IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

UNITED STATES' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING THE OPINION AND ORDER ISSUED IN *WESTLANDS WATER DISTRICT V. UNITED STATES*

Pursuant to the Court's Order dated February 4, 2013 (ECF No. 70), on February 6, 2013, Defendant United States filed its supplemental brief regarding the opinion and order issued in *Westlands Water District v. United States*, No. 12-12C, 2013 WL 308638 (Fed. Cl. Jan. 15, 2013) ("*Westlands*") (ECF No. 72; "Def.'s Suppl. Br.") in support of the United States' 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). Pursuant to that same Order, the United States submits this response to Plaintiffs' Supplemental Brief to Address Chief Judge Hewitt's January 15, 2013 Decision in *Westlands Water District v. United States*, filed on February 4, 2013. ECF No. 71 ("Pls.' Suppl. Br.").

I. INTRODUCTION

In their Supplemental Brief, Plaintiffs argue that the *Westlands* decision does not adversely impact Plaintiffs' claim here. As set forth in the United States' Supplemental Brief, the United States disagrees for three primary reasons. First, in dismissing *Westlands* in its

entirety, Chief Judge Hewitt agreed with the United States and interpreted the event that Plaintiffs here argue triggered the accrual of their takings claim – the September 2010 letter sent from the Bureau of Reclamation ("Reclamation") to Senator Dianne Feinstein – in a manner that is favorable to the position argued by the United States in this case. *Westlands*, slip. op. at 32, 33, 36, 48. Plaintiffs continue to argue that this letter made clear that Reclamation rejected its statutory duty to provide drainage, thereby removing the alleged justifiable uncertainty shrouding the accrual of Plaintiffs' claim. Pls.' Suppl. Br. at 13-14; Def.'s Suppl. Br. at 2. Just as the United States argues here, Chief Judge Hewitt found that the letter did no such thing. Rather, the letter affirmed Reclamation's continued commitment to comply with its statutory duty to provide drainage. *Westlands*, slip op. at 36.

Second, Chief Judge Hewitt explicitly held that there is no express or implied contractual obligation for the United States to provide drainage to Westlands Water District ("Westlands"). *Id.* at 19-31. Despite backing off their position now, Pls.' Suppl. Br. at 12-13, Plaintiffs previously argued that the United States' alleged contractual obligation to provide drainage to Westlands supported their theory of justifiable uncertainty under the stabilization doctrine. Def.'s Suppl. Br. at 3. While the United States disagrees that any such alleged obligation could justify Plaintiffs' uncertainty, given Chief Judge Hewitt's ruling, Plaintiffs' argument must be rejected regardless. *Id.* at 3-4.

Third, Chief Judge Hewitt found that drainage service ceased in 1986 and that the only timely event which could possibly trigger a breach of an alleged contractual duty to provide drainage was the September 2010 letter. *Westlands*, slip op. at 41-44, 47-48. However, because Chief Judge Hewitt held that the letter did not repudiate any alleged contractual obligation, but instead, affirmed Reclamation's commitment to its statutory duty to provide drainage, this Court

should find that there is no timely event that could possibly accrue Plaintiffs' takings claim. Def.'s Suppl. Br. at 4. These facts demonstrate that dismissal of Plaintiffs' claim as time-barred is the proper result.

The parties do agree on a number of issues. First, the parties agree that *Westlands* is not binding on this Court and its outcome does not mandate the dismissal of this action. Pls.' Suppl. Br. at 4. Second, the parties agree that the United States' obligation to provide drainage is statutory, *id.*; a point the United States has always embraced in this litigation. Third, as acknowledged in the United States' Supplemental Brief, the parties agree that claim accrual analysis for a breach of contract is distinct from that of a taking. Pls.' Suppl. Br. at 5. Fourth, the parties also agree that *Westlands* did not address a takings claim or the stabilization doctrine. *Id*. at 6. Fifth, the parties agree that the only conceivable way Plaintiffs' takings claim could be found timely is if the stabilization doctrine applies and the alleged justifiable uncertainty surrounding the accrual of the claim was removed within the limitations period, *id.*at 8; an allegation vigorously disputed by the United States. Sixth, the parties agree that the occurrence of alleged damage to Plaintiffs' farmlands caused by rising groundwater and accumulating salts absent drainage is not difficult to perceive. *Id.* at 9. Finally, the parties agree that Chief Judge Hewitt's opinion dismissing *Westlands* in its entirety is the reasonable outcome. *Id.* at 6-7. None of these issues lends credence to Plaintiffs' theory of claim accrual. Plaintiffs' remaining arguments to the contrary are not persuasive and this Court should find Plaintiffs' claim time-barred.

