luis Act Was Mired in Litigation Until 2000.

As reported by the Government, its closure of the Kesterson Reservoir and its cessation of any drainage service prompted two lawsuits that were eventually consolidated to resolve the common allegation that the United States was obligated to complete the San Luis Drain in order to provide drainage to farmlands in the San Luis Unit. Compl. ¶ 67; *see also* Complaint, *Firebaugh*, No. CV-F-88-634 (E.D. Cal. filed Dec. 9, 1988) (Stip. Fact CC [App. 22 {JA00649-JA00664}]), and Complaint, *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) (Stip. Fact FF [App. 25 {JA00783-JA00845}]); *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. May 26, 1992) (order re consolidation) (Stip. Fact HH [App. 26 {JA00847}]). In those cases, the United States contended that "subsequent changes in the law and environmental compliance made compliance with the San Luis Act impossible, and . . . excused the [United States] from performing th[e] duty [to provide drainage]," *see Firebaugh*, 203 F.3d 568, 571 (9th Cir. 2000) (Stip. Fact QQ [App. 06 {JA00239}]) , but this position was by no means a foregone conclusion or an undisputed fact. Rather, it was a central dispute to the litigation that was fiercely contested. *See id.* at 572-73 (JA00240). Accordingly, from 1988, when the *Firebaugh* litigation commenced, through the 1994 trial in the consolidated cases in the United States District Court, and up until the United States

Court of Appeals for the Ninth Circuit's affirmation and subsequent remand to the District Court in 2000, the drainage issue was entangled in litigation and squarely before the federal courts in California. Compl. ¶¶ 67-78; *see also Firebaugh*, 203 F.3d at 572-73 (JA00240).

At no point during the course of that litigation was the Government ever relieved of its obligation to provide the drainage that had been imposed by the San Luis Act. In fact, just the opposite occurred. The obligation was recognized by the District Court in 1993, Compl. ¶ 69; *see also Firebaugh*, No. CV-F-88-634 (E.D. Cal. May 17, 1993) (order re partial summary judgment) (Stip. Fact II [App. 27 {JA00849-JA00876}]), and reflected in the Findings of Fact the District Court issued in 1994. Compl. ¶¶ 71-73; *see also Firebaugh*, No. CV-F-88-634 (E.D. Cal. Dec. 16, 1994) (findings of fact and conclusions of law) (Stip. Fact NN [App. 32 {JA01076-JA01122}]). It was again confirmed by the District Court in 1995, Compl. ¶ 74; *see Firebaugh*, No. CV-F-88-634 (E.D. Cal. Mar. 12, 1995) (partial judgment re statutory duty) (Stip. Fact OO [App. 33 {JA01123-JA001136}]), affirmed by the Ninth Circuit in February 2000, Compl. ¶ 75; *see Firebaugh*, 203 F.3d at 570 (JA000238), and pushed to implementation by the District Court under remand from the Ninth Circuit later that year. Compl. ¶ 77; *see Firebaugh*, No. CV-F-88-634 (E.D. Cal. Dec. 18, 2000) (order re statutory duty to conform to Ninth Circuit) (Stip. Fact RR [App. 35 {JA01139-JA01143}]) ("Drainage Order").

D. Through 2008, the United States Continued Its Efforts to Provide Drainage to Plaintiffs' Farmlands to Satisfy Its Statutory Obligation and the Drainage Order.

Following the Ninth Circuit's affirmation of the District Court's finding that the United States had unlawfully withheld drainage services from Westlands in violation of the San Luis Act, the United States set out to satisfy its statutory and court-ordered obligation to provide drainage to lands within the San Luis Unit. Compl. ¶¶ 78-89, 93-94.

The Government began by providing an overview of its plan and timeline, which it did with its April 2001 release of a "Plan of Action for Drainage to the San Luis Unit Central Valley Project ('Plan of Action')." Compl. ¶ 79; *see also* Bureau of Reclamation, Plan of Action (Apr. 18, 2001) (Stip. Fact SS [App. 36 {JA01144-JA01167}]). In it, the Government stated it would "initiate immediately a detailed review of all reasonable alternatives for providing drainage service to lands within the San Luis Unit" in order to make "a decision on how to proceed with providing drainage service within the San Luis Unit." Plan of Action at 1 (JA01145). By 2005, it expected to reach this decision. *Id.* at 3 (JA01147).

Near the end of 2001, the Government issued the "San Luis Unit Drainage Feature Re-Evaluation Preliminary Alternatives Report ('Preliminary Alternatives Report')." Compl. ¶ 79; *see also* Bureau of Reclamation, Preliminary Alternatives Report (Dec. 2001) (Stip. Fact TT [App. 17 {JA00530-JA00573}]). The Report made the Government's objective clear: "The purpose of the San Luis Drainage Feature Re-evaluation is to identify for prompt implementation a measure or combination of measures to provide drainage service to the [San Luis Unit]." *Id.* at ES-1 (JA00536). The Government represented that it would "formulate and implement a plan that support [*sic*] sustainable agriculture by providing agricultural drainage service to the [San Luis Unit] that achieves long-term, sustainable salt and water balance in the root zone of irrigated lands." *Id.* at ES-2 (JA00537). The Government repeated this statement in several hefty reports and studies it issued almost every year throughout the decade. *See infra*.

Toward this end, the Preliminary Alternatives Report "identifie[d] the range of preliminary alternatives that could be utilized to meet the court's order to provide drainage service to the [San Luis Unit]," and it anticipated that "beyond 2005" drainage service would be a reality. *Id.* at ES-1

to ES-2 (JA00536-JA00537). In the meantime, the Government noted that it would also evaluate potential interim or short-term actions to provide drainage service by 2005. *Id.* at ES-5 (JA00540).

The "San Luis Drainage Feature Re-evaluation Plan Formulation Report ('Plan Formulation Report')" was issued in December 2002, continuing the Government's efforts to comply with the Drainage Order. Compl. ¶ 80; *see also* Bureau of Reclamation, Plan Formulation Report at P-1 (Dec. 2002) (Stip. Fact XX [App. 39 {JA01212}]). This document set forth the Government's analysis of the various alternatives for providing drainage to the San Luis Unit, and it identified the "In-Valley Alternative"—combining a drain water collection system, regional drain water reuse facilities, selenium treatment, reverse osmosis treatment, and evaporation ponds for salt disposal—as the option the Government intended to pursue to meet its drainage obligation. *Id.* at ES-2 (JA01213). In this report, the Government conveyed its plan to prepare an Environmental Impact Statement ("EIS") in 2003 pursuant to NEPA and to initiate permitting work given the complexity of the project and "the need to provide prompt drainage service." *Id.* at 7-7 (JA01247).

In July 2004, the Government sought to incorporate "land retirement" among the alternatives for providing drainage to the San Luis Unit and issued its "Plan Formulation Report Addendum" to reflect this expanded scope and a revised timeline. Compl. ¶ 81; *see also* Bureau of Reclamation, San Luis Drainage Feature Re-evaluation, Plan Formulation Report Addendum, at E-2 to E-3 (Jul. 2004) (Stip. Fact EEE [App. 46 {JA01407-JA01408}]).

The United States issued a Draft EIS in May 2005, and the Final EIS followed in May 2006. Compl. ¶ 82; *see also* Bureau of Reclamation, San Luis Drainage Feature Re-evaluation, Draft EIS (May 2005) (Stip. Fact III [App. 50 {JA01467}]); Bureau of Reclamation, San Luis Drainage Feature Re-evaluation, Final EIS (May 2006) (Stip. Fact KKK [App. 52 {JA01559}]). Both NEPA documents plainly announced that the purpose of the proposed federal action was to

meet the needs of the Unit for drainage service, to fulfill the requirements of the Ninth Circuit Order, and to be completed under the authority of the San Luis Act. Draft EIS at ES-1 (JA01467); Final EIS at ES-1 (JA01559).

