IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' RE-FILED RESPONSE TO UNITED STATES' SUPPLEMENTAL BRIEF TO SURREPLY TO UNITED STATES REPLY IN SUPPORT OF MOTION TO DISMISS[1]

PREFACE

Plaintiffs submit the following Re-filed Response to the United States' Supplemental Brief In Response to Plaintiffs' Surreply to United States' Motion to Dismiss (filed June 8, 2012 [Doc. 34]) (referred to as "Re-filed Response to Def. Supp. Br.") 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]). Consistent with the Court's Order, no additional arguments related to newly raised facts, cases, or other materials have been made. Order (filed Oct. 10, 2012 [Doc. 55]). Further, the revised citations 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 filed the original version of this brief on June 15, 2012.

[1] [Footnote omitted]

I. INTRODUCTION

The Government's assertion that Interior had an obvious "policy" all along to, in effect, ignore both Congressional and Judicial mandates by foregoing drainage, is not a reasonable basis to dismiss Plaintiffs' takings claim in the context of the factual record here. The 1960 San Luis Act and the 1995 U.S. District Court Order directing Interior to drain the San Luis Unit – in addition to a drainage plan issued by the U.S. Department of Interior ("Interior") in 1991 and existing contracts between the Westlands Water District and the United States to pay for this drainage – cannot be ignored when determining what a landowner should have known in the 1990s. Since these facts bear on when the Government's liability was fixed and whether a permanent taking of property was "reasonably foreseeable" – the standard for determining accrual – they cannot simply be set aside as the Government repeatedly insists this Court do. Notwithstanding the Government's claim that it had a "no drainage policy" at some undefined point following the closure of Kesterson Reservoir, the above events – all of which occurred in or continued through the 1990s – made it *far from certain* to an objective landowner that the United States would never provide drainage to his farmlands. In fact, it is reasonably foreseeable that the 1995 Court Order directing the United States to provide drainage would lead a reasonable landowner to believe the Government would make good on its statutory promise. On these facts, no takings claim accrued or ever stabilized in the 1990s.

Accordingly, through the allegations in their Complaint and the evidence submitted, Plaintiffs have met their burden to establish subject matter jurisdiction and the Government's motion to dismiss should be denied.

II. ARGUMENT

A. Under No Circumstances Should Westlands Landowners Have Known Their Properties Were Permanently Taken in the 1990s.[2]

1. The Government's Vague Assertions of a "No Drainage "Policy" Do Not Accrue Plaintiffs' Claim.

As an initial matter, the three pre-1990 events Defendant cites as "fixing" the Government's alleged liability are all immaterial to the accrual of Plaintiffs' claim under the stabilization doctrine. Doc. 34: Def. 6/8 Supp. Br. at 2. The Government has already "concede[d] that Plaintiffs' claim may not have stabilized prior to September 1990." Doc. 29: Def. Reply at 2-3, n.1; *see also* Doc. 34: Def. Supp. Br. at 2 (marking "the 1990s" as time of reasonable foreseeability). Accordingly, in determining when Plaintiffs' claim stabilized, the court need not consider the impacts of the lack of drainage to farmlands; Plaintiffs' having never received drainage; or the Government's cessation of drainage services in 1986, and Plaintiffs do not revisit these events here.

What remains of the Government's theory that its liability was fixed before 2005 is the United States' "policy decision" made "subsequent[]" to the 1986 closure of Kesterson Reservoir to no longer provide drainage. Doc. 34: Def. 6/8 Supp. Br. at 2. However, for numerous reasons, this purported "policy" continues to be nothing more than a litigation posture that never triggered Plaintiffs' claim:

First, even assuming that the Government's policy would be represented by the Rainbow Report – the September 1990 document on which the Government bases its earlier concession of delayed stabilization (*see* Doc. 29: Def. Reply at 3, n.1) – the fact remains that in December 1991,

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[2] Plaintiffs make no attempt to "inject a subjective standard into the accrual question," as Defendant contends (Doc. 34: Def. Supp. Br. at 6), and do not respond to Defendant's argument and case authority on an issue where there is no conflict. It is simply a matter of fact, undisputed by Defendant, that none of the Plaintiffs owned their taken farmlands in the 1990s. *See* Compl. ¶¶ 11-14.

