IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

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The United States' original motion to dismiss and memorandum in support in this matter were filed on December 8, 2011 (ECF No. 9). Pursuant to the Court's Order dated October 10, 2012 (ECF No. 55), the parties are to re-file their respective briefs relating to this motion to include revised citations to the Joint Stipulation of Facts (ECF No. 50) ("Stipulation"), the parties' respective proposed findings of facts (ECF Nos. 51, 53), and related appendices filed on October 9, 2012. In addition to including new citations, the re-filed briefs are to address any new arguments, if appropriate, based on any newly identified facts, cases, or other materials. ECF Nos. 47, 55. Pursuant to the parties' agreement, "with the exception of the revised citations to the Stipulation or proposed findings of facts, any changes to the briefs to be re-filed will be highlighted in yellow for ease of reference." Joint Status Report at 1 (ECF No. 49).[1] The United States' re-filed its motion to dismiss and memorandum in support (ECF No. 56) ("Motion") and its supplemental brief in support (ECF No. 57) ("Supplemental Brief") on November 16, 2012. Plaintiffs re-filed their response brief (ECF No. 58) ("Response") on December 21, 2012. The United States hereby re-files its reply brief.

I. INTRODUCTION

As detailed in our Motion, Plaintiffs' Complaint is barred by the statute of limitations, 28 U.S.C. § 2501. Plaintiffs' Response does not prove otherwise. In their Response, Plaintiffs do not argue that they had been unaware until recently of the seepage occurring beneath their farmlands from decades of irrigation without drainage, or that they were unaware until recently of harmful salts accumulating in the soils beneath their farmlands. To the contrary, Plaintiffs' Response effectively confirms that they had been aware of the seepage beneath their properties long before

[1] In this brief, Exhibit Numbers have been replaced with citations to the Joint Appendix ("J.A."), Defendant's Appendix ("D.A"), or Plaintiffs' Appendix ("P.A.") filed on October 9, 2012, unless noted otherwise.

September 2, 2005, six years before they filed their Complaint. Indeed, Plaintiffs concede that they have always known that irrigation without drainage damages their farmlands. Compl. ¶¶ 2, 64 (ECF No. 1); Resp. at 3. Plaintiffs also aver that since June 1986, the United States has failed to provide them drainage service. Compl. ¶ 63; Stip. No. Z. And Plaintiffs do not dispute that similarly situated landowners – putative class members here – brought a nearly identical takings claim against the United States in 1991, and settled that claim over a decade later. Supp. Br. at 7, 9 (citing Mot. at 13-15); Stip. Nos. FF, UU, WW; United States' Proposed Additional Findings of Fact No. D-FF ("USPF") (ECF No. 53). These facts demonstrate that Plaintiffs knew or should have known that their takings claim accrued roughly two decades before their Complaint was filed.

Plaintiffs, however, attempt to rely on the stabilization doctrine to argue that events of the last decade created enough justifiable uncertainty for the Court to find their claim accrued after September 2, 2005 (six years before the filing of the Complaint). Resp. at 2-3. In support, they argue the United States has been either pursuing a solution to the drainage issue, allegedly as recently as July 2008, *id.*, when the United States submitted a drainage feasibility report to Congress, *id.* at 8-12, or litigating its drainage obligation, *id.* at 1, allegedly ending sometime in 2000. *Id*. at 7-8. Alternatively, they argue their claim "only recently accrued" because only then were Plaintiffs able to ascertain the extent of the damage to their farmlands in the Westlands Water District ("Westlands"). *Id*. at 3. In support, they argue that events occurring between 2009 and 2010, *id.*, allegedly ending with a September 2010 letter from the Bureau of Reclamation ("Reclamation") to a United States Senator, which allegedly reneged on the United States' commitment to providing drainage, *id.* at 12-13, made it clear that the United States would not provide drainage to Plaintiffs' farmlands. *Id*. at 2-3. However, the indisputable facts show that multiple court decisions consistently found that, through 2000, the United States had made the

policy decision not to provide drainage and that decision was known to be causing irreparable injury. Supp. Br. at 9-10; Mot. at 15-23. For this Court to hold otherwise would require it to collaterally review the findings of other courts, and to reverse those findings; two things this Court lacks jurisdiction to accomplish. Further, the subsequent government promises of mitigation – made only after being court-ordered – on which Plaintiffs rely, cannot revive their stale claim. Supp. Br. at 11 (citing *Banks v. United States*, 102 Fed. Cl. 115, 134 n.13 (2011)).[2] Therefore, these subsequent events on which Plaintiffs focus are irrelevant. The other arguments raised by Plaintiffs and discussed further below, are similarly meritless. Accordingly, the Complaint should be dismissed in its entirety.

