IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on February 4, 2013

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

PLAINTIFFS' SUPPLEMENTAL BRIEF TO ADDRESS CHIEF JUDGE HEWITT'S JANUARY 15, 2013 DECISION IN *WESTLANDS WATER DISTRICT v. UNITED STATES*

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I. INTRODUCTION

Chief Judge Hewitt's recently issued Opinion and Order in *Westlands Water District v. United States*, No. 12-12 C (Fed. Cl. filed Jan. 9, 2012)[1] does not determine the outcome of this case, either on its merits or as to the jurisdictional challenge pending before the Court. While the *Westlands* case and this litigation stem from the failure of the United States to comply with its obligation to provide drainage to drainage-impaired farmlands in the Westlands Water District, the two cases involve different Plaintiffs, assert different legal claims, request different relief, and concern different legal interests. However, given the two cases present some common factual issues and the Government's responses to the two cases assert untimeliness as a jurisdictional defense, aspects of Judge Hewitt's decision can be instructive here.

In particular – and especially important to the Government's pending jurisdictional challenge in this case –Judge Hewitt's Opinion and Order demonstrates that whether the statute of limitations has run depends upon the nature of the claim alleged. Of the five claims analyzed by Judge Hewitt under the same six-year statute of limitations applicable here, three **would not** have been time barred.[2] A takings claim based on similar facts, such as the one asserted by Plaintiffs, can also be timely. Moreover, the reasons Judge Hewitt gives for accrual within the limitations period as to these three claims also support a finding that Plaintiffs' takings claim is similarly not time-barred.

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[1] Notice of this decision and the decision itself were recently provided to the Court by the Government. *See* United States' Notice of Additional Authority & Exhibit 1 thereto (filed Jan. 28, 2013 [Docs. 60 and 60-1]).

[2] The three claims that would survive the statute of limitations were the District's claims for breach of the implied covenant of good faith and fair dealing, total breach, and anticipatory repudiation. *Westlands*, No. 12-12C, slip op. at 45-48 (Fed. Cl. filed Jan. 15, 2013). The two claims the *Westlands* court time-barred were the District's claims for past breaches of express and implied contracts and declaratory relief (which was disposed of on other grounds). *Id.* 40-45, 49-52.

In addition, the underlying merits determination of the District's contract claims in *Westlands* also favors the timeliness of Plaintiffs' claims. In holding that the United States' contracts with Westlands did not include a binding contractual undertaking to provide drainage, Judge Hewitt reasoned that expressions of the Government's intent to provide drainage in the contracts reflected its statutory drainage obligation. This interpretation of the contracts undercuts the Government's oft-repeated claim that Plaintiffs' takings claim accrued outside the limitations period because the United States had made a "policy decision" not to provide drainage. In actuality, the Government's repeated statements of its intent to provide drainage coupled with protracted litigation resulting in court orders affirming the Government's statutory obligation created justifiable uncertainty that prevented the stabilization, and accrual, of Plaintiffs' takings claim outside the limitations period.

By applying a claim-dependent analysis to her accrual determinations, Judge Hewitt's Opinion and Order underscores the timeliness of Plaintiffs' takings claim. And by recognizing the United States' ongoing statutory drainage obligation, Judge Hewitt's Opinion and Order reinforces a principal reason why Plaintiffs' takings claim is timely. Accordingly, the proper jurisdiction of this Court over Plaintiffs' takings claim is in no way altered by the dismissal of the District's contract claims in *Westlands*.

II. ARGUMENT

A. Plaintiffs' Takings Litigation Is Distinct From The *Westlands* Action.

Plaintiffs' lawsuit presents a different claim from those asserted by the District in *Westlands*. As explained by Plaintiffs in a prior notice to the Court, the two cases "involve distinctly different Plaintiffs, assert different legal claims, request different relief, and concern different legal interests," even if both cases stem from the United States' failure to comply with its

obligation to provide drainage to drainage-impaired farmlands in the Westlands Water District. *See* Plaintiffs' Notice of Potentially Indirectly Related Case (filed Jan. 19, 2012 [Doc. 17]).