In March 2007, the United States adopted its NEPA Record of Decision in which it selected the "In-Valley/Water Needs Land Retirement Alternative" as the project to fulfill its drainage obligation as well as the requirements of the Ninth Circuit Order. Compl. ¶¶ 84-85; *see also* Bureau of Reclamation, San Luis Drainage Feature Re-evaluation Record of Decision ("Record of Decision") at 1 (Stip. Fact LLL [App. 10 {JA00405}]). The selected alternative included drainage reduction measures, drainage water reuse facilities, treatment systems, and the retirement of nearly 200,000 acres of land from irrigated farming. *Id.* In selecting this alternative, the Government acknowledged that the project's implementation "would likely require new authorizing legislation to increase the appropriations ceiling for funding beyond what was authorized by the San Luis Act." Compl. ¶ 86; Record of Decision at 1 (JA00405).

Accordingly, in 2008, the Bureau completed and submitted to the United States Congress its "San Luis Drainage Feature Re-evaluation Feasibility Report ('Feasibility Report')," to determine the feasibility of implementing the "In-Valley/Water Needs Land Retirement Alternative" selected. Compl. ¶ 87; Feasibility Report (Stip. Fact NNN [App. 07 {JA00250}]); U.S Dept. Interior, Letter to Hon. Jeff Bingaman (July 8, 2008) (Stip. Fact OOO [App. 54 {JA01827-JA01829}]). The Feasibility Report presented the relative economic benefits and costs of the selected plan, and observed that the total estimated cost to implement the "In-Valley/Water Needs Land Retirement Alternative" was $2.69 billion, but that the "combined remaining construction cost ceiling for the San Luis Unit [was] $428,674,777." Feasibility Report, at iii, viii (JA00250, JA00255). The Bureau recommended that the plan be implemented, noting it would

require Congressional action to increase the cost ceiling for the San Luis Unit. *Id.* at xxvi, 99 (JA00273, JA00318).

Thus, at no point prior to September 2, 2005 (six years before Plaintiffs' Complaint was filed) was the Government ever relieved of its obligation to provide drainage service imposed by the San Luis Act. In fact, from the moment the Ninth Circuit affirmed that obligation through at least July 2008, the Government continued a concerted process to meet its obligation of providing drainage to the farmers of the San Luis Unit. Compl. ¶¶ 78-89, 93-94.

E. Since Adopting the NEPA Record of Decision, the Government Has Failed to Pursue Any Legislative Action to Implement the Full Proposal and Promptly Provide Drainage to Plaintiffs' Farmlands and the San Luis Unit In Its Entirety.

Since issuing the Feasibility Report in July 2008, with its plain recognition that legislative changes would be necessary for full implementation, Interior and the Bureau have made no motion to seek such changes from Congress. Compl. ¶¶ 90, 92, 95, 101.

Under the purview of the District Court, which to date has been overseeing the Government's efforts to bring drainage to the San Luis Unit, the Bureau has provided periodic updates of its progress. Compl. ¶ 78. Prompted by the Court, the Government supplied a "Control Schedule" in November 2009 that outlined the actions it intended to pursue between 2010 and 2019. Compl. ¶ 94; *see also* Supplemental Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Nov. 18, 2009) (Stip. Fact RRR [App. 57 {JA01845-JA01855}]). The Schedule was troubling, however, because it proposed limited expenditures for only a subpart of the San Luis Unit and did nothing to address a complete drainage solution for the full expanse of drainage-impaired farmlands in the San Luis Unit. *Id.* at 3:1-5 (JA01847). The Government also reaffirmed its intention to finalize the elements of a legislative proposal on a long-term drainage strategy by the end of 2009. *Id.* at 4:8-11 (JA01848). Importantly, it never did. Compl. ¶ 95. Since issuing its

November 2009 Control Schedule, in all of its periodic updates through September 2, 2011 (when this case was filed), the Government has made no mention of any legislative proposal to for the drainage service plan it had committed to implement. *Id.* ¶¶ 100-01; *see also* Federal Defendants' Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Apr. 1, 2010) (Stip. Fact TTT [App. 59 {JA01862-JA01870}]); Federal Defendants' Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Oct. 1, 2010) (Stip. Fact VVV [App. 61 {JA01880-JA01888}]); Federal Defendants' Status Report, *Firebaugh*, No. CV-88-0634 (E.D. Cal. Apr. 1, 2011) (Stip. Fact WWW [App. 63 {JA01889-JA01896}]).

Instead, through telling communications with U. S. Senator Dianne Feinstein in September 2010, the Bureau proposed an alternative strategy to Congress. Compl. ¶ 96; *see also* U.S. Dept. Interior, Letter to Sen. Diane Feinstein (Sept. 1, 2010) (Stip. Fact UUU [App. 60 {JA01875-JA01879}]). In the letter, the Bureau reiterated that it could not implement the entire Record of Decision but only one subunit of drainage facilities within the Westlands Water District. *Id.* (JA01876). Further, instead of implementing the Record of Decision's "In-Valley/Water Needs Land Retirement Alternative," the Bureau proposed an alternative action whereby Westlands and other San Luis water districts somehow assume the responsibility from the United States for providing drainage to the Unit. *Id.* ("We believe the best way to accomplish those goals is to transfer responsibility for irrigation drainage to local control . . ."). After 50 years, the statutory, contractual, and legal commitments by the United States were effectively and unilaterally undone by the United States.

F. This Court Has Never Adjudicated a Takings Claim on the Merits Stemming from the United States' Failure to Provide Drainage.

Despite the Government's clear implication to the contrary in its motion, to Plaintiffs' knowledge, at no point during this extensive history has the Court of Federal Claims ever

adjudicated on the merits any inverse condemnation claim brought against the Federal Government for its failures to provide drainage to landowners in the San Luis Unit.

In the 1980s, three takings claims were filed in the Court of Claims. *See Claus v. United States*, No. 270-85L (Cl. Ct. filed May 9, 1985); *Schwab v. United States*, No. 292-85L (Ct. Cl. filed May 16, 1985); *Freitas v. United States*, No. 218-88L (Ct. Cl. filed Apr. 5, 1988). However, none of these cases involved properties within the San Luis Unit or claims related to the Government's failure to provide drainage. Instead, they concerned properties outside of Fresno County near to or adjoining the Kesterson Reservoir, the discharge point for the San Luis Drain when it operated. *See Claus*, No. 270-85L at ¶¶ 2, 4 (DA000004-DA000005); *Schwab*, No. 292-85L at ¶ 2 (DA000010); *Freitas*, No. 218-88L at §§ II-III(DA000015-DA000016). And the takings claim was based on harms to the plaintiffs' properties based on leakage from the Kesterson Reservoir, not a failure to provide drainage. *See Claus*, No. 270-85L at ¶¶ 8-11 (DA000006-DA000007); *Schwab*, No. 292-85L at ¶¶ 8-11 (DA000012-DA000013; *Freitas*, No. 218-88L at §§ IV-X & Ex. A (DA000016-DA000018, DA000021-000028). Moreover, all of these cases settled, none were adjudicated on its merits. *See* Re-filed Initial Br. at 24.

To be sure, the lawsuits following the Kesterson Reservoir closure that did concern the Government's failure to comply with its drainage obligation – *Firebaugh* and *Sumner Peck* – involved takings claims against the United States, as the Government has duly pointed out. Re-filed Initial Br. at 15-16. But neither the *Firebaugh* plaintiffs nor the *Sumner Peck* plaintiffs filed their claims in the Court of Federal Claims, and neither claim was ever heard on the merits.

With respect to the *Sumner Peck* plaintiffs, the District Court initially dismissed the claim against the United States for lack of jurisdiction on the ground that the court was the incorrect venue to proceed with damage claims against the United States. *Sumner Peck*, 823 F. Supp. 715,

749 (E.D. Cal. 1993). The court ultimately adopted a Stipulation between the *Sumner Peck* plaintiffs and the United States to modify the District Court's initial order to stay the taking claim pending transfer to the Court of Federal Claims. *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. Oct. 24, 2002) (decision and order re motion to modify) (Stip. Fact VV [App. 37 {JA01190}]). Six weeks later, the parties settled the action, which included a waiver of the inverse condemnation claims against the Government. *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. Feb. 6, 2003) (decision and order re consent decree and consent judgment) (Stip. Fact YY [App. 40 {JA01251-JA01317}]).