II. ARGUMENT

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

There are at least five historical litigation events, spanning nearly a decade of well-publicized lawsuits, which undeniably show that there could be no justifiable uncertainty that the United States refused to provide drainage prior to 2000, thus accruing Plaintiffs' claims more than six years before the filing of the Complaint. First, no later than January 1991, the plaintiffs in

[2] As argued previously, the United States maintains that the stabilization doctrine is inapplicable here because, unlike cases of recurrent flooding or erosion, such as in *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000), and *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994), the effects of failing to provide drainage are immediately knowable and not difficult to discover. ECF No. 29 at 5-6, 10; ECF No. 15 at 5; *infra* at 13. If, however, the Court finds that the stabilization doctrine does apply, Plaintiffs' claim may not have stabilized prior to September 1990. While the United States forsook its obligation to solely provide drainage service in 1985, Supp. Br. at 11, it was not until the issuance of the "Rainbow Report" (J.A. 24) by the federal and state interagency program addressing drainage, the San Joaquin Valley Drainage Program, Mot. at 3, 3 n.2, that affected landowners concluded that the United States would not provide drainage service as required by the San Luis Act. *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) ("*Sumner Peck*") Compl. ¶¶ 92-93 (J.A. 25). However, for Plaintiffs' claim to be untimely, the Court only need find that it accrued before September 2, 2005. Supp. Br. at 2-5; Mot. at 25-29.

Sumner Peck – which are similarly situated to the putative class here, Supp. Br. at 9 (citing Mot. at 15-17)[3] – were so certain that the United States breached its duty to provide drainage that they brought, *inter alia*, inverse condemnation claims against the United States and Westlands which mirror the claim brought against the United States here. Mot. at 16-17, 27-28; Stip. No. FF (citing J.A. 25); USPF Nos. D-FF, D-11 (citing J.A. 25, D.A. D-11); *see also* USPF No. D-15 (showing further similar allegations from the *Sumner Peck* supplemental complaint).[4] Second, in May 1993, Judge Wanger of the United States District Court for the Eastern District of California found that, unless otherwise excused, the United States breached its statutory duty to provide drainage. Mot. at 15; *see also generally* J.A. 27 (Judge Wanger's opinion finding that the duty to provide drainage existed and the United States had failed to fulfill its duty). Third, in December 1994, Judge Wanger found that the United States was not excused from performing its duty, had failed to provide drainage service for years, was unlikely to provide drainage service absent court order, and that these similarly situated plaintiffs had been irreparably damaged by the United States' failure to provide drainage. Mot. at 17-18; J.A. 32 at JA01091, JA01121. Fourth, in March 1995, Judge Wanger entered partial summary judgment on these findings and held that "[b]ecause of the [United States'] failure to provide drainage for the San Luis Unit in violation of law, [these similarly situated plaintiffs] are suffering irreparable injury." J.A. 33 at JA01132. Fifth, in February 2000, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), in

[3] Plaintiffs, in their original Response (ECF No. 19), did not dispute this fact. Plaintiffs now argue that they are different from the *Sumner Peck* plaintiffs because Plaintiffs' properties are unique and their circumstances are different. Resp. at 26, 28. The United States agrees that each parcel at issue here is unique; however, the long, well-documented history of the United States' failure to provide drainage in the 1990s is the same for all. Plaintiffs simply ignore their class action allegations that they adequately represent the interests of all landowners in Westlands which did not receive drainage. Compl. ¶¶ 16, 17, 19, 20. These facts prove that putative class members here are similarly situated as those in *Sumner Peck*.

[4] [Footnote deleted].

largely affirming Judge Wanger, held that by "ma[king] the policy decision not to provide drainage service in violation of section 1 of the San Luis Act," for the prior 13 years, the United States had been making these similarly situated plaintiffs' farmlands sterile and causing irreparable injury. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577-78 (9th Cir. 2000) (J.A. 6).

