

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 RESPONSE TO PLAINTIFFS’ SUBMISSION
PURSUANT TO ORDER DATED JULY 26, 2012**

On July 26, 2012, the Court ordered the parties to file a submission relating to the United States’ pending motion to dismiss (ECF No. 9; Re-filed ECF No. 56) on statute of limitations and standing grounds. ECF No. 37. Plaintiffs filed their submission (“Pls.’ Submission”) on August 8, 2012. ECF No. 38. Pursuant to the Court’s Order dated July 26, 2012 (ECF No. 37), the United States hereby files its response to Plaintiffs’ Submission.

ARGUMENT

A. PLAINTIFFS FAIL TO PROVE THEIR CLAIM DID NOT ACCRUE UNTIL 2010.

In their Submission, Plaintiffs argue that their takings claim did not accrue until 2010, when the United States allegedly shirked its statutory duty to provide drainage. Pls.’ Submission at 1. They base this argument on a letter sent from the Department of the Interior, Bureau of Reclamation (“Reclamation”) to United States Senator Dianne Feinstein. Pls.’ App. Ex. 33 (ECF No. 20-38) at 6-10 [JA60 at JA01875-79]. Plaintiffs argue that prior to this letter, they were justifiably uncertain whether drainage water had substantially encroached their farmlands. Pls.’ Submission at 1.

As argued previously, Plaintiffs' position is baseless. First, the events of the 1990s removed any alleged justifiable uncertainty and accrued Plaintiffs' claim. ECF No. 39 at 7-8; ECF No. 34 at 2-8; ECF No. 59 at 6-14; ECF No. 57 at 8-12. And subsequent events after 2000 cannot revive their stale claim. ECF No. 39 at 4; ECF No. 34 at 5-6; ECF No. 59 at 2-3, 10; ECF No. 57 at 11. Second, as found by the United States District Court for the Eastern District of California, the United States is complying with its statutory duty to provide drainage. *See Firebaugh Canal Water Dist. v. United States*, 819 F. Supp. 2d 1057, 1074-76 (E.D. Cal. 2011) (finding that the United States is complying with its statutory duty and with the control schedule for implementing drainage pursuant to Reclamation's 2007 Record of Decision (portions filed as Pls.' App. Ex. 27; ECF No. 20-32)) [JA10]. Reclamation's 2010 letter to Senator Feinstein was before the district court when it adjudicated this issue and thus, the letter cannot bring the court's conclusion into question. *Id.*; Pls.' App. Ex. 33 (ECF No. 20-38) [JA60]; *see also* ECF No. 34 at 6 (reasoning why this 2010 letter was not a rejection of the duty to provide drainage); ECF No. 32 at 3 n.3 (same). Further, this Court is without authority to review the district court's findings. ECF No. 59 at 4. The Court should, therefore, reject Plaintiffs' argument.

Plaintiffs further argue that the legislative histories of the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) ("San Luis Act") [JA02] and the Authorization of the Appropriations of the San Luis Unit, Pub. L. No. 95-46, 91 Stat. 225 (1977) [JA12], and the San Luis Act's related litigation history, support their view that their claim's accrual was justifiably uncertain before 2010 because they prove that the duty to provide drainage was never interrupted. Pls.' Submission at 2-6. For reasons briefed previously, Plaintiffs' argument eviscerates the statute of limitations and should be rejected. ECF No. 39 at 5; ECF No. 34 at 4; ECF No. 59 at 6-8, 11-13; ECF No. 57 at 9-10. A contrary result would mean that when a statutory duty exists, any takings

claim predicated on the failure to fulfill that duty would never be untimely no matter how long that shortcoming persisted. That is contrary to the purpose of the statute of limitations and the narrow construction of the stabilization doctrine. *United States v. Dow*, 357 U.S. 17, 27 (1947); *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990); *Kabua v. United States*, 546 F.2d 381, 384 (Ct. Cl. 1976); *Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556, 656 (1966); ECF No. 39 at 5.

Plaintiffs also attempt to reframe the stabilization doctrine so that the accrual question is determined by whether Plaintiffs were justifiably uncertain that drainage would be provided. Pls.' Submission at 3. That is not the relevant question. Rather, the question is when did the substantial encroachment of Plaintiffs' property occur and the extent of damage become reasonably foreseeable. ECF No. 39 at 2-3. That is when alleged uncertainty is no longer justifiable. *Id.* Because it is indisputable that the United States failed to provide drainage in the 1990s and this failure was causing irreparable harm and sterilizing Plaintiffs' farmlands, *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577-78 (9th Cir. 2000) [JA06 at JA00243-44], there can be little doubt that substantial encroachment occurred outside the limitations period and there was no justifiable uncertainty which would delay accrual of Plaintiffs' claim until 2010.

B. PLAINTIFFS MUST SEEK LEAVE TO AMEND THEIR COMPLAINT.

The parties are in agreement regarding standing. Pls.' Submission at 6-7. But Plaintiffs now propose that if the Court finds that their claim accrued prior to the earliest date of ownership for a Plaintiff (July 12, 2007), then they will seek leave to amend their Complaint to add plaintiffs who would satisfy the standing requirements. *Id.* Under Rule 15(a)(2) of the Rules of the Court of Federal Claims, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so

requires.” At this juncture, Plaintiffs have not sought leave from the Court nor provided sufficient information (e.g., the identity of these potential plaintiffs, where their property is located, and when they acquired it) to allow the United States to take a position with respect to any such forthcoming motion. Accordingly, the United States will wait until such leave is sought before taking a position on whether it should be granted. However, despite such an amendment, the United States would be entitled to judgment against the current Plaintiffs if the Court finds that their takings claim accrued before they acquired their property.

CONCLUSION

For the foregoing reasons and those briefed previously, the Complaint should be dismissed in its entirety.

Dated: February 1, 2013

Respectfully submitted,

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