The *Firebaugh* plaintiffs saw their takings claims eventually transfer to the Court of Federal Claims, but Judge Bruggink dismissed the action for lack of jurisdiction under 28 U.S.C. § 1500 as a result of pending tort claims by the same plaintiffs in the United States District Court. *See Firebaugh Canal Water District v. United States*, No. 05-262L (Fed. Cl. Mar. 29, 2006 and reissued May 25, 2006) (Stip. Fact JJJ [App. 51 {JA01542-JA01552}]).

Further, no takings claim has been pursued in the Court of Federal Claims as a class action. The Government notes that the 1979 *Barcellos* litigation in the District Court involved a class action, *see* Re-filed Initial Brief at 14-15, but it was a defendant class action in which certain landowners in Westlands sued another group of landowners (the putative class) in the water district based on a water allocation dispute. *See* Third Am. Compl., *Barcellos*, No. CV-79-106 (E.D. Cal. filed July 25, 1979) (Stip. Fact P [App. 15 {JA00493-JA00524}]). In addition, no inverse condemnation claims were ever asserted against the United States in that lawsuit or in any of the counterclaims or cross-claims. *See id.* Class Notice, *Barcellos*, No. 79-106 (E.D. Cal. Dec. 10, 1981) (Stip. Fact Q [App. 11 {JA00044}) (providing litigation history).[1] Moreover, in *Barcellos*, the Government's duty to provide drainage was not a central issue before the court, which

[1] [Footnote deleted.]

primarily considered water rate and supply issues between Westlands landowners under the 1963 contract between the Government and Westlands. *See generally* Third Am. Compl., *Barcellos*, No. CV-79-106 (E.D. Cal. filed Jun. 13, 1979) (Stip. Fact P [App. 15 {JA00493-JA00524}]); *Barcellos*, 491 F. Supp. 263, 265 (E.D. Cal. 1980).

IV. LEGAL ARGUMENT

A. Standard of Review.

The standard for ruling on the United States' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule of the United States Court of Federal Claims ("RCFC") 12(b)(1) is well-settled. *Cent. Pines Land Co. v. United States*, 99 Fed. Cl. 394, 397 (2011). In deciding the motion, this Court must presume all of Plaintiffs' undisputed factual allegations to be true and must construe all reasonable inferences in favor of Plaintiffs. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982). To defeat the motion, Plaintiffs "must make only a prima facie showing of jurisdictional facts" in their Complaint. *Figueroa v. United States*, 57 Fed. Cl. at 492. However, where the United States has challenged the truth of the jurisdictional facts alleged by Plaintiffs, the Court may consider relevant evidence in order to resolve those disputed facts. *See Reynolds v. Army & Air Force Exchange Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). The relevant issue in a motion to dismiss under RCFC 12(b)(1) "is not whether [Plaintiffs] will ultimately prevail but whether [they are] entitled to offer evidence to support the[ir] claims." *See Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (citations omitted). Although Plaintiffs bear the burden of establishing subject matter jurisdiction by a preponderance of the evidence, their Complaint should not be dismissed "unless it is beyond doubt" Plaintiffs can "prove no set of facts which would entitle [them] to relief." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

B. Plaintiffs' Takings Claim Is Not Time-Barred.

Under the standard of review, the Government's motion to dismiss Plaintiffs' Complaint as time-barred fails. The factual allegations in the Complaint, none of which the Government disputes, make clear that jurisdiction is proper. Further, the Government's motion is premised on incorrect standards for accrual and a disregard of both the Government's legal duties as well as its efforts to address the drainage problem through at least 2008. When these are considered, it is evident that Plaintiffs' takings claim did not accrue before September 2, 2005—or outside of this Court's limitations period—and the Complaint survives.

1. Plaintiffs' Takings Claim Does Not Accrue Until the Situation Has Stabilized.

Plaintiffs' takings claim accrues when "all the events which fix the government's alleged liability have occurred *and* [Plaintiffs were] or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original). However, a more nuanced test for accrual applies when the taking is a result of a gradual and continuous process.

In such cases, the Supreme Court has held that a taking accrues when "the situation becomes stabilized." *Dickinson*, 331 U.S. at 749. The Federal Circuit has defined this as the point "when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined." *Boling*, 220 F. 3d at 1370-71. Thus, where the gradual taking of property is involved, plaintiffs can postpone filing suit until "the consequences of inundation have so manifested themselves that a final account may be struck." *Dickinson*, 331 U.S. at 749. Moreover, courts can refrain from applying the principles of accrual too strictly in unique cases involving

takings by a continuous physical process. *Id*. ("procedural rigidities should be avoided" when determining accrual dates in flooding context).

The Government's contention that the stabilization doctrine is inapplicable here—which it characterizes as involving the "distinct non-event" of the Government's failure to provide drainage, *see* United States Supplemental Brief in Support of Its Motion to Dismiss ("Supplement") at 5—is both misleading and inconsistent with positions taken elsewhere in its motion. First, the argument misplaces the proper focus of the takings analysis under the stabilization doctrine, which is to be on the *effects* of the governmental action, not on the government action itself. *See Applegate v. United States*, 35 Fed. Cl. 406, 414 (1996) ("[T]he effect of the government action causing damage . . . is the proper focus of the takings analysis.") (citations omitted).

And second, the argument disregards Defendant's multiple acknowledgments of and references to the physical invasion of rising water tables alleged in Plaintiffs' Complaint. *See, e.g.,* Initial Brief at 2-3; Supplement at 2-3. Plaintiffs' Complaint clearly alleges that the Government has taken and befouled their properties through the inundation of water, and that such a process has been continuous and gradual over time. *See* Compl. ¶¶ 106-108. Both the Supreme Court and this Court have ruled the application of the stabilization doctrine entirely appropriate in these circumstances. *See, e.g., Dickinson*, 331 U.S. at 749 (takings caused by "superinduced additions of water" emerging gradually over time subject to stabilization doctrine); *Bagwell v. United States*, 21 Cl. Ct. 722, 729 (1990) (applying stabilization doctrine to determine accrual of takings claim based on flowage easement).

2. The Government's Litigation of Its Drainage Obligation and Its Attempts to Fix the Drainage Problems Stayed the Accrual Date and Made it Uncertain.

Under the stabilization doctrine, the accrual of a takings claim is postponed when "justifiable uncertainty" exists regarding the permanence of the taking. *See Applegate v. United*

States, 25 F.3d 1579, 1583-84 (Fed. Cir. 1994); *Banks v. United States*, 314 F. 3d 1304, 1309 (Fed. Cir. 2003) (the "critical element that delay[s] stabilization . . . is the justifiable uncertainty about the permanency of the taking."). The law is clear in this Court that dismissal of a takings claim based on the statute of limitations is improper if the permanency of the taking is uncertain.

In *Applegate*, a class of 271 landowners brought a takings claim against the Government due to harms to their beachfront properties suffered beginning in the 1950s when a nearby deep-water harbor project constructed by the Army Corps of Engineers caused sands to recede and washed away the plaintiffs' shoreline properties. 25 F.3d at 1580. The trial court dismissed the 1992 complaint due, in part, to the six-year statute of limitations. *Id.* at 1581.