While Plaintiffs appear correct that the Court of Federal Claims ("CFC") has never adjudicated a takings claim on the merits that was predicated on Westlands landowners' alleged right to drainage, Resp. at 13-16, that is irrelevant to the question whether Plaintiffs' claim accrued outside the limitations period. Based on the facts found by Judge Wanger and the Ninth Circuit, and as empirically shown by the *Sumner Peck* and *Firebaugh Canal Co. v. United States*, No. CV-F88-634 (E.D. Cal. filed Dec. 9, 1988) (J.A. 22) ("*Firebaugh*") lawsuits, Plaintiffs' claim accrued no later than the 1990s.[5] Supp. Br. at 9-10; Mot. at 27-29. Further, while not adjudicated in this Court, the United States did settle the *Sumner Peck* lawsuit, including those plaintiffs' inverse condemnation claims that were set to be transferred to the CFC but were not pursued there due to the settlement. Stip Nos. UU, VV, WW, YY, ZZ; USPF Nos. D-13, D-YY, D-16; J.A. 37; J.A. 40; J.A. 41. The *Firebaugh* plaintiffs, however, filed their transferred claim in the CFC in February 2005, and it was dismissed pursuant to 28 U.S.C. § 1500. Stip. No. JJJ; Resp. at 15; Mot. at 23 (citing *Firebaugh Canal Water Dist. v. United States*, 70 Fed. Cl. 593, 597-99 (2006) (J.A. 51)). In addition, three drainage-related takings cases were filed in the CFC and they also settled. USPF Nos. D-7, D-8, D-10; Mot. at 24 (citing Def.'s Ex. 12). While Plaintiffs correctly observe that these three cases involved landowners outside Westlands, Response at 14 (also noted by the United States, Mot. at 27), these lawsuits are another example of the objective truth: the United States was

[5] [Footnote deleted.]

failing to provide drainage and landowners' farmlands were being substantially encroached by invasive groundwater.[6] There is no justifiable uncertainty under such circumstances.

Despite these repeated court findings that the United States had not, and would not, provide drainage service to Plaintiffs' farmlands in Westlands, and the subsequent settlement of the nearly identical *Sumner Peck* claims, Plaintiffs rely heavily on the "justifiable uncertainty" doctrine, claiming that, before 2009 or 2010, they did not know whether the United States would provide drainage to their farmlands within Westlands.[7]

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

In support of their theory, Plaintiffs identify two alleged mitigation promises, i.e., commitments by Reclamation to provide drainage to Westlands, during the 1990s.[8] Plaintiffs cite Reclamation's 1991 Draft Environmental Impact Statement ("1991 DEIS") (excerpts contained in J.A. 23), and a 1990 Plan of Study for the San Luis Unit Drainage Program ("1990 Study") (excerpts in P.A. P03) in support of their argument. Resp. at 5-6. However, contrary to Plaintiffs'

[6] Plaintiffs protest that these three takings cases did not relate to the failure to provide drainage; rather, they relate only to "leakage from the Kesterson Reservoir." Resp. at 14. While the complaints in *Claus* and *Schwab* focus on seepage from Kesterson, Plaintiffs' narrow view of the allegations in *Freitas* should be rejected. *See generally* D.A. D4 (*Freitas* complaint). The *Freitas* plaintiffs did not limit their allegations to seepage from Kesterson, included other features of the drainage system, and alleged the United States' "omissions" failed to prevent invasive groundwater from encroaching their property. *Id.* ¶¶ III-VI.

[7] Plaintiffs' Response cites to events in 2009 and 2010 as accruing their claim. Resp. at 3, 12-13. Plaintiffs also assert that their claim accrued "no earlier than September 2010." *Id.* at 36; *see also id.* at 39 ("if the Court agrees that Plaintiffs' taking stabilized no earlier than September 2010…"). According to Plaintiffs, this is when the United States sent a letter to United States Senator Diane Feinstein to propose to Congress an alternative drainage strategy where Westlands and other water district should assume the responsibility from the United States for providing drainage to Westlands. *Id.* at 1-2, 13 (citing J.A. 60). These allegations are discussed below at 15-16, 16 n.13.

[8] [Footnote deleted].

assertions, the 1991 DEIS did not promise that the United States would provide drainage to affected lands within Westlands. Mot. at 10-11; *see also* J.A. 32 at 15-16 (despite the issuance of the 1991 DEIS, Judge Wanger found that the United States "failed to take necessary steps to provide drainage for a number of years" and it "is unlikely to undertake efforts to provide drainage service unless ordered to do so by the Court").

Nor did the 1990 Study make such a promise. As its name suggests, the 1990 Study was only a study and a precursor to the 1991 DEIS. P.A. P03 at PA00031-33. Neither of these documents reflects an unwavering commitment to mitigate sufficient to invoke justifiable uncertainty. *See Mildenberger v. United States*, 643 F.3d 938, 947-48 (Fed. Cir. 2011) (more than government proposals or discussions are necessary in order to invoke the stabilization doctrine on basis of mitigation promises); *Applegate*, 25 F.3d at 1582-84 (an unwavering commitment to mitigate is required); United States' Submission Pursuant to Order dated July 26, 2012 at 2-4 (ECF No. 39) (discussing *Mildenberger*, *Applegate*, and other relevant precedent). In any event, subsequent events and Judge Wanger's findings that it was the policy decision of the United States to not provide drainage, eliminated any alleged uncertainty brought about by the issuance of the 1991 DEIS or 1990 Study.[9]

