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 GOVERNMENT'S AUGUST 8, 2012 SUPPLEMENTAL BRIEF PURSUANT TO JULY 26, 2012 COURT ORDER

PREFACE

Plaintiffs submit the following Re-filed Response to the Government's August 8, 2012 Supplemental Brief Pursuant to the July 26, 2012 Court Order. *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 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 August 15, 2012.

I. ARGUMENT

A. Plaintiffs Have Met Their Burden On A Motion To Dismiss To Show By A Preponderance Of The Evidence That Landowners Were Justifiably Uncertain Of Their Takings Claim Until 2010.

The Government's contention that Plaintiffs have failed to prove their claim is timely is without regard to Plaintiffs' burden of proof and is plainly wrong in the light of the facts alleged, particularly when the Court must presume all of Plaintiffs' undisputed factual allegations to be true and must construe all reasonable inferences in favor of Plaintiffs. Docket Number (" Dkt. No.") 39, U.S. 8/8/12 Supp. Br. at 1. Plaintiffs have more than satisfied their burden on a motion to dismiss to demonstrate by a preponderance of the evidence that subject matter jurisdiction with this Court is proper and that they are "entitled to offer evidence to support the[ir] claims." *See Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (citations omitted). "[U]nless it is beyond doubt" Plaintiffs can "prove no set of facts which would entitle [them] to relief," Plaintiffs claim should not be dismissed. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

Plaintiffs' justifiable uncertainty about whether the United States would provide drainage and therefore prevent the accumulation of undrained wastewater from permanently damaging their property is well supported by the facts Plaintiffs have alleged in their Complaint and the evidence they have proffered in support of those facts. Plaintiffs have alleged and provided support for the following: The United States entered into contracts with the Westlands Water District in the 1960s for irrigation water and drainage of that water; the United States began construction of drainage facilities in the late 1960s and early 1970s; it provided drainage for part of the Westlands Water District from the late 1970s to 1986; and even after the United States ceased to provide drainage to Westlands in 1986, it continued to develop a plan to "solve the drainage problem," which it presented in the form of a Draft Environmental Impact Statement in December 1991. *See* Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 3-12, 19-22. The litigation that commenced in 1988 with the

Firebaugh Canal action and in 1991 with the *Sumner Peck* lawsuit never relieved the United States of its drainage obligation. Instead, the later consolidated actions resulted in District Court rulings in 1993 and 1995 which ordered the Government to provide drainage to the San Luis Unit, culminating in the Ninth Circuit's affirmation in 2000 of the United States' duty to provide drainage. *See id.;* Dkt. No. 35, Pltfs. 6/15/12 Surreply at 2-6. From 2000 through 2008, under the Ninth Circuit's mandate and the oversight of the District Court, the United States proceeded to devise a drainage solution that involved development and analysis of various alternatives as reflected in a number of reports, including but not limited to the Government's Plan of Action, its Plan Formulation Report, Draft and Final Environmental Impact Studies, and its 2007 Record of Decision that finally selected the project to be implemented by the United States to fulfill its drainage obligation to Plaintiffs' farmlands. *See* Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 7-10, 20. And permeating all of these events was the United States' overarching duty to provide drainage pursuant to the San Luis Act. Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 1. These facts demonstrating the basis for landowners' justifiable uncertainty as to their takings claim before 2005 – outside the applicable limitation period – more than sufficiently meet Plaintiffs' burden on a motion to dismiss. Allegations related to Bureau of Reclamation Commissioner Michael Connor's letter to Senator Diane Feinstein in September 2010 in which the Government rejected the agreed-upon drainage solution embodied in the 2007 Record of Decision simply confirm accrual within the six-year limitations period and the timeliness of Plaintiffs' claim. Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 12, 23.

The Government's suggestion that the only facts appropriate under the stabilization doctrine are those that demonstrate an "unwavering commitment" to mitigation overstates Federal Circuit law embodied by *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994) and *Mildenberger v.*

United States, 643 F. 3d 938 (Fed. Cir. 2011). Dkt. No. 39, U.S. 8/8/12 Supp. Br. at 2-4. It also ignores the principles of fairness on which the stabilization doctrine is based. *See United States v. Dickinson*, 331 U.S. 745, 749 (1947) ("[t]he Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action. . . .").

The *Applegate* court held "[t]he slow physical process, however, is not the only event inhibiting stabilization. The Corps itself has held forth a promise of a sand transfer plant for years." 25 F.3d at 1582. In *Applegate,* this promise consisted of a Congressional authorization and appropriations to build the plant in 1962, Senate approval of a Corps' beach restoration plan in 1968, and a 1988 Corps proposal to again build the sand transfer plant that was originally authorized some twenty-six years earlier. *Id.* at 1580. On these facts, which show a nearly twenty-year gap between Congress' initial 1968 approval of the sand transfer plant and the Corps' renewed proposal for a sand transfer plaint in 1988, the Government's recent embrace of *Applegate* is notable. *See id.* at 1580, 1583 (1992 complaint timely based on uncertainty stemming from Government's promises of sand transfer plant "for years"). Plaintiffs' case goes beyond the promises made in *Applegate* in that the Government here has been under a specific statutory duty to provide drainage; it actually constructed certain drainage facilities; and it has issued numerous reports for provision of drainage over the years, including a 2007 Record of Decision that selected the drainage solution to be implemented. To the extent the Government does not dispute the Corps' actions in *Applegate* represent an "unwavering commitment" to provide a sand transfer plant, its inability to recognize its own commitment and obligation to provide drainage on these facts seems an anomaly.