the Government released a Draft Environmental Impact Statement ("1991 DEIS") containing a drainage plan fully endorsed by the United States. *See generally* 1991 DEIS (Stip. Fact GG [App. 23 {JA00667, JA00672-JA00679}]). Defendant's current ongoing dispute with the 1991 DEIS as a mitigation measure delaying accrual (*see* Doc. 34: Pl. 6/8 Supp. Br. at 4, n.1) belies Interior's introductory statement made in 1991 to the public and all relevant agencies that the plan "will address drainage needs through the year 2007, satisfy requirements of the *Barcellos* Judgment, and be compatible with potential long-term solutions." 1991 DEIS (Stip. Fact GG [App. 23 {JA00667}]). It is also counter to the position the Government asserted in 1992 in the *Sumner Peck* litigation in which it had "no doubt that, by issuing the [1991] DEIS, Reclamation formally endorsed . . . its current best 'plan' to satisfy the criteria of the [*Barcellos*] Judgment and to solve the drainage problem." *See* U.S. Memorandum of Points and Authorities ISO Federal Defendants Motion to Dismiss, in *Sumner Peck v. Bureau of Reclamation*, Case No. CV-F-91-048, at 9 (Apr. 20, 1992) ("U.S. 4/20/1992 Brief") (Pl. App. Ex. 8).

Second, the Government cannot transform a defense tendered in litigation into an undisputable "policy" in order to prematurely accrue Plaintiffs' claim. The Government repeatedly links its "policy decision" to not provide drainage with its contention that the obligation had been excused, impliedly repealed, or made impossible. *See, e.g.,* Doc. 34: Def. 6/8 Supp. Br. at 2. However, the Government's claims of excuse or impossibility were legal defenses first proffered by the U.S. Department of Justice ("DOJ") in *Sumner Peck* in April 1992, not any policy Interior had adopted prior. *See* U.S. 4/20/1992 Brief, at 16 (Pl. App. Ex. 8) (asking court to excuse strict compliance with *Barcellos* Judgment obligation to produce drainage plan based on impossibility of performance). A litigation posture by DOJ simply does not constitute agency policymaking by Interior. Moreover, the Government's inability to identify the date, source, or any formal

announcement of such a policy by any official policy maker at Interior or the Bureau of Reclamation calls into question whether such a policy existed at all.

Accordingly, the Government's "policy" of no drainage – the only leg left of its accrual theory – is shaky at best. And when the Government's tenuous policy is combined with the 1995 federal district court order ("1995 Court Order")[3] requiring Interior to implement a drainage plan and the unrepealed statutory obligation to provide drainage under the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960), the Government's accrual theory falls apart. Under these circumstances, a reasonable landowner would in no way be certain the Government's taking had become permanent.

2. The San Luis Act and Judge Wanger's 1995 Court Order Committed the Government to Provide Drainage and Delayed Accrual of Plaintiffs' Claims.

As noted, Defendant's disregard for a public law and a court order, both of which undercut whatever "no drainage policy" Defendant's counsel now claims the Government had, cannot serve as the basis for establishing the certainty of Plaintiffs' claim. In the Government's view, these facts do not create uncertainty because only committed governmental action in the form of mitigation measures can delay accrual and litigation simply does not count (Doc. 34: Pl. Supp. Br. at 4-5); but the United States' position loses sight of both the facts and the law.

On the facts, Defendant ignores the crux of Plaintiffs' argument which centers not on the years of litigation (though this would reasonably cause uncertainty), but on the actual 1995 Court Order that resulted from that litigation requiring the United States to provide drainage. *See* Doc. 31-1: Pl. Surreply at 3. Thus, it is not "duplicative litigation" that Plaintiffs present as the cause of

[3] The 1995 Court Order refers to Judge Wanger's Partial Judgment in *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (filed Mar. 12, 1995) (Stip. Fact OO [App. 33 {JA01123-JA01136}]).

uncertainty but rather a court order which expressly directs the Government to make good on its drainage obligation. Moreover, throughout the 1990s and still even today, the San Luis Act – which the Government repeatedly has recognized imposes a statutory obligation to provide drainage – has been valid law. *See* San Luis Act (Stip. Fact B [App. 02 {JA00117-JA00121}]); Doc. 9: Def. Mot. at 3-20 (factual background); Doc. 34: Def. 6/8 Supp. Br. at 8 (recognizing statutory obligation to provide drainage). Since its directive to the Government to provide drainage has never been repealed, the obligations imposed by the public law set the Government's course of action and represents a legislatively mandated commitment to drainage in the San Luis Unit.