Between the issuance of the 1991 DEIS and the Ninth Circuit's 2000 opinion in *Firebaugh*, Plaintiffs fail to identify any alleged mitigation promises in support of their theory of justifiable uncertainty. Instead, Plaintiffs invite the Court to expand the scope of justifiable uncertainty beyond promises of mitigation by the United States to include the uncertainty caused by litigation

[9] Notably, in the 1990s, Reclamation did not proceed to finalize the 1991 DEIS or issue a final decision based on that document. Instead, after 2000, Reclamation developed the San Luis Drainage Feature Re-evaluation, developed a new Environmental Impact Statement, and adopted that action in its March 2007 Record of Decision. Resp. at 8-12; *see also generally* J.A. 17, J.A. 39, J.A. 46, J.A. 50, J.A. 52, J.A. 10 (excerpts of various documents from Reclamation's San Luis Unit Feature Re-evaluation).

with the United States. Resp. at 25-26. The Court should decline Plaintiffs' invitation. The stabilization doctrine originated in *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947). In subsequent years, the Supreme Court, the Court of Claims (predecessor to the Federal Circuit), and this Court all narrowly construed the doctrine. *See United States v. Dow*, 357 U.S. 17, 27 (1958) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."); *Kabua v. United States*, 546 F.2d 381, 384 (Ct. Cl. 1976) (noting that *Dow*, 357 U.S. at 27, limited *Dickinson* to the class of flooding cases "to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking"); *Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556, 656 (1966) (broad interpretation of *Dickinson* would result in an "unending conflict with the statute of limitations"). This Court should refrain from expanding application of the stabilization doctrine to circumstances not expressly embraced by the Supreme Court.

Second, Plaintiffs cannot point to litigation uncertainty as a basis for finding justifiable uncertainty exists. Rather, as made clear by the Federal Circuit, justifiable uncertainty requires a gradual physical process coupled with promises of mitigation by the United States. *See Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1291 (Fed. Cir. 2006) (holding that takings claim did not stabilize until aquatic weeds had grown to harmful levels and the Army Corps of Engineers (the "Corps") had refused to take mitigating action); *Banks v. United States*, 314 F.3d 1304, 1310 (Fed. Cir. 2003) (holding that gradual erosion process coupled with decades of promised mitigation efforts by the Corps made claim accrual uncertain); *Applegate*, 25 F.3d at 1582 (holding that "[t]he gradual … process set in motion by the Corps, compounded by the

Government's promises [of mitigation] … have indeed made accrual of the landowner's claim uncertain"). However, in a misguided attempt to support their expansive view of justifiable uncertainty, Plaintiffs now rely heavily on *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994). Resp. at 21-23, 25. In *Creppel*, the plaintiffs presented two, separate regulatory taking claims: a temporary one premised on actions occurring between 1976 and 1984, 41 F.3d at 632; and a permanent one premised on a regulatory action occurring on October 16, 1985. *Id.* at 633-34. The Federal Circuit held that the temporary taking claim was time barred. *Id.* at 632.[10] However, it held the permanent taking claim timely because, between the end of the temporary taking in 1984 and the beginning of the permanent taking on October 16, 1985, an intervening court order gave the plaintiffs the expectation of the project at issue being completed, restoring some measure of the property's value (which was previously wiped out during the temporary taking). *Id.* at 634. This "restoration" gave the plaintiffs reasonable investment-backed expectations, *id.*, which are critical for a regulatory taking analysis. *Id.* at 632. A subsequent agency decision, on October 16, 1985, effected a permanent regulatory taking by quashing all value in the property. *Id.* at 633-34.

Plaintiffs argue that this case is like *Creppel* because Judge Wanger's 1995 Order restored Plaintiffs' expectations that drainage would be provided, thus, creating justifiable uncertainty because the permanence of the taking remained unclear. Resp. at 22, 25. *Creppel*, however, is inapposite. *Creppel* is distinguishable from this case because it concerned allegations of regulatory, not physical, takings. 41 F.3d at 631-32. Plaintiffs fail to cite to any case which applies the stabilization doctrine to a regulatory taking claim or interprets *Creppel* to apply the

[10] It is worth noting that much of *Creppel*'s discussion of temporary takings is dicta and holds no precedential value. *See Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1360 (Fed. Cir. 2000) (court need not rely on dicta of prior panel decisions such as that in *Creppel*). Subsequent cases reject *Creppel*'s dicta claiming that a temporary takings claim does not accrue until the temporary taking is completed. *Navajo Nation v. United States*, 631 F.3d 1268, 1278 (Fed. Cir. 2011); *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 896 (Fed. Cir. 1998).