The Federal Circuit reversed despite the passage of nearly four decades between the erosion process set in motion by the Army Corps and the plaintiffs' complaint. *Id.* at 1583. Under the stabilization doctrine, the Court found that the slow physical erosion process coupled with the Government's promises to correct the erosion "made accrual of the landowner's claim uncertain." *See id.* at 1582-83. Those government promises included a 1962 federal law authorizing millions of dollars for a sand transfer plant, which purported to reverse the continuous erosion process and prevent the permanent destruction of the plaintiffs' properties; the 1968 approval by the Senate Public Works Committee of an Army Corps plan to restore the beaches; and the 1988 renewal of the Government's proposal to build the sand transfer plant, after a period of delay in the 1970s. *Id.*

On that record, with "plans for a sand transfer plant pending," the Federal Circuit held that the landowners were "justifiably uncertain about the permanency of the erosion and the taking." *Id.* at 1582-83 (landowners "did not know when or if their land would be permanently destroyed" and "had no way to determine the extent, if any, of the permanent physical occupation"). Absent "any predictability of the extent of damage to the land," the Court found that by 1986—six years

before the *Applegate* landowners filed suit—"this taking situation had not stabilized." *Id.* at 1583. Accordingly, the Federal Circuit ruled that the uncertainty stemming from the Government's proposals to correct the damage the plaintiffs had complained about "stayed accrual of the claim," and the statute of limitations did not bar the action. *Id*.

The Federal Circuit reached the same conclusion in *Northwest La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1291 (Fed. Cir. 2006). There, a state wildlife commission brought a takings suit against the United States, alleging that the Army Corps damaged a lake that the plaintiff had maintained for recreation, by allowing the overgrowth of hydrilla, an aquatic weed, that rendered the lake inaccessible, unmanageable, and virtually useless. *Id.* at 1286. By 1996, the weed levels prompted the plaintiff to request permission from the Army Corps to drain, or draw down the lake, its standard mechanism for controlling unwanted vegetation. *Id.* at 1287-88. In January 1997, the Army Corps refused to allow the drawdown; in 2001, the plaintiff brought suit. *Id.* at 1289.

The Federal Circuit disagreed with the 1994 accrual date adopted by the trial court, given that the alleged damages were still "unquantifiable and speculative" at that point:

> In 1994, when the Corps had not yet issued a final refusal, there was only the possibility or threat of damage or a taking. A possible future taking of property cannot give rise to a present action for damages. Thus, in this case, until the hydrilla had grown, and had grown to harmful levels, *and* the Corps refused to drain the lake to alleviate the harm caused by the *overgrowth* of hydrilla, damages were not "present," i.e. they were still unquantifiable and speculative. Until damages were quantifiable and present, the potential harm that could be caused by the hydrilla was only a threat.

Id. at 1291 (emphasis in original, citations omitted). Because the "nature and extent of harm was not clear in 1994," when the plaintiff "could only conjecture about potential harms or the prospect that the Corps may agree to mitigate those harms," the court ruled that the accrual date was no earlier than January 1997, the date the Army Corps refused the drawdown. *Id.* at 1292.

Further, the Federal Circuit has indeed tolled the statute of limitations in takings cases where litigation and court orders have contributed to the uncertainty as to the permanence of a claim. In *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994), the plaintiff landowners filed suit in 1991 for the government's taking of their swamp and marshland properties. *Id.* at 629. The lands were subject to flooding during the wet season, and in 1964, they had been slated for a development project involving levees and pumping stations approved by the U.S. Army Corps of Engineers to control the flooding. *Id.* at 629. After the first phase of the project was completed in 1973, the Environmental Protection Agency raised issues as to the propriety of constructing the levees with dredged or fill material based on Clean Water Act concerns. *Id*. Subsequently, the Corps issued an order in 1976 modifying the project and halting construction of a pumping station. *Id*. Local property owners filed suit in state court in 1977 and secured an injunction that enjoined the abandonment of the original project. *Id.* Additionally, in 1977, the property owners also filed a lawsuit in federal district court to overturn the Corps order that modified the original plan. *Id.* In 1982, the United States Court of Appeals for the Fifth Circuit, while agreeing with the lower courts that the Corps did not abuse its discretion, remanded the case so that the district court could determine whether completion of the modified project could be assured. *Id*. In August 1984, the district court ordered the original project to proceed when it found it could not be assured that the modified project could be completed. *Id*. at 630. In December 1984, the EPA began proceedings to determine whether to block the project by denying it a necessary Clean Water Act permit, and the district court stayed its August 1984 order pending that decision. *Id*. In October 1985, the EPA issued its Final Determination to permanently block the project. *Id*. The plaintiffs' inverse condemnation lawsuits were filed between June and October 1991. *Id*.

On these facts, the Federal Circuit rejected the lower court ruling that the statute of limitations barred the *Creppel* plaintiffs' permanent takings claim. *Id*. at 634. The Federal Circuit reasoned that **the August 1984 district court order "restored some potential expectation of completion of the Project and thus some measure of the property's value**." *Id*. at 634 (emphasis added). It further found that for the entire period the district court order was in effect (i.e., until it was stayed), the plaintiff landowners "owned 3,200 acres of land that appeared destined for development" and that "[b]y virtue of the district court's temporary restoration of the original [p]roject, the landowners regained the 'reasonable expectation' that their property value would increase." *Id*. The Federal Circuit found that as long as "the property owners retained some expectation of completion of the [p]roject," the Government's liability for a taking had not been fixed. *Id*. (emphasis added). Moreover, not even the EPA's commencement of hearings on the issue accrued the plaintiffs' claim "because the outcome was unknown" and "[i]t remained unclear" how the EPA would rule and the scope of the ruling. *Id*. Ultimately, the Federal Circuit concluded that the permanent takings claim accrued in October 1985 when the EPA fully vetoed the original project. *Id*.

Creppel – precedent for this Court – demonstrates how the Federal Circuit has consistently found takings claims viable where there is justifiable uncertainty about the extent and permanence of a taking. *See Banks*, 314 F.3d at 1310 (Fed. Cir. 2003) (until Corps reported that erosion was permanent and irreversible, plaintiff remained uncertain as to the permanent nature of the taking). And trial courts in the Court of Federal Claims agree. *See, e.g., Forsgren v. United States*, 64 Fed. Cl. 456 (2005) (governmental efforts through 1999 to address flooding of plaintiff's property that resulted from Government project made accrual uncertain and plaintiff's 2004 complaint timely).

In this case, the Government concedes such uncertainty at least through April 1985 (when the United States and Westlands signed an agreement to close the Kesterson Reservoir). Re-filed Supp. Br. at 6-7. The Government thus recognizes that when the Bureau has diligently and in good faith sought to provide drainage, as it acknowledges was the case through 1985, there can be no accrual. But the facts alleged in Plaintiffs' Complaint, which Defendant has not disputed and this Court must take as true, demonstrate justifiable uncertainty all the way through 2008, well within the limitations period.

Plaintiffs' Complaint is replete with facts—which Defendant dismisses as irrelevant—that demonstrate anything *but* certainty as to how the Government would satisfy its drainage obligations. In 1986, in its settlement of *Barcellos*, the Government agreed to complete a drainage plan by 1991. Compl. ¶¶ 65-66; *Barcellos* Judgment at 20 (Stip. Fact BB [App. 21 {JA00612}]). In 1989, the Bureau formed the San Luis Drainage Program to achieve a long-term drainage solution. *See* M. Delamore Decl. at 2 (Pl. Fact P-B [App. P02 {PA00021}]). In 1990, the Bureau issued a Plan of Study under the San Luis United Drainage Program that echoed its intent "to identify and implement a long-term solution to the drainage problem of the [San Luis Unit]," affirmed its commitment to comply with the drainage requirements of the *Barcellos* Judgment, and set forth a schedule for achieving these tasks. Reclamation, San Luis Unit Drainage Program Plan of Study (March 1990), at 1-4 (Pl. Fact P-C [App. P03 {PA00029, PA00031-PA00033}]). In 1991, the Government presented its plan under the *Barcellos* Judgment to "solve the drainage problem," even while contending it was excused from the obligation. *See* DEIS at 1 (Stip. Fact GG [App. 23 {JA00667}]). These actions undermine Defendant's position that by April 1985, Plaintiffs' harms were a foregone conclusion and the taking certain.

