

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on February 6, 2013

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

**UNITED STATES’ SUPPLEMENTAL BRIEF REGARDING ADDITIONAL
AUTHORITY IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant United States submits this supplemental brief supporting its pending motion to dismiss, filed December 8, 2011 (ECF No. 9) and re-filed pursuant to Court order on November 16, 2012 (ECF No. 56) (“Motion”). See ECF Nos. 47, 55 (ordering the parties to revise and re-file their briefs related to the Motion). As argued in our Motion, Plaintiffs’ Complaint is barred by the applicable statute of limitations, 28 U.S.C. § 2501.

On January 15, 2013, Chief Judge Emily C. Hewitt issued an opinion and decision in *Westlands Water District v. United States*, No. 12-12C (Fed. Cl. Jan. 15, 2013) (“*Westlands*”). The United States filed its Notice of Additional Authority regarding *Westlands* on January 28, 2013. ECF No. 60. In *Westlands*, the Westlands Water District (“Westlands”) brought numerous breach of contract claims against the United States premised on an alleged failure to provide drainage as allegedly required by various contracts between Westlands and the United States. *Westlands*, slip op. at 1-2. Chief Judge Hewitt dismissed the case in its entirety. *Id.* at 53. The United States is filing this supplemental brief because *Westlands* is indirectly related to the present case, ECF No. 17 (Pls.’ Notice of Potentially Indirectly Related Case), and Chief

Judge Hewitt's resolution of issues in *Westlands* supports the United States' pending Motion in this action.

ARGUMENT

There are three issues in *Westlands* that are germane to the present case: (1) the proper interpretation of the September 2010 letter sent from the Bureau of Reclamation ("Reclamation") to Senator Dianne Feinstein, *Westlands*, slip op. at 32, 33, 36, 48; (2) the absence of any express or implied contractual obligation for the United States to provide drainage, *id.* at 19-31; and (3) the events allegedly causing contractual damages stemming from a lack of drainage occurred outside the limitations period. *Id.* at 40-44, 47-48. Each of these issues is discussed below.

First, *Westlands* favorably addresses the September 2010 letter sent from Reclamation to Senator Feinstein.¹ *Westlands*, slip op. at 32, 33, 36, 48. In this case, Plaintiffs argue that this letter accrued their claim because it "openly rejected the agreed-upon drainage solution embodied in [Reclamation's] 2007 Record of Decision" and "marked the point where *Westlands* landowners, including Plaintiffs, knew of the extent of the harm to their farmlands and all events that fixed the Government's liability had occurred." ECF No. 58 at 32; *see also id.* at 13, 35-36 (arguing that this letter proves that Reclamation is reneging on its commitment to providing drainage and that Plaintiffs' claim accrued "no earlier than September 2010, when Interior washed its hands of the Record of Decision" and transferred responsibility for drainage to local water districts). As argued previously, this letter in no way reflects a rejection of the 2007 Record of Decision or Reclamation's commitment to providing drainage. ECF No. 59 at 16-17, 16 n.13; ECF No. 40 at 1-2; ECF No. 34 at 6. The *Westlands*' decision fully supports the United States' position as to the proper interpretation of the letter. There, in rejecting a similar claim

¹ The letter at issue is filed with the Court at Joint Appendix 60 (JA01875-79).

accrual argument put forth by Westlands, Chief Judge Hewitt found that the September 2010 letter was not a rejection of Reclamation's drainage obligation (whether contractual or statutory) because, *inter alia*, the letter (1) acknowledged Reclamation's statutory duty to provide drainage; (2) discussed steps Reclamation is taking to provide drainage; (3) sought legislative assistance to comply with Reclamation's statutory duty to provide drainage; (4) described key elements of a long-term legislative drainage strategy that the administration would support; and (5) contrary to Westlands' and Plaintiffs' assertions, did not transfer Reclamation's drainage obligations to local water districts. *Westlands*, slip op. at 36. Just as Chief Judge Hewitt in *Westlands* found, this Court should also find that the September 2010 letter did not reject Reclamation's commitment to providing drainage or the 2007 Record of Decision. The letter is simply not an event sufficient to accrue Plaintiffs' claim.² Rather, Plaintiffs' claim accrued well outside the limitations period as argued in the Motion.