stabilization doctrine. Rather, the stabilization doctrine only applies to physical taking claims predicated on gradual physical processes. *Supra* at 8-9. Contrary to Plaintiffs' argument, *Creppel* simply does not stand for the proposition that a physical taking claim does not accrue while litigation allegedly causes justifiable uncertainty. Resp. at 22-24. Further, the effect of the ongoing litigation in *Creppel* did not delay accrual or cause justifiable uncertainty as Plaintiffs argue. Rather, a temporary taking began, ended, and then, a permanent taking occurred. Plaintiffs make no such claims here.[11] In addition, the cases that do find justifiable uncertainty make that finding based upon promises of mitigation by the United States, not court orders, not hopes that a court will order mitigation, Resp. at 25-26, and not joint efforts with interested stakeholders to study mitigating plans. *See* Supp. Br. at 8-9 (recounting how, from April 1985 through 2000, the United States did not offer to provide drainage without the assistance of California, Westlands, landowners, and other stakeholders); USPF Nos. D-X, D-12, D-GG. And the only CFC decision which considered postponing the accrual of a taking claim where a legal situation, rather than a factual one, allegedly concealed the claim's existence, rejected application of the stabilization doctrine. *Banks*, 102 Fed. Cl. at 142-47 (citing *Boling v. United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000) as binding precedent on this issue) (remaining citations omitted).

The third reason the Court should reject Plaintiffs' invitation to expand the scope of justifiable uncertainty is that Plaintiffs' protestations of uncertainty are meritless. From the time of Judge Wanger's orders through the Ninth Circuit's 2000 ruling in the consolidated *Sumner Peck* and *Firebaugh* lawsuits, there was nothing but certainty that the courts found: (1) the United States was not providing drainage; (2) it was the policy decision of the United States not to provide

[11] While the United States disputes the existence of a temporary taking here, any alleged temporary taking claim is also time barred because it accrued when the physical invasion began. *Dow*, 357 U.S. at 23-26; *Caldwell v. United States*, 391 F.3d 1226, 1234-35 (Fed. Cir. 2004); *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 67 (2009).

drainage (while the United States asserted its drainage obligation had been excused or rendered legally impossible); and (3) farmlands in Westlands were being irreparably damaged by the failure to provide drainage. *Supra* at 3-5. Plaintiffs argue that the United States' "fiercely contested" litigation position – that its failure to provide drainage was excused or legally impossible – created uncertainty whether the United States had in fact failed to provide drainage. Resp. at 7, 25. Beyond being circular, this argument ignores the facts. Regardless of how the Ninth Circuit was to rule, Judge Wanger found that it was the policy decision of the United States not to provide drainage and the effects of that failure were known and certain enough to landowners in Westlands that they filed suit in 1991. J.A. 25, J.A. 27, J.A. 32, J.A. 33. Under such circumstances, there is no justifiable uncertainty and the stabilization doctrine cannot apply. *See Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 251 (Ct. Cl. 1958) (rejecting application of the stabilization doctrine when "[t]he very same suit, on the same grounds and for the same damages, could have been brought by the plaintiff at least [twenty years] ago"); *cf. Duncan v. United States*, 456 F. App'x 891, 892-94 (Fed. Cir. 2011) (per curiam) (affirming dismissal of takings claim as time-barred when litigation concerning the existence of property interests at issue should have alerted plaintiff to accrual of takings claim).[12]

Yet, Plaintiffs claim this ongoing litigation somehow delayed accrual. Resp. at 24. Plaintiffs' argument strains credibility. Plaintiffs point to no evidence during this 1990s litigation history which in any way hints at, much less proves, that the United States was promising

[12] Plaintiffs counter by citing *Applegate*, 25 F.3d at 1580, 1582, for the proposition that an intervening lawsuit was a non-factor in that court's claim accrual analysis. Resp. at 28. At best, such a proposition is non-binding dictum as the court did not discuss the effect of this lawsuit. There is no indication in the opinion whether the lawsuit was a basis for arguing the claim accrued untimely. Such a proposition is also contrary to *Nadler*'s binding precedent. Finally, *Applegate* relied heavily on the gradual physical process at issue and the repeated promises to mitigate and repair the resulting damage. *Id.* at 1583-84. None of these facts are present here.