The litigation that commenced in 1988 in *Firebaugh* and in 1991 in *Sumner Peck* to determine the Government's legal obligations to provide drainage to farmlands in Westlands fueled the uncertainty. Compl. ¶ 67; Complaint, *Firebaugh*, No. CV-F-88-634 (E.D. Cal. Dec. 9, 1988) (Stip. Fact CC [App. 22 {JA00649-JA00664}]); Complaint, *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. Jan. 31, 1991) (Stip. Fact FF [App. 25{JA00783-JA00845}]). The nearly 12-year litigation saga that ensued was punctuated by decisions in 1995 from the District Court and in 2000 by the Ninth Circuit which affirmed the Government's obligation to provide drainage service. Compl. ¶¶ 67-77; *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. May 17, 1993) (order re partial summary judgment) (Stip. Fact II [App. 27 {JA00849-JA00876}]); *id.* (E.D. Cal. Dec. 16, 1994) (findings of fact) (Stip. Fact NN [App. 32 {JA01076-JA01122}]); *Firebaugh*, No. CV-F-88-634 (E.D. Cal. Mar. 12, 1995) (order on summary judgment) (Stip. Fact OO [App. 33 {JA01123-JA01136}]); *id.*, 203 F.3d at 570 (Stip. Fact QQ [App. 06 {JA00238}]).

And from 2000 through 2008, under the mandate of the Ninth Circuit and the oversight of the District Court, the Government devised, scrutinized, and implemented a new drainage plan that was to comply with its statutory duty, and now Court Orders, and correct the environmental damage it had caused Westlands' farmlands. *Id*. ¶¶ 77-89; *see generally* Plan of Action (Stip. Fact SS [App. 36 {JA01145}]); Preliminary Alternatives Report (Stip. Fact TT [App. 17 {JA00536}]); Plan Formulation Report (Stip. Fact XX [App. 39 {JA01212}]); Plan Formulation Report Addendum (Stip. Fact EEE [App. 46 {JA01406}]); Draft EIS (Stip. Fact III [App. 50{JA01467}]); Final EIS (Stip. Fact KKK [App. 52 {JA01559}]); Record of Decision (Stip. Fact LLL [App. 10 {JA00405}]). Indeed, in May 2005, on the eve of the limitations period, the Bureau released a Draft EIS that continued to promise drainage to landowners:

> The proposed Federal Action is to provide drainage service to the San Luis Unit. This proposed action would meet the needs of the Unit for drainage

> service, fulfill the requirements of the February 2000 Court Order, and be completed under the authority of Public Law 86-488.

Draft EIS at ES-1 (Stip. Fact III [App. 50 {JA01467}]).

These facts plainly show the absence of any certainty before September 2, 2005 with respect to the permanence of Plaintiffs' takings claim. The permanent nature of the environmental harms to Plaintiffs' farmlands was neither reasonably foreseeable nor well-known to Plaintiffs before September 2, 2005. The Government mired the issue of its drainage obligation in litigation by seeking to be excused from implementing its statutory duty. Compl. ¶¶ 67-78. For years, the Bureau vacillated on its obligation all while under the statutory duty and the contractual promise to provide drainage. Compl. ¶¶ 75, 100-103. Taken together, these events lent uncertainty as to the extent and permanence of the Government's taking in this case. As in *Creppel*, the permanence of the taking of Plaintiffs' farmlands "remained unclear" for them given the shutdown of Kesterson, the ensuing litigation, and the Government's ongoing representations of its intent to reach a drainage solution for the San Luis Unit. *See Creppel*, 41 F.3d at 634. In such circumstances, Plaintiffs "could only conjecture about potential harms or the prospect that the Government might agree to mitigate those harms," just like the plaintiff in *Northwest*. *See Northwest*, 446 F.3d at 1292. And there can be no doubt that from the moment the district court issued its 1995 order, which first recognized the Government's drainage obligation and ordered the Government's compliance, that Plaintiffs have had "reasonable expectations" that their properties would receive such drainage. *See Creppel*, 41 F.3d at 634. Based on these events, Defendant's actions have instilled justifiable uncertainty in Westlands landowners as to whether or when their farmlands would be permanently destroyed due to the lack of drainage service.[2]

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[2] This uncertainty is reflected in Defendant's own motion, which offers this Court no fewer than seven distinct options for accrual dates, *see* Supplement at 9, in the hopes that one of them might stick.

Defendant contends that the 1985 Agreement, in which it refused sole responsibility for providing drainage, and the litigation that followed eliminated any uncertainty surrounding the accrual of Plaintiffs' claim. Re-filed Suppl, Br. at 9-10. But that position contradicts Defendant's actions, including the 1991 drainage plan it prepared and issued. *See Forsgren*, 64 Fed. Cl. 456 (Government's denial of responsibility for flooding not a factor where it continued to pursue efforts to mitigate environmental damage it caused). Defendant also ignores not only the statutory duty under the San Luis Act but also the federal court rulings of 1995 and 2000 as well as the subsequent NEPA Record of Decision in 2007. Simply because the Government took the position in litigation that it was excused from a legal obligation does not make it so. Plaintiffs cannot be expected to presume an outcome contrary to law to suppose a permanent taking. If anything, by, at times, disclaiming its drainage obligation and litigating the issue, the Government fostered increased uncertainty.

3. Prior Takings Cases Asserted Against the Government Do Not Trigger the Statute of Limitations.

None of the previously filed takings cases cited by the Government – including the three 1980s cases the Government has newly referenced – makes Plaintiffs' takings claim untimely, nor do they signify that Plaintiffs are not entitled to their own days in court for their unique property interests, as the Government suggests. Despite the Government's assessment that the existence of these past lawsuits are "most telling," its eleventh-hour effort to present Plaintiffs' takings claim as part and parcel of every past takings claim against the Government relating in any way to the San Luis Act is both misleading and unavailing.

a. The Prior Takings Cases Do Not Undermine Plaintiffs' Justifiable Uncertainty With Respect to Their Claims.

The five other takings cases the Government now highlights – including the *Sumner Peck*

and *Firebaugh* lawsuits the Government has previously argued should be the basis for accrual (*see* Re-filed Supp. Br. at 9, 11) – cannot time-bar Plaintiffs' claim. None of these lawsuits undercut the justifiable uncertainty with respect to Plaintiffs' claims. *Claus v. United States* and *Schwab v. United States* were both filed in 1985. *See Claus*, No. 270-85L at 1 (DA000004) (file date stamp of May 9, 1985); *Schwab*, No. 292-85L at 1 (file date stamp of May 16, 1985). Thus, they cannot serve to establish any certainty by 1985 as to Plaintiffs' claims, especially since the drain had yet to be plugged then and the Government has most recently tendered 1986 as its proposed accrual date. *See Firebaugh*, 203 F. 3d at 572 (Stip. Fact. Z [App. 06 {JA00239}]); Aug. 20, 2012 Mot. to Dismiss Oral Arg. Tr. at 5:10-11; *see also* Re-filed Supp. Br. at 4. *Freitas v. United States* and *Firebaugh*, both filed in April 1988, and *Sumner Peck*, filed in 1991, do not dictate the timeliness of Plaintiffs' claims either. When those lawsuits were filed, drainage plans for the San Luis Unit were still underway, as reflected in a March 1990 Plan of Study and then in a 1991 Draft Environmental Impact Statement that advanced a drainage plan fully endorsed by the Government. *See* Reclamation, San Luis Unit Drainage Program Plan of Study (March 1990), at 1-4 (Pl. Fact P-C [App. P03 {PA00029}]); San Luis Unit Drainage Program, Central Valley Project, California, DEIS (Dec. 20, 1991) (Stip. Fact GG [App. 23{JA00667, JA00672-JA00679}]). Such plans – which bestowed upon landowners in Westlands the expectation that drainage would be provided – made the permanence of any taking uncertain. *See Creppel*, 41 F.3d at 634.

