IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on February 1, 2013

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

UNITED STATES' RE-FILED SUPPLEMENTAL BRIEF IN RESPONSE TO PLAINTIFFS' SURREPLY TO UNITED STATES' MOTION TO DISMISS

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On December 8, 2011, the United States filed its motion to dismiss the Complaint ("Def.'s Mot."). ECF No. 9 (Re-Filed ECF No. 56). Pursuant to this Court's Order of December 15, 2011 (ECF No. 13), on January 9, 2012, the United States filed a supplemental brief in support of its Motion ("Def.'s Suppl. Br."). ECF No. 15 (Re-Filed ECF No. 57). On February 8, 2012, Plaintiffs filed their response to the United States' Motion ("Pls.' Resp."). ECF No. 19. On March 12, 2012, the United States filed its reply brief in support of its Motion ("Def.'s Reply"). ECF No. 29 (Re-Filed ECF No. 59). On March 30, 2012, Plaintiffs filed a motion for leave to file a surreply to the United States' Reply (ECF No. 31), which attached the surreply as Exhibit A ("Pls.' Surreply"). ECF No. 31-1. By Order dated May 25, 2012, the Court granted Plaintiffs' motion for leave to file the Surreply. ECF No. 33. Pursuant to that same Order, the United States hereby files its supplemental brief in response to the Surreply. *Id.*[1]

I. ARGUMENT

A. PLAINTIFFS HAVE NOT PROVEN THEIR CLAIM IS TIMELY.

Plaintiffs, on behalf of a class of similarly situated landowners, allege a taking of their property without just compensation due to the United States' failure to provide drainage to their farmlands in the San Luis Unit. Compl. ¶¶ 105-111. Plaintiffs allege that this failure dates back to at least June 1986. *Id.* ¶ 63. The United States seeks dismissal of the Complaint because Plaintiffs' claim is barred by the applicable statute of limitations, codified at 28 U.S.C. § 2501, as their claim accrued more than six years before the filing of the Complaint. Alternatively, the

[1] Pursuant to the Court's Order dated October 10, 2012 (ECF No. 55), the parties are to re-file their respective briefs relating to Defendant's 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. Citations to Defendant's Motion, Defendant's Supplemental Brief, Plaintiffs' Response, and Defendant's Reply herein cite to these "re-filed" briefs.

United States seeks dismissal because Plaintiffs lack standing as they did not own their property when their claim accrued.

In their Surreply, Plaintiffs again argue that the stabilization doctrine applies to their claim and its accrual was delayed past September 2, 2005 (six years before the Complaint was filed) because (1) throughout the 1990s, the United States litigated its obligation to provide drainage; and (2) the United States' dilatory provision of drainage since 2000 constitutes mitigation promises, further delaying accrual of their claim. Pls.' Surreply at 2-4; *see also* Pls.' Resp. at 2, 6-10 (arguing same). These arguments are not new and were addressed previously. Def.'s Reply at 3-14; Def.'s Suppl. Br. at 2-10. However, due to Plaintiffs' attempts to confuse the issues, it is worth summarizing the United States' position here.

Plaintiffs' claim accrued "'when all events [] occurred to fix the Government's alleged liability, entitling the claimant to demand payment.'" *Sabree v. United States*, 90 Fed. Cl. 683, 691 (2009) (quoting *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003)). There can be little doubt that those events occurred well before September 2, 2005 because (1) landowners in the San Luis Unit have always known that irrigation without drainage causes damage to their farmlands, Def.'s Mot. at 3-6; Compl. ¶ 64; (2) despite irrigation service beginning in the San Luis Unit in 1967, the named Plaintiffs never received drainage, Def.'s Suppl. Br. at 5-8; Def.'s Mot. at 7-8; (3) in June 1986, the United States stopped providing drainage to any landowner in the San Luis Unit (*i.e.*, the putative class), Def.'s Suppl. Br. at 7-8; Def.'s Mot. at 9-10; Compl. ¶ 63; and (4) the United States subsequently made the policy decision to not provide drainage and refused to do so until 2000. Def.'s Reply at 8-14; Def.'s Suppl. Br. at 8-10. Throughout the 1990s, the damage to Plaintiffs' farmlands was reasonably foreseeable and there were no mitigation promises which would cause the accrual of Plaintiffs'

claim to be justifiably uncertain. Def.'s Reply at 6-14; Def.'s Suppl. Br. at 7-10. In fact, instead of promising mitigation, the United States repeatedly took the position that any obligation to provide drainage under the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) ("San Luis Act") [JA02], had been excused, impliedly repealed, or rendered impossible due to intervening events. Def.'s Mot. at 13-19; *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 570-77 (9th Cir. 2000) [JA06 at 00238-43]. Under such circumstances, objective landowners in the San Luis Unit would be certain that their claim had accrued.