mitigation (i.e., providing drainage). *See also* Resp. at 1 ("Up to 2008, the Government has either pursued a solution to the drainage problem … or has litigated the issue of its drainage obligation.") (emphasis added), 23-24 (discussing events allegedly justifying uncertainty, but failing to cite any events during the 1990s other than ongoing litigation, the 1990 Study, or the 1991 DEIS). Plaintiffs merely conclude that because the United States was never relieved of its statutory duty to provide drainage, Resp. at 12, 34 n.5, there was "ongoing uncertainty as to the permanence of the taking here." *Id.* at 34. This is a non-sequitur. Regardless of whether that duty existed or that the United States' nonperformance was excused, it was known that the United States had failed to, and would not, deliver the mitigation measures that Plaintiffs now, and the *Sumner Peck* plaintiffs then, allege were necessary to fulfill that duty. *Compare* Compl. ¶¶ 93-103 (allegations that the United States' drainage efforts inadequately serve subparts of Westlands, fail to obtain necessary appropriations, and otherwise fail to implement a drainage solution for Plaintiffs' farmlands) *with* J.A. 25 ¶¶ 92, 97 (allegations that the United States' drainage efforts inadequately served subparts of Westlands, failed to properly spend appropriations, and otherwise failed to provide a drainage solution for the plaintiffs' farmlands); *see also* USPF No. D-15 (supplemental *Sumner Peck* complaint from 2002 alleging very similar wrongs to those raised here) (citing D.A. D8; D.A. D9). Plaintiffs' subjective hope that mitigation efforts may eventually surface, whether by court order or otherwise, is insufficient to justify alleged uncertainty. *Gary v. United States*, 67 Fed. Cl. 202, 210 (2005) (when analyzing claim accrual, "'[t]he court determines whether the pertinent events have occurred under an objective standard'") (quoting *McDonald v. United States*, 37 Fed. Cl. 110, 114 (1997)). And to accept the argument that the San Luis Act's continuing effect creates justifiable uncertainty would mean that when a statutory duty to act exists, a taking claim predicated on a failure to meet that duty would never be untimely – a position soundly rejected by the Federal

Circuit. *See Navajo Nation*, 631 F.3d at 1275-76 (when taking claim is predicated on the effect of a statute, the claim accrues when the statute is enacted); *Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995) (in rejecting plaintiffs' assertion of a continuing claim predicated on a statute's effect, holding that if plaintiffs' argument was correct and "damages continue to increase over time, then plaintiffs' cause of action would never accrue and the statute of limitations would never run") (citation omitted).

Fourth, the Court should not expand the scope of justifiable uncertainty to this case because the premise upon which it rests, the stabilization doctrine, is itself inapposite. Supp. Br. at 5-6. Whether intermittent flooding is "inevitably recurring" is dependent on many individualized facts. *See Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012) (takings cases predicated upon flooding turn on the particular circumstances of each case); *The George Family Trust ex rel. George v. United States*, 91 Fed. Cl. 177, 192-95 (2009) (analyzing the facts of various flooding cases); *Bagwell v. United States*, 21 Cl. Ct. 722, 725-27 (1990) (same). Conversely, the effect of the failure to provide drainage to Plaintiffs' farmlands is immediately knowable. Compl. ¶ 2; Resp. at 3. Thus, the reasoning behind the stabilization doctrine – that it takes time for the damage caused by gradual physical processes to become known to the landowner – is absent here, making the doctrine inapplicable.

This result is buttressed by the Supreme Court's recent decision in *Arkansas Game and Fish Commission*, 133 S. Ct. at 522. There, the Supreme Court reviewed several factors which may assist the determination of whether government action constitutes a taking: the duration of the invasion, the foreseeable result of the government action, the character of the land at issue, the landowners' reasonable investment-backed expectations, and the severity of the invasion. *Id.* (citations omitted). Here, the duration of the invasion was ongoing at least since 1986, when

drainage ceased. Mot. at 9; Compl. ¶ 63. The result of the failure to provide drainage is not only foreseeable but immediately knowable. *Supra* at 13. The land at issue experienced drainage problems historically even before irrigation began and these conditions are well-known to landowners in the area, thereby, dampening their reasonable investment-backed expectations. Mot. at 3; Resp. at 3; Compl. ¶¶ 2, 64. And the severity of the invasion is allegedly constant and cumulative with groundwater continuing to seep and salts continuing to accumulate during the period of no drainage. Compl. ¶¶ 2, 3, 104, 107, 108. Under such circumstances, the reasonable result is a finding that Plaintiffs' claim accrued outside the limitations period.

Plaintiffs conclude their justifiable uncertainty argument by asserting that Reclamation's promises of mitigation between 2000 and 2008 did not stabilize the accrual of their claim until sometime in 2009 or 2010. Resp. at 8-13, 24-26. As discussed in the Supplemental Brief, these subsequent events cannot revive Plaintiffs' stale claim, Supp. Br. at 11 (citing *Banks*, 102 Fed. Cl. at 134 n.13), and Plaintiffs present no argument to the contrary. Instead, Plaintiffs rely on the uncertainty allegedly caused by the litigation discussed above, or, in the alternative, they argue that their claim did not accrue until sometime between 2009 and 2010 because the extent of the damage to their farmlands was not reasonably foreseeable until then. Resp. at 3, 31-36.