The Westlands Water District, in its own Notice of Indirectly Related Cases filed in this action, concurred, noting that "[t]he legal and damages theories presented in the two cases are completely different." Westlands Water District, Notice of Indirectly Related Case, at 2 (filed Jan. 23, 2012 [Doc. 18]). The District further explained:

> Westlands has sued the Government for historical breach of contract, anticipatory breach of contract, and total breach of contract. Based on these theories of recovery, Westlands seeks contract damages and declaratory relief. Westland's damages are contract damages based on the failure to receive what the Government promised to provide in return for historically made payments and damages for the total value of the Government's future performance of those obligations. The *Etchegoinberry* Plaintiffs are private property owners with the Westlands Water District whose farmland has been damaged due to the Government's failure to provide the drainage required by statute. These Plaintiffs have sued the Government for the taking of property without just compensation. Their claims are based on Constitutional takings law and the Government's breach of its statutory obligation. They have no breach of contract claims. Their damages are based on damages to the land.

Id. at 2-3. The description of the two cases makes clear that in *Westlands*, the District was seeking damages based on claims rooted in contract, whereas here, Plaintiff farmers seek just compensation under the Constitution for a taking of their properties.

In response to these notices, neither the Court nor Government sought consolidation or coordination. Thus, the two lawsuits have been separately litigated, and properly so.

B. Judge Hewitt's Ruling That The United States Owed No Contractual Duty To The Westlands Water District Neither Controls This Case Nor Disturbs Plaintiffs' Takings Claim.

Judge Hewitt's Opinion and Order is clear that the *Westlands* action was principally dismissed because the court found nothing in the contracts between the District and the United States that established a binding commitment on the part of the Government to provide drainage to the Westlands Water District. *Westlands,* No. 12-12 C, slip op. at 14-37, 42, 45-48. This was the

bases for Judge Hewitt's rulings on the Government's motion to dismiss for the District's failure to state a claim under RCFC 12(b)(6). *Id*. at 14-37. And but for the breach of express and implied contract claims, the absence of any contractual obligation was ultimately the grounds for the dismissal of nearly all the contract claims following the Government's motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1). *See, e.g., id*. at 42-48. Since Plaintiffs' Complaint has not asserted any contract claims, *see generally* Compl. ¶¶ 1-111 (filed Sept. 1, 2011 [Doc. 1]), Judge Hewitt's Opinion and Order adjudicating contract claims neither controls this case nor compels the same result. *Cf. Crusan v. United States*, 86 Fed. Cl. 415, 423-424 (Fed. Cl. 2009) (trial court not bound by holdings of another trial court).

Judge Hewitt's Opinion and Order is also equally clear that that the *Westlands* court never considered a takings claim; the validity of such a claim for damages to farmlands in the Westlands Water District; or the timeliness of a takings claim asserted in 2011 for the Government's failure to provide drainage to those farmlands. *See generally Westlands,* No. 12-12 C, slip op. at 45-46. The Constitutional takings doctrine is not referenced once in the *Westlands* Opinion and Order. *See id.* Thus, a ruling from another trial court which never analyzes a takings claim and which makes no points of law on the takings doctrine cannot control or compel a result in this case which asserts a takings violation as Plaintiffs' single claim for relief. *See Crusan*, 86 Fed. Cl. at 423-424.