II. ARGUMENT

A. CHIEF JUDGE HEWITT'S INTERPRETATION OF THE SEPTEMBER 2010 LETTER SUPPORTS DISMISSAL OF THIS ACTION.

The parties' divergent views on the import of *Westlands* are most stark in their discussion of Reclamation's September 2010 letter to Senator Feinstein. This is a critical issue as Plaintiffs point to this letter as the only timely event accruing their takings claim because it allegedly removed all justifiable uncertainty whether the United States would comply with its statutory duty to provide drainage. Pls.' Suppl. Br. at 9, 13-14. Plaintiffs' position is untenable.

First and foremost, Judge Wanger of the U.S. District Court for the Eastern District of California 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 *Firebaugh* from the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in 2000, the United States has complied with its statutory duty to provide drainage). This September 2010 letter was before Judge Wanger when he issued this opinion a year later, in September 2011, and he implicitly rejected the interpretation of the letter advanced by Plaintiffs in this litigation and by Westlands in its case. Given this, Plaintiffs' argument is baseless.

Second, as discussed above, Chief Judge Hewitt's interpretation of this same letter explicitly rejects the interpretation advanced by Plaintiffs and Westlands. Plaintiffs, however, argue that Chief Judge Hewitt recognized that the September 2010 letter can function appropriately as an accrual date for "some" claims. *See* Pls.' Suppl. Br. at 13-14 (citing *Westlands*, slip op. at 47-48, discussing Westlands's total breach and anticipatory repudiation claims). Plaintiffs are technically correct in the abstract, but they misconstrue Chief Judge Hewitt's analysis. Rather than finding that the September 2010 letter accrued Westlands's total

breach or anticipatory repudiation claims, Chief Judge Hewitt concluded that the letter was not a repudiation of an alleged contractual duty to provide drainage (to the contrary, it is evidence of Reclamation's compliance with its statutory duty to provide drainage), *Westlands*, slip op. at 36, 48, nor was it evidence of a total breach. *Id.* at 46-47. While the court stated that if Westlands's allegations supporting these claims could be favorably construed, such claims could be timely, Chief Judge Hewitt rejected Westlands's allegations regarding the effect and interpretation of the September 2010 letter. *Id.* at 36, 46-48. This Court should follow suit and find that the September 2010 letter was not a rejection of Reclamation's commitment to providing drainage. Therefore, just as in *Westlands*, there is no timely event accruing Plaintiffs' claim.[1] The groundwater invasion of Plaintiffs' properties began decades ago, accruing Plaintiffs' claim, and as discussed below, events since 2000 cannot revive this stale claim.

B. PLAINTIFFS FAIL TO PROVE THAT ALLEGED JUSTIFIABLE UNCERTAINTY PERSISTED UNTIL SEPTEMBER 2010.

The proper interpretation of the September 2010 letter should be resolved in the United States' favor and Plaintiffs' claim found time-barred. As this letter is the only timely event at issue, Plaintiffs' continued insistence that the United States' "refusal to satisfy [its statutory] obligation has recently been made clear to Plaintiffs," Pls.' Suppl. Br. at 9, lacks evidentiary support. Because the parties agree that drainage ceased in 1986 and any alleged resulting damage is not difficult to perceive, there should be no question that the stabilization doctrine does not apply and Plaintiffs' claim accrued untimely. And because the San Luis Act, Pub. L.

[1] Plaintiffs also argue unpersuasively that because the September 2010 letter was sent within the limitations period, any claim predicated on "obligations of infinite duration, like Plaintiffs' takings claim," is timely. Pls.' Suppl. Br. at 7. Obviously, any claim predicated on an event occurring within the limitations period could be timely. The point, however, is that the September 2010 letter did not accrue Westlands's alleged claims nor should it accrue Plaintiffs' claim.

No. 86-488, 74 Stat. 156 (1960), does not obligate the United States to remediate alleged past damage, *Firebaugh*, 819 F. Supp. at 1067, Plaintiffs cannot credibly claim that the permanence of the alleged damage was not reasonably foreseeable until 24 years later when Reclamation sent the September 2010 letter. Plaintiffs, however, once again reargue their theory under the stabilization doctrine that justifiable uncertainty delayed the accrual of their claim until 2010. Pls.' Suppl. Br. at 9-13.