This is evidenced by a group of landowners in the San Luis Unit which, in 1991, did file suit against the United States in *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) ("*Sumner Peck*") [JA23]. Def.'s Reply at 3-6; Def.'s Suppl. Br. at 8-10; Def.'s Mot. at 27-29. Plaintiffs do not dispute that these *Sumner Peck* plaintiffs are similarly situated to Plaintiffs and therefore are putative class members here. Def.'s Reply at 3-4. Plaintiffs also do not dispute that the *Sumner Peck* claims mirror those brought here. Def.'s Reply at 3-4; Def.'s Mot. at 27-29. No, instead, Plaintiffs argue that the *Sumner Peck* litigation itself was the basis for their uncertainty, thus, delaying accrual of their claim. Pls.' Surreply at 3. Plaintiffs' argument requires a suspension of disbelief that can only exist in a fictional context. To believe that the *Sumner Peck* plaintiffs were uncertain that their claims had accrued by 1991 when they filed suit – or that subsequent and repeated court findings that the United States continued to refuse to provide drainage created further uncertainty – is implausible. And because these identical claims were brought by these similarly situated *Sumner Peck* plaintiffs, it is implausible for Plaintiffs to argue that they were justifiably uncertain their claim did not accrue prior to 2005. *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"); *see also* Def.'s Reply at 6-14 (providing additional analysis why the stabilization doctrine is inapplicable here and Plaintiffs' alleged uncertainty is anything but justified).

B. PLAINTIFFS' NEW ARGUMENTS ARE WITHOUT MERIT.

In their Surreply, Plaintiffs do provide a few new arguments related to the stabilization doctrine and justifiable uncertainty. They attempt to distinguish *Nadler*, 164 F. Supp. 249, on the sole basis that there was not any governmental action causing uncertainty in that case. Pls.' Surreply at 4. But there was no governmental action here that could cause uncertainty, which is why *Nadler* applies in the instant action. Despite being afforded two opportunities to do so, Plaintiffs have failed to identify any government action, between the 1991 Draft Environmental Impact Statement ("1991 DEIS") [JA23] and the efforts beginning in 2000, which rise to the level of mitigation promises that could justify uncertainty regarding the accrual of their claim.[2] Rather, Plaintiffs continue to invite the Court to extend application of the stabilization doctrine to include a situation where the extent of the damage caused by a physical process is justifiably uncertain due to duplicative litigation seeking compensation for the same alleged harm caused by that same process. Pls.' Surreply at 1. This argument is circular, completely eviscerating the holding of *Nadler*, and should be rejected accordingly. Def.'s Reply at 6-14.

[2] In their Surreply and without evidentiary support, Plaintiffs assert that the United States has undertaken "extensive efforts to pursue drainage in Westlands – from its 1991 [DEIS] through its adoption of the Record of Decision in 2008." Pls.' Surreply at 5. To the contrary, courts have held that the United States failed to provide drainage between 1986 and 2000, and that its policy was not to provide drainage. Def.'s Reply at 3-6, 10-11; Def.'s Mot. at 15-22. Plaintiffs' unsubstantiated assertion to the contrary is meritless. The United States also continues to dispute that the 1991 DEIS constituted a mitigation promise because that document did not commit the United States to providing drainage. Def.'s Reply at 5 n.5 (footnote deleted in ECF No. 59); *see also Mildenberger v. United States*, 643 F.3d 938, 947 (Fed. Cir. 2011) (government consideration of possible mitigating activities, without action or a commitment to do more, is insufficient to justify uncertainty).

Plaintiffs' argument that they could not presume the United States would ignore its duty to provide drainage after Judge Wanger's 1995 Order, Pls.' Surreply at 5 (citing Pls.' App. Ex. 19 at 11-12) [JA33 at JA01133-34], is similarly flawed and ignores the intervening events from 1986 forward when the United States had failed to provide drainage. The fact is that Judge Wanger repeatedly found that the United States had breached its statutory duty and Plaintiffs did not need to presume one way or the other whether the United States would subsequently provide drainage in order to know that their farmlands had been harmed by the lack of drainage in the intervening years. Further, the United States subsequently appealed Judge Wanger's 1995 Order to the Ninth Circuit and continued to maintain on appeal that it had no obligation to provide drainage. *See Firebaugh*, 203 F.3d at 573-74 (summarizing and rejecting the United States' arguments concerning its duty under the San Luis Act) [JA06 at JA00240-41].