On the law, the Government's blind insistence on a "mitigation measure" between 1991 and 2000 misses the point. As previously noted, *Mildenberger v. United States*, 643 F.3d 938 (Fed. Cir. 2011) and *Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249 (Ct. Cl. 1958) – the cases on which Defendant principally relies – never consider whether a court order directing the Government to mitigate or an ongoing, unfulfilled statutory obligation to act can delay accrual under the stabilization doctrine, since those facts were not presented to those respective courts. Doc. 19: Pl. Resp. at 24-25; Doc. 31-1: Pl. Surreply at 4.

But it is clear from the Federal Circuit's decision in *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), that they can. Recall that the *Applegate* court found the plaintiffs' 1992 takings claim timely based on "the promise of a sand transfer plant for years." *Id.* at 1582. That promise was first conveyed through **1962 legislation** (the River and Harbor Act of 1962 which authorized funds for construction of the plant), reiterated by the Senate Public Works Committee and Florida Department of Natural Resources, and proposed again in 1988 after years of delay by the Corps of Engineers. *See id.* at 1580, 1582. Based on the renewed promise of a sand transfer

plant, the *Applegate* "landowners did not know when or if their land would be permanently destroyed." *Id.* at 1582.

Here, the 1960 San Luis Act set forth the Government's commitment to provide drainage, which Interior worked on for decades up to and even following the closure of the Kesterson Reservoir in 1986. *See* Compl. ¶ 26; San Luis Act (Stip. Fact B [App. 02 {JA00117-JA00121}]). The promise of drainage was renewed through Judge Wanger's 1995 Court Order and renewed again through the Ninth Circuit's affirmation of that Order in 2000 and the decade of planning that followed. *See* 1995 Court Order (Stip. Fact OO [App. 33 {JA01123-JA01136}]); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 570 (9th Cir. 2000) (Stip. Fact QQ [App. 06 {JA00238}]).

With these facts, delayed accrual under the stabilization doctrine is fitting, especially given the United States Supreme Court's instruction against a strict application of accrual principles in takings cases involving continuous physical processes. *See United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'--when they are born, whether they proliferate, and when they die.").

3. The Contracts Between Westlands and the United States Contributed to the Justifiable Uncertainty of the Taking.

While the above facts sufficiently establish justifiable uncertainty about the permanence of the Government's taking throughout the 1990s and delayed accrual, the contracts between Westlands and the United States simply underscore the point.

Defendant points out Plaintiffs' prior representation that this litigation and the *Westlands Water District v. United States* litigation before Chief Judge Hewitt concern different legal issues and are thus indirectly related. *See* Doc. 34: Pl. 6/8 Supp. Br. at 8; *Westlands Water District v. United States*, Case No. 12-12C (Fed. Cl. filed Jan. 6, 2012). Plaintiffs' invocation of these

contracts does not alter this position, especially given Plaintiffs have asserted no contract claims against the Government under any theory. *See generally* Compl. ¶¶ 1-111. Rather, Plaintiffs have included allegations regarding the contracts in their Complaint (*see id*. ¶¶ 29-42) and discussed them in response to Defendant's motion to dismiss for the limited purpose of setting forth additional facts to establish that Plaintiffs' claim is not time-barred and this Court's jurisdiction is proper. They are not cited to invite this Court to adjudicate contractual claims that are squarely before Chief Judge Hewitt in *Westlands*.