Further, while ruling that no *contractual* duty existed between the District and the United States, Judge Hewitt's Opinion and Order is also equally clear in its recognition of the Government's ongoing *statutory* duty to provide drainage. *See, e.g., Westlands*, No 12-12 C, slip op. at 20 (interpreting 1963 Contract to be consistent with Government's statutory duty to provide drainage, rather than a separate contractual undertaking) (citing San Luis Act § 5, 74 Stat. at 159, and *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000)); *id.* at 21 (endorsing

Government's position that drainage is a statutory obligation); *id.* at 26-27 & n.13 (same). The *Westlands* Opinion and Order never once disputes, refutes, or undermines the Government's *statutory* obligation to provide drainage. *See id.* at 1-53. This undisputed and ongoing statutory obligation serves as the basis for Plaintiffs' takings claim and allows Plaintiffs' takings claim to proceed, even absent a recognized contractual obligation.

C. Plaintiffs' Takings Claim Is Not Time-Barred As A Result Of Judge Hewitt's Decision In *Westlands*.

Simply because Judge Hewitt found *some* of the District's contract claims time-barred does not mean that Plaintiffs' takings claim is time-barred, especially since Judge Hewitt found that three of the District's claims would have survived the statute of limitations challenge.

1. Accrual of Plaintiffs' Takings Claim Is Analyzed Differently Than Accrual of the *Westlands* Contract Claims.

While the statute of limitations for both the District's contract claims and for Plaintiffs' takings claim is six years, *see* 28 U.S.C. § 2501, the analysis of when a breach of contract claim accrues can be – and on the facts Plaintiffs have alleged, is – distinct from the analysis of when a takings claim accrues. This is so because the stabilization doctrine, articulated by the United States Supreme Court, applies to delay the accrual of a takings claim when the permanence of the taking is not certain. *See United States v. Dickinson*, 331 U.S. 745, 749 (1947). Given the gradual continuous process that has been alleged, *see* Compl. ¶¶ 106-108, as well as the years of litigation about the Government's statutory duty under the San Luis Act and subsequent Government commitments to comply with that duty, the permanence of the taking of Plaintiffs' farmlands has long been uncertain. *See* Section II.C.2, *infra*. Accrual of Plaintiffs' takings claim is therefore properly analyzed under the stabilization doctrine. *Dickinson*, 331 U.S. at 749; *Applegate v. United States*, 25 F. 3d 1579, 1583-84 (Fed. Cir. 1994).

Westlands, on the other hand, did not present Judge Hewitt with a takings claim, since none had been alleged by the District there. *See* Compl., *Westlands*, No. 12-12 C (Fed. Cl. filed Jan. 9, 2012). Judge Hewitt's Opinion and Order never considered when a takings claim accrues or how accrual of a takings claim is distinct from a claim based in contract. *See generally Westlands*, No. 12-12 C, slip op. at 1-56. Judge Hewitt never analyzed the stabilization doctrine either. *See id.* Thus, the key legal doctrine that justifies the timeliness of Plaintiffs' claim was not considered in Judge Hewitt's statute of limitations analysis.

Rather, Judge Hewitt's statute of limitations analysis for accrual is tethered to the particular claims before that court, and the outcome of that accrual analysis – whether a particular claim was time-barred or not – demonstrates that accrual of a claim depends on the claim alleged. But far from supporting any blanket rule that makes all drainage lawsuits stale, Judge Hewitt's Opinion and Order recognizes that the statute of limitations analysis depends on the legal claim asserted, and more importantly, that some claims related to the Government's failure to provide drainage could be timely.

The only claims Judge Hewitt dismissed on statute of limitations grounds were the District's claims for past breaches of express and implied contracts. *Westlands*, No. 12-12 C, slip. op. at 40-45. Judge Hewitt found these claims, asserted under the 1963 Contract and 1965 Contract, to be time-barred based on the legal standard for accrual of contract claims – that is, when a plaintiff has fully performed its obligation under the contract but the defendant has failed to perform – and the District's allegations of such harms outside of the limitations period. *Id*. at 10, 40-45 (citations omitted). Given the District's breach of contract claims – which allegedly stemmed from the 1963 and 1965 contracts that effectively came with date-stamped

obligations – were claimed to have been breached outside the limitations period, *see id.* at 40-45, the outcome is reasonable.