Plaintiffs also try to confuse the issues by ignoring the passage of time and meshing the United States' failure to provide drainage, from 1986 through 2000, with its post-2000 efforts to provide drainage. Pls.' Surreply at 1-3; *see id.* at 3 (arguing that the United States "claims to have a 'no drainage' policy while it nonetheless endeavors to implement a drainage system"). Plaintiffs further argue that the United States' position is inconsistent and this inconsistency exemplifies the uncertainty surrounding the accrual of their claim. *Id.* Any inconsistency, however, is the result of Plaintiffs' misapprehension. The events in the 1990s made it clear that the United States had decided not to provide drainage, resulting in the same alleged damage to Plaintiffs' farmlands for which they now seek compensation (and for which the *Sumner Peck* plaintiffs sought compensation for in 1991). These events accrued Plaintiffs' claim. Subsequently, after litigating its drainage obligation to the Ninth Circuit, in 2000, the United States reversed course and has since taken steps to provide drainage in fulfillment of its statutory

duty. *Firebaugh Canal Water Dist. v. United States*, 819 F. Supp. 2d 1057, 1073-75 (E.D. Cal. 2011) ("*2011 Firebaugh Decision*"). These subsequent events are irrelevant to the accrual question here and, notably, Plaintiffs do not argue that these post-2000 events revived their otherwise stale claim, Pls.' Surreply at 3 ("Plaintiffs' claim never went stale and never needed revival"); – a position rejected by Chief Judge Hewitt in *Banks v. United States*, 102 Fed. Cl. 115, 134 n.13 (2011).

Plaintiffs, however, argue in the alternative that their claim accrued in 2010 when the United States "made clear that it will not provide drainage to Westlands' farmlands." Pls.' Surreply at 6; *see also* Pls.' Resp. at 2 ("Alternatively, the Government's motion fails because Plaintiffs' claim has only recently accrued."). For the reasons set forth in the Reply, this "alternative" theory should be rejected. Def.'s Reply at 14-18; *see also* United States' Opp'n to Pls.' Mot. for Leave to File Surreply (ECF No. 32) at 3 n.3 (noting how events in 2010, including the change in location of where construction of drainage facilities would begin, in no way equated to a refusal to provide drainage to Westlands Water District ("Westlands"), a view supported by the *2011 Firebaugh Decision*). But in the Surreply, Plaintiffs present two new arguments in support of their argument that their claim did not accrue until 2010.

First, Plaintiffs inject a subjective standard into the accrual question. Pls.' Surreply at 4 (arguing that the claim could not have accrued in the 1990s "before any of the Plaintiffs even owned the farmlands for which they seek just compensation"). As an initial matter, if their claim did accrue before they owned their farmland, Plaintiffs lack standing to bring the present lawsuit. Def.'s Mot. at 30-31. Plaintiffs previously conceded as much. Pls.' Resp. at 27; Def.'s Reply at 19. Further, claim accrual is an objective, not subjective, question and Plaintiffs' alleged ignorance of events transpiring in the 1990s is not a basis to delay accrual of their claim. *See*

Fallini v. United States, 56 F.3d 1378, 1380 (Fed. Cir. 1995) (claim accrual is an objective test and an individual "plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue") (citations omitted); Def.'s Reply at 11-12 (claim accrual is decided under an objective standard) (citing *Gary v. United States*, 67 Fed. Cl. 202, 210 (2005)); Def.'s Mot. at 25 (same).

Second, Plaintiffs vaguely assert that four contracts between the United States and Westlands "involving drainage" prove that their claim did not accrue in the 1990s. Pls.' Surreply at 5-6.[3] As the Court is aware, Westlands recently filed suit against the United States alleging, *inter alia*, breaches of these same contracts. Compl. ¶¶ 131-36 (ECF No. 1), *Westlands Water District v. United States*, No. 12-12C (Fed. Cl. filed Jan. 6, 2012) ("*Westlands*"). Plaintiffs previously represented that *Westlands* is indirectly related to this action because, among other reasons, it concerns different legal issues. Pls.' Notice of Potentially Indirectly Related Cases (ECF No. 17) at 1. In an apparent reversal, Plaintiffs now wish to make the United States' contractual obligations to Westlands a part of this case. But Plaintiffs lack privity of contract, are not third-party beneficiaries to these contracts, and they have no standing to litigate this issue. *Katz v. Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994) ("Absent privity between [plaintiffs] and the government, there is no case."); *Orff v. United States*, 358 F.3d 1137, 1145-48 (9th Cir. 2004) (landowners in Westlands are not third-party beneficiaries to Westlands' 1963 water service contract); *Carter v. United States*, 98 Fed. Cl. 632, 635 (2011) (without privity of contract, plaintiffs lack standing).