Further, the court rulings resulting from the *Sumner Peck* and *Firebaugh* lawsuits ordering the Government to provide drainage fostered the expectation that the Government would not shirk its orders and that drainage would be provided. *See id*.; Section III.C, *supra*. These events make the permanence of the taking of any farmlands in Westlands by 1986, 1991, or even by 2000 (when the Ninth Circuit affirmed the Government's obligation) or 2001 (when the *Sumner Peck* plaintiffs

filed its supplemental complaint)[3] anything but certain. *See also Applegate*, 25 F.3d at 1580, 1582 (takings lawsuit filed in 1970 a non-factor in court's analysis that found a 1991 takings suit to be timely because of the slow physical process of the taking and the government's ongoing commitment to build sand transfer plant).

b. The Prior Takings Cases Do Not Concern Plaintiffs' Properties, and Some Do Not Even Involve Takings Claims Stemming from the Government's Failure to Provide Drainage.

Further, none of the lawsuits cited by the Government involves Plaintiffs or their properties and cannot serve as the grounds for revoking Plaintiffs' right to have their own days in court. *See United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("The question of whether there is a fifth amendment taking . . . must be based on the particular circumstances of each case."); *United States v. Peewee Coal Co.*, 341 U.S. 114, 117 n. 4 (1951) (a taking "must be determined in light of the particular fact and circumstances involved"). The facts and circumstances of Plaintiffs' claim are distinct from those in any purportedly "similar" case tendered by the Government.

As an initial matter, Plaintiffs were not among those who brought the *Sumner Peck* or the *Firebaugh* lawsuits, nor were their properties involved in either lawsuit. *Compare* Compl. ¶¶ 11-14 *with* Third Am. Compl., *Sumner Peck*, No. CV-F-91-048 (Stip. Fact FF [App. 25 {JA00783-JA00845}]). The Government's focus on the similarities between Plaintiffs' claim and the lawsuits

[3] The Government's newly-added reference to the *Sumner Peck* plaintiffs' Supplemental Complaint filed in 2001 does not aid its cause. Re-filed Initial Br. at 22. Not only does it conflict with the Government's earlier position that most events since 2000 are inconsequential to its motion (*see id.* at 12), the supplemental pleading in no way undermines the justifiable uncertainty with respect to Plaintiffs' takings claims, especially in light of the 2000 Ninth Circuit Order that affirmed the Government's obligation to provide drainage. *See Firebaugh*, 203 F.3d at 570. The court's emphasis on "judicial economy" and concerns about "piecemeal litigation" that has taken over a decade in granting leave to amend was made in the context of an amended pleading that involved the same parties and the same properties that had long been at issue in the case (*see* Re-filed Initial Br. at 22), and did not contemplate precluding claims of other potential litigants not before the court.

filed by the *Sumner Peck* and *Firebaugh* Canal plaintiffs ignore this critical difference. *See* Re-filed Initial Br. at 27-28. Further, the Government does not meaningfully address those allegations unique to Plaintiffs' claim that provide the very basis for applying the stabilization doctrine. *See* Re-filed Initial Br. at 28. Contrary to the Government's assertion otherwise, not even the *Sumner Peck* plaintiffs' 2001 supplemental complaint could allege government actions that promised mitigation measures through 2010, as Plaintiffs' takings claim uniquely and necessarily does. *See* Compl. ¶¶ 79-103. Under these circumstances where Plaintiffs have alleged facts and proffered evidence showing justifiable uncertainty through the limitations period, some similarities in allegations – premised on historical facts that not even the Government disputes – does not make Plaintiffs' claim untimely.

Moreover, *Claus*, *Schwab*, and *Freitas* – the cases newly cited by the Government – do not even concern lands within the Westlands Water District. *Claus*, *Schwab*, and *Freitas* all bear on properties located near to or adjoining the Kesterson Reservoir outside of Fresno County outside of the San Luis Unit. *See Claus*, No. 270-85L at ¶¶ 2, 4 (DA000004-DA000005); *Schwab*, No. 292-85L at ¶ 2 (DA000010); *Freitas*, No. 218-88L at §§ II-III (DA000015-DA000016). These properties are completely distinct from Plaintiffs' farmlands located in Fresno County and which are located in the San Luis Unit. *See* Compl. ¶¶ 12-15. Further, contrary to the Government's assertion that the "closure of Kesterson and the United States' failure to address drainage lead to the filing" of *Claus*, *Schwab*, and *Freitas* (*see* Re-filed Initial Br. at 27), the alleged taking in those newly referenced cases is quite distinct from the one alleged by Plaintiffs, which is premised on the Government's failure to provide drainage. *See* Compl. ¶¶ 1-9. In contrast, the takings claims at issue in *Claus*, *Schwab*, and *Freitas* arose from the Government's actual provision of drainage, specifically leakage from the Kesterson Reservoir – the discharge point for the San Luis Drain –

which had been occurring as a result of the operation of the Drain. *See Claus*, No. 270-85L at ¶¶ 8-11 (DA000006-DA000007); *Schwab*, No. 292-85L at ¶¶ 8-11 (DA000012-DA000013; *Freitas*, No. 218-88L at §§ IV-X & Ex. A (DA000016-DA000018, DA000021-000028). As the allegations of those complaints demonstrate, Defendant's attribution of those cases to the Government's "failure to provide drainage" is not accurate. None of those cases govern when Plaintiffs' claim accrued.

c. The Government's Settlement Payments in Prior Takings Cases Have No Bearing on This Matter.

Finally, the Government's unexplained reference to settlement payments it has made in nearly all of these past takings cases is of no value to the timeliness of Plaintiffs' case because the settlements are simply irrelevant. *Cf. Milton S. Kronheim & Co. v. United States*, 143 Ct. Cl. 390, 401-402 (Ct. Cl. 1958) (settlement not admission of liability). As previously discussed, any takings liabilities that the Government may have settled did not involve Plaintiffs or their properties. *See* Section IV.B.3.b, *supra*. The dispositions of the inverse condemnation claims in *Sumner Peck* – in which the takings claim was waived as part of that settlement – and in *Firebaugh* – in which the settlement was transferred from district court to the Court of Federal Claims on jurisdictional grounds under 28 U.S.C. § 1500 – only confirm that this Court has never adjudicated a takings claim on the merits stemming from the Government's failure to provide drainage. *See Sumner Peck*, No. CV-F-91-048 (E.D. Cal. Feb. 6, 2003) (decision and order re consent decree and consent judgment) (Stip. Fact YY [App. 40 {JA01251-JA01317}]); *Firebaugh*, No. 05-262L (Fed. Cl. Mar. 29, 2006 and reissued May 25, 2006) (Stip. Fact JJJ [App. 51 {JA01542-JA01552}]). Thus, this Court has never made a determination as to the timeliness of any takings claim that has preceded this one. Based on the existence of those other takings lawsuits alone, Defendant cannot insist otherwise.

4. Under the Stabilization Doctrine, Plaintiffs Foresaw the Extent of Damage to Their Farmlands Two Years Before Filing Their Complaint.

While the Government-induced uncertainty is enough to dispose of the motion to dismiss, the motion fails for the separate reason that Plaintiffs' claim has only recently accrued. Plaintiffs have ascertained the extent of the damage to their farmlands only within the last few years. Between 2009 and 2010, the Government made clear it will not provide drainage to their farmlands, which has rendered the extent of damage to Plaintiffs' lands reasonably foreseeable such that now a "final account may be struck." *Dickinson*, 331 U.S. at 749.