Notably, Judge Hewitt did not time-bar all the breach of contract claims for all the contracts, finding that where "any of the events alleged in the pleadings to have occurred after January 6, 2006 can be understood as alleged breaches of the 2007 Interim Contract or the 2010 Interim Contract, such claims would survive the statute of limitations." *Id*. at 45 (citation omitted). Further, Judge Hewitt found that other claims asserted by the District would not be time-barred. Specifically, the District's claims that involved obligations of infinite duration, like Plaintiffs' takings claim – rather than date-stamped performance deadlines – were not time-barred.

For instance, Judge Hewitt found the District's claim for breach of the implied obligation of good faith and fair dealing claim "would survive the statute of limitations" as long as the District's alleged breaches took place within the statute of limitations period. *Id.* at 46. She also found that the District's claim for anticipatory breach – which the Government did not challenge on statute of limitations grounds – would be timely. *See id.* at 48 (holding that based on District's position that Government made clear its intent to abandon its drainage obligation in September 2010, "Plaintiff's claim of repudiation of a contractual obligation would be viewed as having allegedly occurred in 2010 and would survive the statute of limitations"). In addition, Judge Hewitt concluded that the District's total breach claim "would have accrued in 2010 and would not be barred by the statute of limitations" based on the District's assertion that "it finally became clear that the Government would never provide the drainage facilities required by the Contracts" in 2010. *Id.* at 47 (citations omitted). Factored into the court's analysis was the District's sense that the Government's "duty to provide drainage was indefinite" and that "no immediate obligation to perform the purported

drainage obligation arose until it was no longer reasonable for plaintiff to believe that such performance would be forthcoming." *Id.*

Judge Hewitt's rulings underscore the *Westlands* Court's implicit and explicit recognition that for certain obligations (like its obligation of good faith and fair dealing), the United States is not subject to any deadline, and that such obligations did not necessarily have to be satisfied outside of the limitations period. The same holds true for the United States' statutory obligation to provide drainage given the absence of any specified deadline to complete its obligation. As such, Plaintiffs' takings claim should survive the Government's statute of limitations challenge as long as it was asserted when any uncertainty with respect to the permanence of the taking ceased, which is what Plaintiffs have done here.

Such an outcome underscores the "uniquely fact intensive" nature of takings jurisprudence. *See John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182, 193 (Fed. Cl. 2003). It is consistent with a plaintiff's right to not resort to premature or piecemeal litigation when there is a continuous process that results in a taking and when government action makes accrual of that claim uncertain. *See Dickinson*, 331 U.S. at 749; *Applegate*, 25 F.3d 1579, 1582 (Fed. Cir. 1994); *Boling v. United States*, 220 F.3d 1365, 1371 (Fed Cir. 2000) ("[D]uring the time when it is uncertain whether the gradual process will result in a permanent taking, the plaintiff need not sue."). And exercising jurisdiction here would adhere to the Supreme Court's direction to avoid "procedural rigidities" when "dealing with a program which arises under such diverse circumstances." *Dickinson*, 331 U.S. at 748-749 ("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.").

Not only would this Court's exercise of jurisdiction over Plaintiffs' takings claim be an appropriate application of the stabilization doctrine, it would also be in accord with the "principle of fairness" embodied in the Fifth Amendment, *see id.,* and called for by the facts of this case. Here, the damage to Plaintiffs' farmlands as a result of rising groundwater and accumulating salt that occurs absent drainage is clear. *See* Compl. ¶¶ 106-108; U.S. Re-Filed Motion to Dismiss and Memorandum in Support at 27, 29 (filed Nov. 16, 2012 [Doc. 56]). The United States' statutory obligation to provide drainage has been recognized and confirmed by the Ninth Circuit. *See Firebaugh Canal,* 203 F.3d at 570 (Stip. Fact QQ [App. 06 {JA00238}]). And the Government's refusal to satisfy this obligation has recently been made clear to Plaintiffs. *See* Section II.D, *infra.* Should the dismissal of *Westlands* stand, then Plaintiffs' takings claim may be the only means by which the Government can be held accountable for conduct that violates its own laws and Court Orders. Thus, Judge Hewitt's Opinion and Order underscores the reason why this Court's exercise of jurisdiction over Plaintiffs' takings claim is proper and that the action proceed to a determination on the merits.

