

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

*Electronically Filed on April 10, 2013*

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

**UNITED STATES' SECOND NOTICE OF ADDITIONAL AUTHORITY**

Defendant United States submits this second notice of additional authority related to and supporting the United States' pending motion to dismiss, filed December 8, 2011 (ECF No. 9) and re-filed 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).

On April 5, 2013, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") issued an opinion and decision in *Firebaugh Canal Water Dist. v. United States*, No. 11-17715 (9th Cir. Apr. 5, 2013) (attached as Exhibit 1) ("*Firebaugh IP*"). The Ninth Circuit affirmed Judge Wanger's opinion and decision in *Firebaugh Canal Water Dist. v. United States*, 819 F. Supp. 2d 1057 (E.D. Cal. 2011) (Joint App. 67) ("*Firebaugh I*"), which is relied upon by the United States in support of its Motion. ECF No. 56 at 11-12, 23; ECF No. 59 at 15-17; ECF No. 66 at 5-6; ECF No. 68 at 2; ECF No. 72 at 3, n.2; ECF No. 74 at 4-6.

The *Firebaugh II* decision is relevant here because Plaintiffs allege that the Department of the Interior ("Interior") is causing harm to their farmlands by failing to: (1) provide drainage in a timely manner; (2) seek appropriations from Congress for the entire drainage project; and (3) implement drainage in the place and manner preferred by Plaintiffs. ECF No. 58 at 12-13, 35-

36; ECF No. 61 at 2-3; ECF No. 62 at 2; ECF No. 71 at 13-14; ECF No. 73 at 3-4. However, in affirming Judge Wanger’s holding that Interior is in compliance with its statutory duty to provide drainage, the Ninth Circuit held “that Interior is neither withholding nor unreasonably delaying drainage within the [San Luis] Unit.” *Firebaugh II*, slip op. at 13. The Ninth Circuit elaborated:

And while [] frustration with the pace of implementation is quite understandable, that pace is determined by the scope and cost of the project. Those obstacles are not, by and large, a product of Interior’s inaction. For example, Interior can seek appropriations for drainage projects—and, indeed, has done so—but it is ultimately up to Congress to provide funds. Likewise, it is for Congress to decide whether to lift the current cap on construction costs or to excuse in-[San Luis] Unit districts from their obligation to eventually repay those costs.

*Id.* at 14. Finally, the Ninth Circuit held that “we repeat *Firebaugh I*’s holding that Interior is obliged to find a solution. We also reaffirm, however, that the contours of the solution lie within Interior’s discretion.” *Id.*

Dated: April 10, 2013

Respectfully submitted,

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