As alleged in Plaintiffs' Complaint, landowners have been assessed a drainage service fee pursuant to a 1963 contract Westlands entered into with the United States that only expired in 2007. Compl. ¶¶ 34, 41. The language of the 1963 contract makes this obligation plain:

> Rate and Method of Payment for Water—Drainage Service
> Before December 15 of each year the Contracting Officer shall notify the District in writing of the rate of payment to be made by the District for water which the District is required to accept and pay for during the ensuing year . . . . The rate so announced . . . shall include a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain . . . .
> . . . .
> The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

1963 Contract, ¶¶ 6, 23 (Stip. Fact C [App. 03 {JA00136, JA00147}]).

While the Government echoes the dispute raised in *Westlands* as to whether the contracts obligate the United States to provide drainage, it has no quarrel with respect to Plaintiffs' allegation that a drainage service fee was assessed landowners and drainage-related payments made under these contracts, as identified above. Compl. ¶ 34; Pl. Surreply at 6. With such facts and the reasonable inferences drawn taken as true for the purpose of this motion (*see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)), it is not reasonably foreseeable that any landowner subject to drainage-related fees should have been certain of the permanency of any Government's taking.

4. The *Sumner Peck* Litigation Is Not Proof That Plaintiffs' Takings Claim Was Certain in 1991.

Lastly, there is no way Westlands landowners should have known of the permanence of any taking simply because the *Sumner Peck* litigants filed suit in January 1991, as the Government again contends. Def. 6/8 Supp. Br. at 3. As already noted, eleven months after the suit was filed, the Government issued the 1991 DEIS, advancing a drainage plan fully endorsed by the Government. *See* Section II.A.1, *infra*. Accordingly, the *Sumner Peck* litigation cannot dictate the timeliness of Plaintiffs' takings claim where drainage plans persisted after the lawsuit was filed and then court orders mandating drainage followed. *See* 1991 DEIS (Stip. Fact GG [App. 23 {JA00667, JA00672-JA00679}]); 1995 Court Order (Stip. Fact OO [App. 33 {JA01123-JA01136}]). Moreover, a prior inverse condemnation lawsuit asserted by another plaintiff does not trigger a later plaintiff's takings claim in situations involving physical takings by continuous processes where there is justifiable uncertainty of the claim. *See Applegate*, 25 F.3d at 1580, 1582 (takings lawsuit brought in 1970 a non-factor in court's analysis finding that takings lawsuit brought in 1992 was timely because of slow physical process of taking and government commitment to build sand transfer plant). Accordingly, *Sumner Peck* affords the Government no out from this litigation.

B. The Legislative History of the San Luis Act and Appropriations Act of 1977 Demonstrate the Government's Ongoing Obligation to Provide Drainage..

In its May 25, 2012 Order, the Court directed the parties to address "any relevant legislative history for the San Luis Act, Pub. L. No. 86-488 (1960) and the Authorization of the Appropriations of the San Luis Unit, Pub. L. 95-46 (1977)." As conceded by the Government in both this case and in *Westlands*, its statutory obligation to provide drainage under the San Luis Act was confirmed by the Ninth Circuit and is not being challenged here. Doc. 34: Def. 6/8 Supp. Br.

at 8-9; *Westlands*, Case No. 12-12C (May 21, 2012) (motion to dismiss) (Def. App. Ex. 5 at A181-182, 194-195). The Appropriations Act of 1977 did not alter the Government's obligation under the San Luis Act to provide drainage. In fact, it demonstrates the Government's intent to continue to comply with its statutory obligation. The Secretary of Interior told the Senate that his agency supported the 1977 Act "because it provides for continued progress on the Unit . . ." 123 Cong. Rec. 16387 (1977). He also stated that he believed that the H.R. 4390 (which ultimately became the 1977 Act) "does not alter or abrogate existing provisions of the San Luis Act or related contracts" except with respect to the amount of appropriated funds that could be spent on the drainage system. *Id.* at 16388.

Other than confirming the Government's ongoing obligation to provide drainage under the San Luis Act, neither act nor its corresponding legislative history directly bears on when Plaintiffs' takings claim stabilized, the main issue in contention in the instant motion, because the Government has already conceded no taking stabilized before 1990. *See* Section II.A.I, *supra*.

III. CONCLUSION

Based on these facts, jurisdiction with this Court is proper. For these reasons, the Government's motion to dismiss should be denied because Plaintiffs have asserted a timely takings claim.

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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