Second, *Westlands* favorably resolves Westlands' and Plaintiffs' allegation that Westlands' contracts with the United States created a contractual obligation to provide drainage. *Westlands*, slip op. at 19-31. Here, Plaintiffs argue that the existence of this alleged contractual obligation created justifiable uncertainty delaying accrual of Plaintiffs' takings claim. ECF No. 31-1 at 5-6; ECF No. 35 at 5-6; ECF No. 36 at 7-8. The United States previously argued that no such contractual obligation existed but, even if a contractual obligation did exist, any such obligation failed to create justifiable uncertainty delaying the accrual of Plaintiffs' claim. ECF No. 34 at 7-8. In *Westlands*, Chief Judge Hewitt held that no such contractual obligation exists

² Notably, this letter was before Judge Wanger of the U.S. District Court for the Eastern District of California when he held that 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, 1062-63, 1072-74 (E.D. Cal. 2011) (Joint App. 67) (holding that since the remand of this case from the U.S. Court of Appeals for the Ninth Circuit, the United States has complied with its duty to provide drainage under the San Luis Act).

and Plaintiffs' argument to the contrary should be rejected here, as should Plaintiffs' argument that an alleged contractual obligation created justifiable uncertainty delaying accrual of Plaintiffs' claim.

Third, in *Westlands*, Chief Judge Hewitt found that Westlands stopped receiving drainage service in 1986 and the events giving rise to any breach of an alleged contractual duty occurred prior to 2006.³ *Westlands*, slip op. at 40-44, 47-48. While the United States acknowledges that the claim accrual analysis for a breach of contract differs from that of a taking, Chief Judge Hewitt's analysis of the underlying facts supports the United States' argument that Plaintiffs' takings claim accrued outside the limitations period. Chief Judge Hewitt noted that the alleged damage which allegedly caused lands in Westlands to be fallowed or retired due to a lack of drainage stemmed from the United States' cessation of drainage in 1986. *Id.* at 41, 44. This is the same alleged damage that Plaintiffs here seek just compensation for under the Fifth Amendment. *Westlands'* acknowledgment that damage began due to the cessation of drainage in 1986 supports the United States' view of claim accrual here. Further, the lack of any post-2006 event sufficient to accrue a breach of contract claim also supports the United States' view of claim accrual here. The indisputable facts remain: (1) drainage ceased in 1986; (2) the United States subsequently refused to provide drainage; and (3) that refusal continued until 2000. ECF No. 56 at 10-11, 26-27; ECF No. 57 at 11-12; ECF No. 59 at 10-11. Under such circumstances, Plaintiffs' claim is time-barred and must be dismissed.

CONCLUSION

For the foregoing reasons and those discussed in the Motion and related briefs, Plaintiffs have failed to meet their burden to prove that their claim accrued since September 2, 2005.

³ As noted above, Chief Judge Hewitt found that the one post-2006 event, the September 2010 letter, to be insufficient to accrue Westlands' breach of contract claim. *Westlands*, slip op. at 36.

Therefore, their claim is time-barred pursuant to 28 U.S.C. § 2501 and this Court lacks jurisdiction over this lawsuit.

Dated: February 6, 2013

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

s/ E. Barrett Atwood

E. BARRETT ATWOOD

Trial Attorney

United States Department of Justice

Environment and Natural Resources Division

301 Howard Street

Suite 1050

San Francisco, CA 94105

Email: Barrett.Atwood@usdoj.gov

Telephone: (415) 744-6480

Fax: (415) 744-6476

Counsel for United States

Of Counsel:

Shelly Randel

Attorney/Advisor

U.S. Department of the Interior

Office of the Solicitor