2. Judge Hewitt's Opinion And Order Does Not Undermine The Uncertainty Of Plaintiffs' Takings Claim.

Appropriately considered under the stabilization doctrine, Judge Hewitt's ruling that the United States has no *contractual* obligation to provide drainage to the Westlands Water District does not make the permanence of Plaintiffs' takings claim before 2010 any less uncertain. Plaintiffs' justifiable uncertainty as to their takings claim never rested on a single set of contracts. Rather, a number of events have made Plaintiffs justifiably uncertain over the years.

First, through the San Luis Act, the Government has long held a statutory obligation to provide drainage to Plaintiffs' farmlands. *See* San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) (Stip. Fact B [App. 02 {JA00117-JA00121}]). The 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 Spring 1986. *See id.; see also infra.* Judge Hewitt's Opinion and Order does not dispute, refute, or in any way undermine this statutory obligation. *Westlands,* No. 12-12 C, slip op. at 1-56. In fact, Judge Hewitt's Order and Opinion stands as an endorsement of the ongoing statutory order which obligates the Government to provide drainage to Plaintiffs' farmlands. *See* Section II.B, *supra.*

Second, in the years following the closure of the Kesterson Reservoir, the Government repeatedly expressed its commitment to achieve a long-term drainage solution in the San Luis Unit. In 1986, as part of its settlement of the *Barcellos & Wolfsen, Inc. v. Westlands Water District* matter, the Government agreed to complete a drainage plan by 1991. Judgment, *Barcellos,* No. CV-79-106 (E.D. Cal. Dec. 30, 1986), at 20 (Stip. Fact BB [App. 21 {JA00612}]). In 1989, the Bureau of Reclamation formed the San Luis Unit Drainage Program, which sought to "achieve a long-term solution to the drainage problem in the San Luis Unit." *See* M. Delamore Decl., *Firebaugh Canal,* No. CV-F-88-634 (E.D. Cal. Feb. 11, 1991), at 2 (Pl. Fact P-B [App. P02 {PA00021}]). In March 1990, the Bureau released a Plan of Study for the San Luis United Drainage Program, which echoed its intent "to identify and implement a long-term solution to the drainage problem of the [San Luis Unit]" and affirmed the Bureau's commitment to comply with the drainage requirements of the stipulated judgment in *Barcellos*. *See* Bureau, San Luis Unit Drainage Program Plan of Study (March 1990), at 1-4 (Pl. Fact P-C [App. P03 {PA00029}]). In 1990, the federal-state interagency program, the San Joaquin Valley Drainage Program, issued "A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley," which purported "to identify measures to help solve immediate drainage-related problems on the west side of the San Joaquin Valley and to develop a comprehensive plan for their

long-term management." 1990 Management Plan (Stip. Fact EE [App. 24 {JA00719-JA00782}]); Bureau, San Luis Unit Drainage Program Plan of Study (March 1990), at 1-4 (Pl. Fact P-C [App. P03 {PA00029}]). And in 1991, pursuant to the *Barcellos* Judgment and as part of its continuing efforts to provide drainage to the San Luis Unit, the Bureau submitted a Draft Environmental Impact Statement ("DEIS") for the San Luis Drainage Program. Compl. ¶ 66; *see also* Judgment, *Barcellos,* No. CV-79-106 (E.D. Cal. Dec. 30, 1986) (Stip. Fact BB [App. 21 {JA00591-JA00648}]); San Luis Unit Drainage Program, Central Valley Project, California, DEIS (Dec. 20, 1991) (Stip. Fact GG [App. 23{JA00667, JA00672-JA00679}]). The DEIS's first page states:

> [T]he San Luis Drainage Program . . . will, at least, address drainage needs **through the year 2007** . . . and be compatible with potential long-term solutions. The ultimate goal of the Program is to provide a long-term solution to the agricultural drainage problem in the San Luis Unit.
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> . . . .
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> A long-term solution denotes a balanced condition in which water or salts do not further accumulate in the agricultural environment so that irrigated agriculture can continue indefinitely.

Id. (Stip. Fact GG [App. 23{JA00667}]) (emphasis added).

Third, the *Firebaugh* and *Sumner Peck* litigation initiated in 1988 and 1991, respectively, and the Court Orders issued in 1993, 1994, 1995 and 2000 stemming from those lawsuits have not only affirmed the Government's statutory obligation to provide drainage, they resulted in express orders for the Government to make good on its drainage obligation. Complaint, *Firebaugh,* No. CV-F-88-634 (E.D. Cal. Dec. 9, 1988) (Stip. Fact CC [App. 22 {JA00649-JA00664}]); Complaint, *Sumner Peck,* No. CV-F-91-048 (E.D. Cal. Jan. 31, 1991) (Stip. Fact FF [App. 25{JA00783-JA00845}]); *Sumner Peck,* No. CV-F-91-048 (E.D. Cal. May 17, 1993) (order re partial summary judgment) (Stip. Fact II [App. 27 {JA00849-JA00876}]); *id.* (E.D. Cal. Dec. 16, 1994) (findings of fact) (Stip. Fact NN [App. 32 {JA01076-JA01122}]); *Firebaugh,* No. CV-F-88-634 (E.D. Cal.

Mar. 12, 1995) (order on summary judgment) (Stip. Fact OO [App. 33 {JA01123-JA01136}]); *id.*, 203 F.3d at 570 (Stip. Fact QQ [App. 06 {JA00238}]). Each lawsuit contributed to Plaintiffs' uncertainty, and with each Court order recognizing the Government's drainage obligation, Plaintiffs' expectations that drainage would be provided to their farmlands reasonably increased.

Fourth, the Government's promise of drainage was renewed almost annually from 2000 through 2008, as the Government devised, scrutinized, and implemented a new drainage plan that was to comply with its statutory duty and Court Orders. *See generally* Plan of Action (Stip. Fact SS [App. 36 {JA01145}]); Preliminary Alternatives Report (Stip. Fact TT [App. 17 {JA00536}]); Plan Formulation Report (Stip. Fact XX [App. 39 {JA01212}]); Plan Formulation Report Addendum (Stip. Fact EEE [App. 46 {JA01406}]); Draft EIS (Stip. Fact III [App. 50 {JA01467}]); Final EIS (Stip. Fact KKK [App. 52 {JA01559}]); Record of Decision (Stip. Fact LLL [App. 10 {JA00405}]). Indeed, in May 2005, on the eve of the limitations period for this case, the Bureau released a Draft EIS that continued to promise drainage to landowners:

> The proposed Federal Action is to provide drainage service to the San Luis Unit. This proposed action would meet the needs of the Unit for drainage service, fulfill the requirements of the February 2000 Court Order, and be completed under the authority of Public Law 86-488.

Draft EIS at ES-1 (Stip. Fact III [App. 50 {JA01467}]).

On this record alone – momentarily setting aside the contracts between Westlands Water District and the United States – the permanence of the taking of Plaintiffs' farmlands has been uncertain from the moment the Kesterson Reservoir closed until only recently. Even without consideration of the contracts, at no point in time since the closure of the Kesterson Reservoir in 1986 has six years elapsed without an event that has reasonably instilled in Plaintiffs the expectation that drainage would be provided to their farmlands or that has made the permanence of the Government's taking of their farmlands certain. And at no point in time have Plaintiffs ever

rested the timeliness of their takings claim exclusively, or even heavily, on contracts between the District and the United States. The record described above undermines any suggestion by the Government to the contrary.