For the many reasons previously raised by the United States, Plaintiffs' theory should be rejected. ECF No. 59 at 6-14; ECF No. 57 at 5-11. In summary, Plaintiffs misrepresent the indisputable fact that the United States previously made the policy decision to not provide drainage and maintained that policy throughout the 1990s (until the Ninth Circuit's 2000 decision in *Firebaugh*). ECF No. 59 at 4-5; ECF No. 57 at 10; ECF No. 56 at 17-19. Instead of admitting this indisputable fact, found repeatedly by Judge Wanger and affirmed by the Ninth Circuit, Plaintiffs claim that "[i]n actuality," this was not the case and that justifiable uncertainty whether the United States would provide drainage persisted until 2010. Pls.' Suppl. Br. at 2, 9-13. In reality, the United States refused to provide drainage throughout the 1990s and did not reverse course until 2000. Nothing Plaintiffs may allege changes that fact. The ever-present statutory obligation to provide drainage does not. ECF No. 59 at 12-13.[2] Reclamation's studies

[2] By way of comparison, the United States is statutorily obligated to manage the assets of Indian tribes that it holds in trust and to provide an accounting of those assets. Despite this ever-present statutory duty, claims predicated on the United States' ongoing failure to provide an accounting, or related breaches of its trust obligations, would be time-barred absent Congress's enactment of legislation such as the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7, waiving the United States' sovereign immunity by delaying accrual of these claims. *See Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1342, 1346-49 (Fed. Cir. 2004) (due to Congress's action, which delayed accrual and extended the government's waiver of sovereign immunity, breach of statutory fiduciary duty claim was timely because it would not accrue until the United States' duty to provide an accounting was satisfied). Here, Congress has not acted to preserve the timeliness of Plaintiffs'

and noncommittal proposals made between the cessation of drainage in 1986 and its issuance of the Draft Environmental Impact Statement in 1991 do not. ECF No. 59 at 6-7; *see also Mildenberger v. United States*, 643 F.3d 938, 948 (Fed. Cir. 2011) (government studies and proposals do not rise to the level of mitigating promises which may cause justifiable uncertainty). Ongoing litigation and disobeyed court orders in the *Firebaugh* and *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) ("*Sumner Peck*") litigations do not. ECF No. 59 at 8-10; *see also Banks v. United States*, 102 Fed. Cl. 115, 144-47 (2011) (the accrual of a claim is not delayed based upon legal uncertainty; the requisite inquiry is the factual circumstances) (citations omitted). Nor does the United States' reversal of its policy decision to not provide drainage after the Ninth Circuit issued its 2000 opinion in *Firebaugh*. ECF No. 59 at 3, 14-15, 17; ECF No. 57 at 11; *see also Mildenberger*, 643 F.3d at 948 (affirming that mitigation efforts cannot revive a stale takings claim); *Banks*, 102 Fed. Cl. at 134 n.13 (subsequent mitigation promises cannot revive stale claim); *Mildenberger v. United States*, 91 Fed. Cl. 217, 239 (2010) ("even if the mitigation efforts cited by plaintiffs could be viewed as reasonably raising an expectation of improvement, those hopes arrived too late in face of a long-expired statute of limitations"). Plaintiffs' failure to prove that justifiable uncertainty delayed accrual of their claim mandates its dismissal.

Moreover, Plaintiffs have not once explained, much less proven, why the accrual of their claim was justifiably uncertain until 2010, while their fellow landowners and putative class members were so certain of this same takings claim that they litigated it in *Sumner Peck*, from 1991 through settlement in 2002. ECF No. 56 at 15-23. Plaintiffs also fail to prove why this

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claim predicated on the breach of the statutory duty to provide drainage. Moreover, Plaintiffs' argument – that a claim predicated on the failure to comply with an ever-present statutory duty is never untimely – is in direct conflict with precedent binding on this Court and should therefore be rejected. *Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995).

alleged uncertainty ceased in 2010 despite Judge Wanger's subsequent finding that the United States has been in compliance with its statutory duty. Plaintiffs' lone argument to the contrary rests upon the United States' alleged rejection of its statutory duty in the September 2010 letter. As shown above, such an argument is in direct contradiction with *Westlands* and Plaintiffs' theory of claim accrual should be rejected accordingly.

C. PLAINTIFFS' CLAIM CANNOT BE EQUITABLY TOLLED.

In an attempt to argue the equities of their theory of claim accrual, Plaintiffs falsely claim that with the dismissal of *Westlands*, 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." Pls.' Suppl. Br. at 9. As an initial matter, Plaintiffs willfully ignore prior litigation history and its resulting settlements. ECF No. 56 at 22-24. This history shows that the United States was held accountable by plaintiffs that timely brought their claims. Further, the United States continues to be subject to the court's jurisdiction in *Firebaugh* and its compliance with its statutory duty remains under the court's supervision. But none of this matters. The statute of limitations is jurisdictional and cannot be equitably tolled regardless whether there is any avenue available for holding the United States accountable for these alleged wrongdoings. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008); *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) ("the statute of limitations applicable to Tucker Act claims, 28 U.S.C. § 2501, is jurisdictional and not susceptible to equitable tolling"). Plaintiffs' argument to the contrary must be rejected.

III. CONCLUSION

For the foregoing reasons and those previously briefed, this Court should follow Chief Judge Hewitt's lead and dismiss this action in its entirety.

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Respectfully submitted,

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