In *Mildenberger*, the Federal Circuit reaffirmed its holdings in both *Applegate* and *Banks v.*

United States, 314 F.3d 1304 (Fed. Cir. 2003), regarding the stabilization doctrine and simply found the plaintiffs' evidence did meet the preponderance of the evidence standard. *See Mildenberger*, 643 F.3d at 947. The majority of evidence relied on by plaintiffs (e.g., local newspaper articles about the St. Lucie Canal, declarations and newsletters of a local community group) were not Government documents, which the court found to be non-representative of "commitments" by the Government. *Id.* The one Government document cited, an internal memo about how to deal with negative publicity over the issue, again did not propose any potential Corps action or commit the Corps to any action. *Id.* These facts are in stark contrast to what Plaintiffs' have alleged in their Complaint and the evidence Plaintiffs have proffered. Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 3-12, 19-22. Under *Mildenberger*, the Government posits that "something more than discussion and proposals . . . must occur in order to create justifiable uncertainty." Dkt. No. 39, U.S. 8/8/12 Supp. Br. at 4. That "something more" is readily satisfied on these facts. Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 3-12, 19-22.

B. The San Luis Act Does Not Change The Accrual Date Of Plaintiffs' Taking Claim.

In its most recent supplemental brief, the Government now cites to *Navajo Nation v. United States*, 631 F.3d 1268 (Fed. Cir. 2011) and *Fallini v. United States*, 56 F.3d 1378 (Fed. Cir. 1995) to argue that the limitations period could have been triggered when the statute was passed because to hold otherwise would circumvent the statute of limitations altogether. Dkt. No. 39, U.S. 8/8/12 Supp. Br. at 5. This argument, however, is a red herring as both *Navajo Nation* and *Fallini* are clearly distinguishable as the legislation at issue in those cases specifically precluded the land owners from using their own property, putting them on notice to a regulatory taking. *See Navajo Nation,* 631 F.3d at 1274; *Fallini*, 56 F.3d at 1380-83.

Here, the San Luis Act requires the Government to provide drainage without respect to a

specific time limit. There is nothing on the face of the statute that would permit Plaintiffs to assume that the Government was not going to comply with its duty within a reasonable time period. Rather, the critical question that the Court must answer here to determine if the statute has run is when was it reasonable for Plaintiffs to assume that the United States would not comply with its statutory duty under the San Luis Act to provide drainage. *See e.g., Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577-1578 (Fed. Cir. 1988) ("[A] cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence."). Or put in the language of the stabilization doctrine, when did Plaintiffs' justifiable uncertainty end about whether the Government would provide drainage required under the San Luis Act.

C. The Legislative Histories Neither Make Plaintiffs' Takings Claim Certain or Suggest an Earlier Date of Accrual.

The Government's use of the legislative history of the 1977 Authorization Act as support for its theory that no justifiable uncertainty delays accrual of Plaintiffs' claim is misplaced. Dkt. No. 39, U.S. 8/8/12 Supp. Br. at 5-6. This legislative history certainly does not validate the Government's offer of the late 1970s as yet another possible date for accrual of Plaintiffs' takings claim. *Id.* at 6-8. Both the Government's rendition of this legislative history and its assertion of the late 1970s as another potential accrual date fail to account for the events that *actually occurred* on farmlands in Westlands in the 1970s and 1980s, and they also contradict positions the Government has already taken in briefing this very motion.

As an initial matter, the legislative debates about drainage during the original 1960 San Luis Act or the 1977 Authorization Act do not make clear that there were "serious impediments to providing drainage" such that landowners in Westlands should assume drainage would not be provided. While Congress considered how to provide drainage, the cost of such drainage, and the

method to repay drainage costs during the 1977 Authorization or through the special report prepared by the task force established by the 1977 Authorization, at no point during these debates did Congress ever question the United States' obligation to provide the drainage as required under the 1960 Act. *See e.g.*, 123 Cong. Rec. 13137-40, 16385-87, 16980-81 (1977); *Special Task Force Report on San Luis Unit, Central Valley Project, California*, Pub. Law 94-46 (1978) (Stip. Fact N (Stip. Fact N [App. 13 {JA00450-JA00480}]).