Here, *Northwest*, which refused to trigger the statute of limitations as long as the permanent nature of the damages alleged was speculative and unclear, 446 F.3d at 1291-92, is again instructive. There, the Federal Circuit found that the trial court had employed the incorrect standard for determining the accrual date by only considering when the plaintiff "knew or should have known" of damage to the lake as a result of the gradual emergence of hydrilla. *Id.* at 1290-91 (finding the trial court erred when it set the accrual date at the time the gradual growth problem was set in motion). Rather, "[t]he correct standard recites that accrual occurs when the harmed party knows or should have known of their existence *and* 'all events which fix the government's alleged liability have occurred.'" *Id.* (citing *Boling*, 220 F. 3d at 1370 (emphasis in original)). Under this standard, the Court found that the taking had stabilized in January 1997, when the Army Corps refused to allow the drawdown requested by the plaintiff. *Id.* at 1292. Accordingly, the plaintiff's 2001 complaint was timely. *Id.* at 1292; *see also Banks*, 314 F.3d 1304, 1310 (plaintiffs' claims accrued with the publication of three reports in 1996, 1997, and 1999 that collectively indicated that erosion was permanent and irreversible). [4]

[4] Chief Judge Hewitt's recent decision in *Banks v. United States*, 2011 U.S. Claims LEXIS 2377 (Fed. Cl. Dec. 23, 2011) ("*Banks 2011*"), does not alter this fundamental tenet that a taking cannot accrue where there is uncertainty as to its permanence. *See id.* at *57. Rather, the finding in

In this case, the turning point analogous to the Army Corps' refusal in *Northwest* began in 2009 with the Government's decision not to pursue the legislation needed to implement a long-term, district-wide drainage solution, and culminated in 2010 with the Government's declaration to Congress that it was throwing in the towel. Compl. ¶¶ 84-86, 93-95, 101; Federal Defendants' Status Reports (Stip. Fact TTT [App. 59 {JA01862-JA01870}]; Stip. Fact VVV [App. 61 {JA01880-JA01888}]; Stip. Fact WWW [App. XXX {JA01889-JA01896}]). In September 2010, the United States submitted to Senator Dianne Feinstein a critical letter that openly rejected the agreed-upon drainage solution embodied in its own 2007 Record of Decision. Compl. ¶ 96; *see* U.S. Dept. Interior, Sen. Feinstein Letter (Stip. Fact UUU [App. 60 {JA01875-JA01879}]). The Government then purported to unilaterally transfer responsibility for its drainage obligations to Westlands and other water districts in the San Luis Unit. *Id.* (JA01876). And it threatened to withhold water from Westlands if the local water districts did not get behind this new plan. *Id.* Just as the Army Corps' refusal to allow the drawdown triggered accrual of the *Northwest* plaintiff's takings claim, Interior's refusal here to implement its Record of Decision marked the point where Westlands landowners, including Plaintiffs, knew of the extent of the harm to their farmlands and all events that fixed the Government's liability had occurred. In short, Plaintiffs' takings claim had accrued.

By ignoring the highly material post-2000 facts, the Government's motion fails to even contemplate stabilization in 2010. Instead, the Government employs the same incorrect standard

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Banks 2011 that the takings claim was time-barred was based on new evidence presented in the liability trial. *Id.* at *32. The new evidence established that the Government activity that resulted in the taking occurred in 1903, rather than in between 1950 and 1989 as had been alleged in the plaintiffs' complaint. *Id*. and *49-*50. On these new facts, the court determined a taking had occurred more than six years before grounds for any justifiable uncertainty existed. *Id.* at *57. In contrast, as shown here, justifiable uncertainty as to the permanence of the taking has been uninterrupted through 2008.

for accrual the Federal Circuit rejected in *Northwest*. First, based on general knowledge of the soil conditions in Westlands since the 19th century, the Government suggests that Plaintiffs' claim has been foreseeable (and thus accrued) "since before the [San Luis] Unit was envisioned" and was "known as soon as irrigation service to their lands began," or in the 1970s. Re-filed Suppl. Br. at 3. (Tellingly, the Government retreats from this remarkable position as soon as it voices it, immediately acknowledging that "up through the 1970s, the United States continued efforts to construct drainage facilities and provide drainage throughout Westlands." *Id.* at 4.) Second, the Government suggests that from the point of the Kesterson Reservoir's closure in June 1986, landowners knew that "damage was occurring, and would continue to occur, to their farmlands." *Id.* And third, the Government tests as possible accrual dates the filing of *Sumner Peck* litigation in 1991 and the ensuing court opinions in 1993, 1994, and 2000. Re-filed Initial Br. at 28-29; Re-filed Suppl. Br. at 11-12.

But none of these dates offered by Defendant conforms with Federal Circuit law. *Northwest* expressly rejects fixing accrual dates at the time of an event that sets a gradual problem in motion, and it also rejects accrual dates based solely on what Plaintiffs "knew or should have known" about their damages at a certain point in time. *See* 446 F.3d at 1292. Setting accrual in the 19th century based on general knowledge of soil conditions, or in the 1970s at the start of irrigation services, or in 1986 upon the closure of Kesterson would contravene both rules. The same goes for the litigation dates. All these points were permeated with uncertainty, *see* section III(B)(b), *supra,* and thus, "all the events that fix[ed] the government's alleged liability" had not occurred, *Boling*, 220 F. 3d at 1370, making them wholly inappropriate trigger dates.

Thus, *Mildenberger v. United States*, 643 F.3d 938 (Fed. Cir. 2011), which the Government cites to in its effort to support various litigation events as the start of Plaintiffs' accrual date, is

distinguishable. In *Mildenberger*, no similar uncertainty stayed the accrual date; the court found no "justifiable uncertainty" because the Army Corps "neither undertook nor committed itself to any mitigation activities." *Id.* at 947. The court also found persuasive the fact that a decade before they filed their complaint, some of the plaintiffs had formed an organization aimed at restoring the health and productivity of the river, issuing newsletters complaining of the same injuries as alleged in the later complaint. *Id.* at 946. Here, the Government has, at various times, both undertaken and committed itself both to the courts and to the affected landowners to provide drainage to the San Luis Unit. *See* Compl. ¶¶ 43-48, 77-89; *see, e.g., Barcellos* Judgment at 20 (Stip. Fact BB [App. 21 {JA00591-JA00648}]); Draft EIS (Stip. Fact GG [App. 23 {JA00667, JA00672-JA00679}]); Record of Decision (Stip. Fact LLL [App. 10 {JA00398-JA00438}]). Moreover, no Plaintiff here has ever organized around the drainage issue prior to filing this lawsuit, and certainly not outside of the limitations period.[5] Accordingly, even if the harms Plaintiffs complain of resemble those asserted by others decades earlier, the ongoing uncertainty as to the permanence of the taking here means the Government's liability was certainly not fixed outside of the limitations period.[6]

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[5] *Mildenberger* is also factually distinguishable since it concerned the alleged taking of riparian water rights over a river—that is, the plaintiffs' rights to pursue recreational activities such as boating, fishing, or swimming in public waters, *id.* at 940—and not the actual flooding of farmlands over which claimants hold fee title and from which they draw their livelihoods, as is the case here. In addition, in *Mildenberger*, the Army Corps never held a statutory duty or contractual duty to refrain from discharging the waters that were ultimately harming the river alongside the plaintiffs' properties. In contrast, for as long as rising saline groundwater has been a problem for farmlands in Westlands, the Government has had a legal obligation and duty to drain it. Compl. ¶¶ 16, 75.

[6] With no consideration of the stabilization doctrine, justifiable uncertainty, or even flooding, *Duncan v. United States*, 2011 U.S. App. LEXIS 22672 (Fed. Cir. Nov. 9, 2011), is even further off-point, in addition to being unpublished and non-precedential. Unlike the plaintiff in *Duncan* who filed a lawsuit in federal court in 2000 and in the Court of Federal Claims in 2010 about the same contested deed, *id.* at *5, Plaintiffs here have never previously filed a lawsuit on their own behalves against any government agency in any court related to drainage, rendering *Duncan* inapplicable.