Further, a consideration of the contracts would not change the analysis. Executed in 1963 and 1965, respectively, the 1963 Contract and the 1965 Repayment Contract were executed during the period of time where there is no dispute as to the Government's obligation to provide drainage and long before drainage commenced anywhere in the Westlands Water District. *See* 1963 Contract (Stip. Fact B [App. 03 {JA00122-JA00177}]); 1965 Repayment Contract (Stip. Fact D [App. 04 {JA00178-JA00220}]). Executed in 2007 and 2010, respectively, the 2007 Interim Renewal Contract and the 2010 Interim Renewal Contract were executed well into the Government's most recent period of mitigation efforts and within the limitations period. *See* 2007 Interim Renewal Contract (Stip. Fact MMM [App. 53 {JA01746-JA01826}]); 2010 Interim Renewal Contract (Stip. Fact SSS [App. 58 {JA01856-JA01861}]). The 2010 contract, in particular, was signed approximately six months before the Government would purport to forego its obligation altogether through the Bureau's letter to Senator Feinstein. Given what matters for this Court's jurisdictional analysis is what took place outside of the limitations period in the six years before Plaintiffs' September 2, 2011 Complaint was filed – that is, before September 2, 2005 – any ruling in *Westlands* with respect to the 2007 and 2010 interim contracts should have little effect.

D. The Bureau's September 2010 Letter To Senator Feinstein Can Serve As The Basis For Accrual of Plaintiffs' Takings Claim.

Finally, Judge Hewitt's Opinion and Order does not affect September 2010 as a valid accrual date for Plaintiffs' takings claim. Indeed, notwithstanding her belief that the letter could not properly repudiate a contractual duty, *see Westlands,* No. 12-12 C, slip op. at 36, Judge Hewitt nonetheless recognizes the Bureau's September 2010 letter can function appropriately as an accrual

date for some claims.[3] In the statute of limitations analysis for the District's anticipatory breach claim, Judge Hewitt concludes that "plaintiff's claim of repudiation of a contractual drainage obligation would be viewed as having allegedly occurred in 2010" based on the District's position that the statute of limitations had not run on its claim "until the Government made clear its intent to abandon its drainage obligation in September of 2010 with the Feinstein letter." *Id*. at 48. Judge Hewitt also recognizes the Bureau's September 2010 letter to Senator Feinstein could accrue the District's total breach claim. *See id.* at 47-48. There is no reason the Bureau's September 2010 letter cannot have the same effect for Plaintiffs' takings claim, when the letter made apparent to Plaintiffs the Government would not fulfill its statutory drainage obligation such that the permanence of the Government's taking became certain.

III. CONCLUSION

For these reasons, Judge Hewitt's Opinion and Order in *Westlands* does not invalidate this Court's jurisdiction over Plaintiffs' takings claim. Unlike the plaintiff in *Westlands* which sought contract damages based on contract claims, Plaintiffs here have asserted a distinct claim against the United States, grounded in the Constitution, for a taking of individual farmlands without just compensation. Under the legal standard for accrual for this claim, Plaintiffs' takings claim against the Government is timely and the Government's motion to dismiss should be denied.

[3] The *Westlands* Court's discussion as to whether the Bureau's September 2010 letter could lead to a contract repudiation was not part of the court's statute of limitations analysis. Rather, it was part of the court's analysis of whether the District could adequately state a claim for relief under an anticipatory breach theory. *See Westlands*, No. 12-12 C, slip op. at 36-37. This is a distinct issue from whether the letter represents a reasonable accrual date for Plaintiffs' takings claim – a matter not taken up by the *Westlands* Court.

Respectfully submitted,

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Date: February 4, 2013

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