Further, the Government's arguments that by 1977, its "alleged commitment to providing drainage was even more tenuous" and that the "barriers to drainage were well known by the 1970s and put landowners on notice that the United States' alleged commitment rest on shaky ground" are, simply put, nonsense. Dkt. No. 39, U.S. 8/8/12 Supp. Br. at 6. These arguments – along with the Government's related contention that the 1960 San Luis Act did not commit the United States to construct drainage – are entirely inconsistent with the events that *actually took place* in Westlands during that time period. *See* Section I.A., *supra*. Further, such arguments also ignore years of statements by the Government evincing an actual commitment to a drainage solution. *See id.* Thus, even the Government's reference to "considerable debate" about repayment contracts as a sign of "further doubt" on the United States' drainage commitment cannot displace the fact that at the time of such debates, contracts providing for drainage were in effect and further established the Government's drainage commitment. Dkt. No. 1, Compl. ¶¶ 29-40. Any contention that the Government was not committed to drainage before September 2005 improperly disregards the Government's actual construction efforts on the ground in the 1960s and 1970s, its provision of drainage to certain farmlands through the mid-1980s, its commitment to devising a drainage solution for Plaintiffs' farmlands following the closure of Kesterson, its ongoing obligation to provide such drainage as confirmed by the United States District Court and affirmed by the Ninth

Circuit, and its renewed efforts towards a drainage solution through 2010. These facts, which span decades and which Plaintiffs have alleged in the Complaint and further substantiated with evidence, cannot be supplanted by *post hoc* arguments devised by the Government's attorneys in 2012.

Finally, the Government's effort to push accrual of Plaintiffs' claims even further back – now before 1990 towards 1977 – needlessly and haphazardly retreads terrain already covered by the parties in earlier briefing.[1] Not only is accrual at such an early date entirely inconsistent with the construction of drainage facilities and provision of drainage underway in Westlands at that time, *see supra*, such an early accrual date is also entirely inconsistent with prior positions taken by the Government in briefs related to this very motion.[2] Already the Government has stated: "Admittedly, however, the United States' actions during the early years of the San Luis Unit may have obscured the picture for landowners in Westlands." Dkt. No. 15, U.S. 1/9/12 Supp. Br. at 3 (emphasis added). It further stated that "[u]p through the 1970s, it appears as though the United States continued efforts to provide drainage throughout Westlands." *Id.* (emphasis added). In fact, the Government "arguably" conceded uncertainty existed at least through April 1985. *Id.* at 6 (stating that landowner uncertainty was "arguably the case here up until April 3, 1985" when the United States and Westlands entered into an agreement to close Kesterson). Moreover, the Government's effort to distance itself from its prior (but now tenuous) concession that Plaintiffs' claim did not stabilize before 1990 does not hold up against the clear, numerous, and unqualified

[1] It is worth noting that the Government's new proposed accrual date in the 1970s is now at least the eighth potential date the Government's has offered as the date of accrual. *See* Dkt. 15, U.S. 1/9/12 Supp. Br. at 9 (identifying pre-Kesterson closure period, April 1985, June 1986, April 1991, May 1993, December 1994, February 2000 as seven other possible accrual events).

[2] Such a position advocating accrual in the 1970s even appears inconsistent with the position taken by the Government two paragraphs prior in the very same brief in which it is argued. *See* Dkt. No. 39, U.S. 8/8/12 Supp. Br. at 5 ("[P]rior events from the 1950s, 1960s, and 1970s, should not decide the question whether the subsequent failure to provide drainage caused the substantial encroachment of Plaintiffs' farmlands.").

statements the Government has made throughout its briefing. *See, e.g.,* Dkt. No. 29, U.S. Rep. Br. at 13 ("[T]he United States position is that . . . Plaintiffs' claim accrued in the 1990s."); Dkt. No. 34, U.S. 6/8/12 Supp. Br. at 5 ("The events in the 1990s made it clear that the United States had decided not to provide drainage…. These events accrued Plaintiffs' claim.").

Setting aside that accrual in the 1990s is incorrect for the reasons Plaintiffs have exhaustively discussed (*see* Dkt. No. 19, Pltfs. 2/8/12 Resp. Br. at 19-21, Dkt. No. 35, Pltfs. 6/15/12 Surreply at 4-6), the Government's own struggle to identify an accrual date reflects its inability to reconcile its past actions, statutory obligation, and ongoing commitment to provide drainage with whatever litigation position might support dismissal of Plaintiffs' claim. The Government's own inability to stick to an accrual date also shows just how uncertain any takings claim was at any point proffered by the Government. If the United States Government cannot remain clear on an accrual date, then no Westlands landowners can certainly or reasonably be expected to know or have known of their takings claim at any time before the Government made clear – through Commissioner Connor's letter to Senator Diane Feinstein in September 2010 – that the United States no longer intended to pursue the long-term drainage solution owed to their farmlands.

II. CONCLUSION

Based on these facts, the statute of limitations has not run and jurisdiction with this Court is proper. For these reasons, the Plaintiffs respectfully request that the Government's motion to dismiss be denied.

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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