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

Plaintiffs' "alternative" theory of claim accrual is similarly without merit. As an initial matter, Plaintiffs' alternative theory does not appear to be distinct from their justifiable uncertainty theory. Their argument relies on the same facts discussed above, and the same cases which found justifiable uncertainty when applying the stabilization doctrine, Resp. at 31-33 (citing *Nw. La.*, 446 F.3d at 1291-92; *Banks*, 314 F.3d at 1310), and it should be rejected for those same reasons discussed above. Both Judge Wanger and the Ninth Circuit held that the United States' failure to

provide drainage in Westlands caused sterilization and irreparable injury to farmlands there. *Supra* at 3-5. This alone is grounds to reject Plaintiffs' post-hoc rationalization that until 2009 or 2010, the extent of the damage to their farmlands could not be reasonably foreseen. It is also significant that the statutory duty to provide drainage is not remedial. *Firebaugh Canal Water Dist. v. United States*, 819 F. Supp. 2d 1057, 1071 (E.D. Cal. 2011). Thus, whether the United States allegedly reneged on its commitment to provide drainage, as Plaintiffs argue (Resp. at 35-36), is irrelevant because there is irreparable harm and the provision of drainage is not intended to mitigate prior damage (unlike the erosion at issue in *Applegate*, 25 F.3d at 1582). Any alleged uncertainty regarding the permanency or foreseeability of the damage cannot be justified in such a situation.

In support of their rationalization, Plaintiffs claim that *Northwest Louisiana* is instructive here. Resp. at 31-32 (citing *Nw. La.*, 446 F.3d at 1291-92). Plaintiffs claim that up until 2009, when Reclamation allegedly refused to implement its drainage plan, Plaintiffs could not know the extent of the harm to their farmlands. *Id.* at 31-36. Plaintiffs attempt to analogize this event to the Corp's refusal of mitigation in *Northwest Louisiana. Id.* at 32. If one closes her eyes to the history of the drainage issue through 2000, Plaintiffs' argument may have merit. However, as discussed above, in the 1990s, the United States was repeatedly found to have made the policy decision not to provide drainage as required by the San Luis Act. *Supra* at 3-5. This situation was evident at the time, and the *Sumner Peck* plaintiffs made many of these same allegations, and asserted the same claim. Mot. at 27-28; USPF No. D-15. And whether the United States subsequently provided drainage makes no difference; Plaintiffs' farmlands were already allegedly damaged and the United States is not obligated to remediate any preexisting damage. Under these facts, Plaintiffs' alleged ignorance of the extent of the damage occurring to their farmlands prior to 2009 is specious.

Further, Plaintiffs' argument that the extent of their claimed damage only became foreseeable after the occurrence of certain events in 2009 and 2010, when the United States allegedly made it clear that it was not providing drainage to their farmlands in Westlands, Resp. at 3, 12-13, 32, is based on allegations which Judge Wanger found incorrect as a matter of law. *See Firebaugh*, 819 F. Supp. 2d at 1062-63, 1072-74 (J.A. 67) (holding that from 2000 through at least June 15, 2011, the United States has, despite its slow progress, indisputably complied with its duty to provide drainage under the San Luis Act). Notably, Judge Wanger's analysis of this issue includes events subsequent to the letter Reclamation sent to Senator Feinstein in September 2010, attached as Ex. 1 to J.A. 60, which Plaintiffs allege capped off these series of claim-accruing events. Resp. at 12-13. Plaintiffs cite that letter as evidence that the United States had rejected implementation of the Record of Decision it adopted in March 2007, Resp. at 11 (citing Compl. ¶¶ 84-85; J.A. 10), and as late as July 2008, had continued to implement by submitting its feasibility report to Congress. *Id.* at 3, 11 (citing Compl. ¶ 87; J.A. 7, J.A. 54).[13] Because Judge Wanger