Further, regardless whether these contracts contain an obligation to provide drainage to Westlands, it is indisputable that the United States did not provide drainage between 1986 and

[3] These four contracts are attached in the Appendix as Exhibits 1 to 4 [JA03 (Ex. 1); JA53 (Ex. 2); JA58 (Ex. 3); JA04 (Ex. 4)].

2000 and that it had made the policy decision to not provide drainage. Whether its obligation to provide drainage was statutory or contractual, the United States failed to do so and any takings claim predicated on that failure accrued outside the limitations period. Plaintiffs present no argument why an alleged breach of a purported contractual duty, versus a breach of a statutory duty, should have any different effect on the accrual of their takings claim. In addition, there is no legal support for Plaintiffs' implied argument that a third-party contract, such as those entered into between the United States and Westlands in the 1960s, created justifiable uncertainty for Plaintiffs and those similarly situated to them during the events of the 1990s. The contracts from the 1960s were not new commitments or new actions which could constitute mitigation promises by the United States in the 1990s. Plaintiffs also fail to provide any argument explaining how the interim renewal water service contracts from 2007 and 2010 could have any effect whatsoever on events transpiring in the 1990s. The United States will not speculate to Plaintiffs' intended argument here.

To any extent these contracts obligate the United States to provide drainage, that issue is before Chief Judge Hewitt in *Westlands*. In that case, the United States has filed a motion to dismiss which explains why these contracts do not obligate the provision of drainage. *Westlands*, Def.'s Mot. to Dismiss (filed May 21, 2012; ECF No. 12) (attached as Appendix Exhibit 5) at 14-24. As explained there, none of these contracts obligate the provision of drainage and any contract language regarding an obligation to provide drainage are whereas or recital clauses which have no binding operative effect. *Grynberg v. Fed. Energy Regulatory Comm'n*, 71 F.3d 413, 416 (D.C. Cir. 1995); *Blackstone Consulting Inc. v. United States*, 65 Fed. Cl. 463, 470 (2005); *Henderson Cnty. Drainage Dist. No. 3 v. United States*, 53 Fed. Cl. 48, 54 (2002). Rather, the United States' obligation to provide drainage is statutory.

The legislative history of the San Luis Act supports the United States' position. Section 1(a) of the San Luis Act authorized construction of distribution and drainage facilities and Section 8 authorized appropriations, subject to certain ceilings, to be made for that construction; but the Act did not actually appropriate funds for construction. 105 Cong. Rec. S6725, 6730-31 (daily ed. May 5, 1959); 105 Cong. Rec. S6882, 6882-83, 6907-08 (daily ed. May 7, 1959); 106 Cong. Rec. H9709, 9712 (daily ed. May 17, 1960). This was because Congress left the local water districts, *e.g.*, Westlands, with the option to construct these facilities themselves. 105 Cong. Rec. S6725, 6730-31; 106 Cong. Rec. H9798, 9808-09 (daily ed. May 18, 1960). If, however, the local water districts preferred that the United States construct these facilities, this was authorized by the San Luis Act but repayment contracts, *e.g.*, the 1965 repayment contract (App. Ex. 4) [JA04], were required before funds for construction could be appropriated. 106 Cong. Rec. H9798, 9808-09; 106 Cong. Rec. S9919, 9922 (daily ed. May 19, 1960); 43 U.S.C. § 485a(e); 43 U.S.C. § 485h(d), (e); *see also Westlands*, Def.'s Mot. to Dismiss (App. Ex. 5) at 3-4 (discussing these statutes).

In addition, Congress enacted the Authorization of the Appropriations of the San Luis Unit, Pub. L. 95-46 (1977) [JA12], to authorize the appropriation of funds for continuing construction. Congress understood that the authorized appropriation exceeded the 1965 repayment contract's agreed-upon amount for drainage construction and that contract would require amendment, or another contract, if construction were to continue. H.R. Rep. No. 95-233, at 4, 8, 11 (1977). This further shows that to the extent the contracts with Westlands concern drainage, they are related to repayment for construction (and operation and maintenance) of drainage facilities but do not obligate the United States to provide drainage.

II. CONCLUSION

For the foregoing reasons and those discussed in the United States' Motion, Supplemental Brief, and Reply, the Complaint should be dismissed in its entirety.

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Respectfully submitted,

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