Additionally, Judge Wanger's decision in *Firebaugh*, 819 F. Supp. 2d 1057 (E.D. Cal. 2011), newly emphasized by Defendant (*see* Re-filed Initial Br. at 12), does not impact when Plaintiffs' takings claim accrued. The opinion concerns only whether there was a violation of the Administrative Procedure Act and did not at all reach the issue of whether a takings claim had accrued. *See Firebaugh*, 819 F. Supp. 2d at 1074-1075. Nor could Judge Wanger have reached any conclusion on takings accrual, given the plaintiffs' takings claim had been transferred and omitted from the operative pleading. *See* Transfer Notice, *Firebaugh*, No. 1:03-cv-02790 (Fed. Cl. Dec. 16, 2003) (Stip. Fact BBB [App. 43 {JA01335}]; Fifth Am. Compl., *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. June 1, 2004) (Stip. Fact DDD [App. 45 {JA01358-JA01398}]). Notably, even though Defendant details the decision in its revised Factual Background (*see* Re-filed Initial Br. at 12), it never incorporates the decision into its legal analysis for accrual in either of its re-filed briefs. See Re-filed Initial Br. at 25-29; Re-filed Supp. Br. at 2-12. It does not guide this Court's jurisdictional analysis.

Further, the Government's dismissal of the Bureau's September 2010 letter to Senator Feinstein as the basis for accrual and its contention that Judge Wanger's 2011 Firebaugh Decision undercuts September 2010 as the proper accrual date are both conclusions reached in a vacuum. *See* Re-filed Initial Br. at 12. In a tenuous effort to undermine Plaintiffs' claims on apparent ripeness grounds (which are antithetical to its pending statute of limitations motion), the Government offers that "Reclamation remains committed to providing drainage pursuant to the control schedule" and assures that it continues to request appropriations annually "sufficient to implement its drainage program pursuant to the control schedule." *Id.* (emphasis added). The Government's carefully chosen words only clarify the now limited scope of its commitment. Notably, that commitment does not encompass implementation of the full 2007 Record of Decision

but rather a far more limited Control Schedule covering only a single subunit of the San Luis Unit. *See* Supplemental Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Nov. 18, 2009) (Stip. Fact RRR [App. 57 {JA01847}]). The Bureau's continuous inaction with respect to seeking new authorizing legislation to increase the appropriations ceiling required for full Record of Decision implementation makes this point, and the Bureau's September 2010 letter lays its cards on the table. *See* Federal Defendants' Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Apr. 1, 2010) (Stip. Fact TTT [App. 59 {JA01862-JA01870}]) (no action taken on legislative proposal for long-term drainage strategy); Federal Defendants' Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Oct. 1, 2010) (Stip. Fact VVV [App. 61 {JA01880-JA01888}]) (same); Federal Defendants' Status Report, *Firebaugh*, No. CV-88-0634 (E.D. Cal. Apr. 1, 2011) (Stip. Fact WWW [App. 63 {JA01889-JA01896}] (same); U.S. Dept. Interior, Letter to Sen. Diane Feinstein (Sept. 1, 2010) (Stip. Fact UUU [App. 60 {JA01875-JA01879}]). For these reasons, the Government's reneging of its commitment in September 2010 is only reinforced by Judge Wanger's astute observation that the Government's "commitment to provide necessary drainage to the San Luis Unit can be questioned." *Firebaugh*, 819 F. Supp. 2d at 1075.

In this case, the Government's liability was fixed no earlier than September 2010, when Interior washed its hands of the Record of Decision. Plaintiffs' Complaint—filed one year after this event and well within the limitation period—is timely.

C. Policy Reasons Also Support Stabilization of Plaintiffs' Takings Claim No Earlier Than September 2010.

There are additional policy reasons that make Plaintiffs' Complaint timely under the stabilization doctrine as well. The rule articulated in *Dickinson* that allows Plaintiffs to wait until the taking has stabilized before bringing a claim also relieves Plaintiffs from "resort[ing either] to

piecemeal or to premature litigation to ascertain the just compensation" owed them. 331 U.S. at 749. Larger concerns about fairness and efficiency are at play:

> Assuming that . . . an action would be sustained [as soon as inundation is threatened], it is not a good enough reason why [a plaintiff] must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain.

Id. In this case, it would not be fair to charge Plaintiffs with foreseeing the extent of their damages before September 2, 2005, when the Government's drainage obligation itself was tangled in litigation and when the possibility that the Government would make good on its drainage obligation always hovered and, for a short period, even seemed imminent.

Moreover, if the Court were to rule that Plaintiffs' claim accrued before September 2005, it would be encouraging irrational behavior. It would mean filing a lawsuit while the Government was in the midst of determining how it was going to implement the drainage solution pursuant to the Court Order, or bringing a separate takings action while the Government was in the middle of a lawsuit focused on the issue of the Government's drainage obligation. This would result in even more legal actions and the type of premature and piecemeal litigation that the *Dickinson* court sought to avoid. 331 U.S. at 749. Such hypothetical scenarios make little sense for the courts or parties. *See Forsgren v. United States*, 64 Fed. Cl. at 460 (Fifth Amendment enforced with an eye towards fairness).

The Government seeks a narrower rendering of the stabilization doctrine (Re-filed Supp. Br. at 6-7), but the cases upon which it relies for such a narrow application are misplaced since none of them considers the role of a statutory obligation plus court orders imposing compliance as well as the Government's repeated (and unkept) promises to take corrective action, as is the case

here. *See, e.g., Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 250-252 (Ct. Cl. 1958) (no consideration of government promises to correct subsidence problem in finding that destruction to plaintiff's land was a foreseeable future event due to a prior cave-in that had destroyed the property); *Kabua v. United States*, 546 F.2d 381, 384 (Ct. Cl. 1976) (no consideration of government promises or court order in statute of limitations analysis for taking stemming from United States' occupation of Micronesian island used for missile range); *Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556, 653-657 (1966) (no consideration of government promises or court order in analysis).

When the Federal Circuit has considered the uncertainties stemming from promises for government action or court orders that create expectations of government action, it has delayed accrual of a takings claim until the permanence of the taking is known. *See Applegate*, 25 F.3d at 1582-84 (with "plans for a sand transfer plant pending," landowners were "justifiably uncertain about the permanency of the erosion and the taking"); *Creppel*, 41 F.3d at 634 (court order which "restore[d] some potential expectation of completion of [p]roject and thus some measure of the property's value" delayed accrual of claim). In permitting these lawsuits to be filed when the taking is certain, or when the taking has stabilized, the Federal Circuit avoids both premature litigation and rewarding the Government for any failures to deliver on promises made.

Finally, Defendant's remarkable focus on the unfairness to the Government that would result from Plaintiffs' claim is, under the circumstances, simply ludicrous. Re-filed Supp. Br. at 6-7. After decades of failing to provide drainage – as has been its statutory duty since the 1960s as recognized and affirmed by several courts, including the Ninth Circuit – the Government's suggestion that the fairness scale tips in its favor against Plaintiff landowners distorts the scales of justice. The "thirteen plus years of documented failures to provide drainage [and] decades of

litigation" (Re-filed Supp. Br. at 6) amount to a hill of beans relative to the over 50 years that has elapsed since the San Luis Act first imposed upon the Government the duty to provide drainage to Plaintiffs' farmlands, which still is not in place today.

D. Standing Is a Non-Issue Because It is Undisputed that Plaintiffs Owned Their Respective Properties by September 2010.

The Government's alternative argument related to Plaintiffs' standing is readily addressed. The Government correctly points out the well-settled principle that only the owner of the property on the date of a taking may bring a takings claim in this Court. Re-filed Initial Br. at 30; *see, e.g., Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992). Here, if the Court agrees that Plaintiffs' taking stabilized no earlier than September 2010, *see* section III(B)(c), *supra*, that test is easily satisfied. All Plaintiffs have identified the specific farmlands they contend have been taken by the United States. *See* RCFC 9(h)(7); Compl. ¶¶ 11-14. As of September 2010, each Plaintiff owned the farmland alleged to have been taken. *See id.* Defendant has not disputed such ownership. Re-filed Initial Br. at 30-31. Accordingly, Plaintiffs' standing is not subject to dispute on these grounds.

V. CONCLUSION

For the foregoing reasons, this Court's jurisdiction over Plaintiffs' takings claim is proper, and Defendant's motion to dismiss should be denied.

Respectfully submitted,

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