[13] While not dispositive of this Motion, the United States disputes Plaintiffs' reading of Reclamation's letter sent to Senator Feinstein. J.A. 60, Ex. 1. After negotiations, between Reclamation and affected parties in 2007 and 2008, failed to reach consensus on a draft bill to address drainage, Reclamation sent this letter in response to a request from the Senator that it provide the outlines of a drainage plan that it could support as an alternative legislative approach. *Id.* at JA01875-76. Contrary to Plaintiffs' allegations, Resp. at 12-13, this letter in no way rejected implementation of the March 2007 Record of Decision. Rather, it acknowledged that Congress had taken no action to date on the legislative steps that were necessary to allow Reclamation to fully implement the plan selected in the Record of Decision. J.A. 60, Ex. 1 at JA01876. Judge Wanger subsequently found that Reclamation's actions were not in violation of the Record of Decision. *Firebaugh*, 819 F. Supp. 2d at 1072-74. Plaintiffs also argue that beginning drainage in one sub-unit versus another, or requesting appropriations on an annual basis versus for the entire project, demonstrates a "limited" commitment to drainage. Resp. at 35-36. This makes no sense. The Record of Decision contemplates providing drainage in phases, e.g., a sub-unit at a time. J.A. 10 at JA00406-07; J.A. 57 at JA01853. There is also no requirement for Reclamation to seek all appropriations at once; a proposition that would increase the likelihood that Congress would not appropriate funds given the roughly $2.7 billion price tag. In any event, as held by Judge Wanger, these actions do not demonstrate a rejection of the duty to provide drainage.

found that, as a matter of law, the United States is complying with the Record of Decision and, therefore, satisfying its duty to provide drainage under the San Luis Act, *Firebaugh*, 819 F. Supp. 2d at 1072-74, Plaintiffs' theory of claim accrual must be rejected. Put another way, because the United States is implementing the Record of Decision, which Plaintiffs agree satisfies the United States' obligation to provide drainage, Resp. at 11, there has been no change of circumstances since 2000, proving that Plaintiffs' claim accrued untimely.

Plaintiffs also build a strawman argument which they readily quash: that the United States' position is that Plaintiffs' claim accrued "in the 19th century based on general knowledge of soil conditions, or in the 1970s at the start of irrigation services…" Resp. at 33. That is a mischaracterization. Rather, the United States' position is that because Plaintiffs knew that their farmlands could be irreparably damaged without drainage when irrigation began, once the United States' drainage service ceased in the 1980s, and when the courts subsequently found that the United States had failed to, and would not, undertake mitigation efforts, Plaintiffs' claim accrued in the 1990s. *See Boling*, 220 F.3d at 1371 ("The contention that *Dickinson* stands for the proposition that the filing of a lawsuit can be postponed until the full extent of the damage is known has been soundly rejected."); *Nadler*, 164 F. Supp. at 251 ("the *Dickinson* doctrine does not permit a plaintiff to wait until any possibility of further damage [has] been removed") (internal quotation omitted). As the indisputable evidence shows, there is no plausible basis to conclude that Plaintiffs' claim did not accrue well before September 2, 2005. And there can be no doubt that Plaintiffs' claim is untimely when the United States was found to have refused mitigation efforts, just like similar refusals in *Mildenberger*, 643 F.3d at 947-48 and *Banks*, 102 Fed. Cl. at 132-34,

and, in 1991, similarly situated plaintiffs brought the same claim against the United States as Plaintiffs do today.[14]

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

As an initial matter, Plaintiffs' policy arguments should be ignored because this Court's statute of limitation is jurisdictional and cannot be tolled for policy reasons. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-39 (2008); *Sabree v. United States*, 90 Fed. Cl. 683, 691 (2009). Further, for the same reasons discussed above, Plaintiffs' policy arguments are without merit. Resp. at 36-39. Contrary to their assertion, piecemeal litigation would not be encouraged by appropriately ruling that Plaintiffs' claim accrued in the 1990s. As an initial matter, this assertion is one of the rationales behind *Dickinson*'s stabilization doctrine and breaking it out here as a separate argument is redundant. Further, as discussed above, there was no justifiable uncertainty in the 1990s, and just like the *Sumner Peck* plaintiffs, putative class members here could have joined *Sumner Peck* or brought their own timely claim. Accordingly, piecemeal litigation is not encouraged.

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

[14] [Footnote deleted].

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

Assuming the Court is persuaded by either the United States' or Plaintiffs' theories of claim accrual, the United States' argument that Plaintiffs lack standing is not at issue. Mot. at 30-31; Resp. at 39. Under the parties' respective theories, Plaintiffs either owned their property when their "timely" claim accrued, or they did not own their property when their untimely claim accrued. However, in the event the Court finds that Plaintiffs' claim accrued between September 2, 2005, and the time each Plaintiff acquired their property, *see* Mot. at 30-31 (citing Compl. ¶¶ 11-14) (the named Plaintiffs acquired their property on four dates between July 12, 2007, and April 23, 2008), then the parties agree that each such Plaintiff lacks standing to pursue its takings claim here. Resp. at 39.

III. CONCLUSION

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

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Respectfully submitted,

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