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, Defendant.	)	

PLAINTIFFS' RESPONSE TO THE UNITED STATES' NOTICE OF ADDITIONAL AUTHORITY IN RESPONSE TO COURT'S APRIL 11, 2013 ORDER

I. INTRODUCTION

Nothing in the Government's additional authority, *Firebaugh Canal Water District v. United States*, 2013 U.S. App. LEXIS 6904 (9th Cir. Apr. 5, 2013) ("*Firebaugh II*"), divests this Court of jurisdiction over Plaintiffs' takings claim. *Firebaugh II* provides no support for the Government's argument that Plaintiffs' takings claim is time-barred. Instead, the additional authority is part of the Government's brazen effort to have Plaintiffs' takings claim dismissed due to untimeliness with case authority that bears more on ripeness than staleness. In doing so, the Government obliquely alludes to ripeness without arguing it. But the Government cannot have it both ways and must now lie in the bed it has made.

Rather than bolstering the Government's motion to dismiss, *Firebaugh II* and the language referenced by the Government in its Second Notice of Additional Authority (filed Apr. 10, 2013 [Doc. 75]) and by the Court in its Order (filed April 11, 2013 [Doc. 76]) undercut its untimeliness defense. Far from portraying stale claims, *Firebaugh II*'s findings that Interior has not withheld or delayed drainage – matters subject to ongoing dispute – lend no support to the Government's

argument that the time to challenge Interior's drainage implementation has long since passed. The Government's endorsement of *Firebaugh II* – which goes against its own position that there has been a long-past breach of a statutory obligation – shows that Plaintiffs' opposition to this untimeliness defense has been correct. Instead of supporting the untimeliness defenses, *Firebaugh II* undermines it and gives more reason to deny the Government's limitations motion.

Further, *Firebaugh II* – which involved parties outside of the San Luis Unit and claims and legal issues asserted under the APA and FTCA – does not prevent this Court from exercising jurisdiction over a claim asserted by landowners in the San Luis Unit for the uncompensated, physical taking of their farmlands. By the appropriate measure, Plaintiffs' takings claim accrued in 2010 – well within the limitations period – when Interior openly rejected the agreed-upon drainage solution embodied in its 2007 Record of Decision and the harm to Plaintiffs' farmlands became reasonably foreseeable. Even though the Ninth Circuit found that agency discretion "place[d] Interior's actions beyond the scope of both the APA and the FTCA," there is nothing in *Firebaugh II* that places Interior's failures beyond the reach of the United States Constitution.

II. ARGUMENT

A. *Firebaugh II* Does Not Time-Bar Plaintiffs' Takings Claim or Otherwise Control This Court's Jurisdiction Over Plaintiffs' Claim.

Like Chief Judge Hewitt's opinion in *Westlands Water District v. United States*, No. 12-12 (Fed. Cl. filed Jan. 15, 2013), the Ninth Circuit's opinion in *Firebaugh II* cannot rescue the Government's failed motion. There are too many material differences between the parties, the claims, and the issues for *Firebaugh II* to dictate the outcome of this lawsuit and the Government's pending motion to dismiss, in particular.

First, the parties are different. The plaintiffs-appellants in *Firebaugh II* are the Firebaugh Canal Water District and the Central California Irrigation District, a water district and irrigation

district located outside and downslope of the San Luis Unit. *See Firebaugh II*, 2013 U.S. App. LEXIS 6904, at *14. In *Firebaugh II*, the Ninth Circuit found that the San Luis Act imposed no obligation on Interior to provide drainage to lands outside the San Luis Unit. *Id.* at *13-*15. In contrast, this action has been brought by Michael Etchegoinberry, Erik Clausen, Barlow Family Farms, L.P., and Christopher Todd Allen, owners of farmlands in the Westlands Water District. *See* Compl. ¶¶ 2, 11-14. *Firebaugh II* confirmed Interior's obligation to these farmlands, which are indisputably inside the San Luis Unit and which Interior is statutorily bound to drain. *Id.* at *15.

Second, the claims are different. The two claims in *Firebaugh II* involve the APA and the FTCA. In contrast, Plaintiffs in this action have asserted a single constitutional claim for the physical taking of their properties without compensation in contravention of the Fifth Amendment to the United States Constitution. In *Firebaugh II*, the Ninth Circuit never considered a takings claim, since the plaintiffs-appellants' takings claim had been transferred and omitted from their operative pleading. *See* Transfer Notice, *Firebaugh*, No. 1:03-cv-02790 (Fed. Cl. Dec. 16, 2003) (Stip. Fact BBB [App. 43 {JA01335}]; Fifth Am. Compl., *Sumner Peck*, No. CV-F-01-048 (E.D. Cal. June 1, 2004) (Stip. Fact DDD [App. 45 {JA01358-JA01398}]). Thus, rulings specific to the standards or elements of the APA and FTCA claims cannot extend to Plaintiffs' single takings cause of action under the Constitution.

Third, the legal issues in *Firebaugh II* are different from the central issue that faces this Court. In *Firebaugh II*, the Ninth Circuit considered whether Interior's failure to provide drainage constituted agency action unlawfully withheld or unreasonably delayed in violation of APA section 706(1) or exposed it to FTCA liability. In contrast, this Court must determine whether the stabilization doctrine has delayed accrual of Plaintiffs' takings claim such that it can properly assert jurisdiction over the case. *Firebaugh II* never touches the issue, and its ruling that relieves Interior

of liability under the APA and FTCA based on agency discretion simply does not bear on the timeliness of Plaintiffs' takings claim.

Firebaugh II does not bind or constrain this Court in any way. *See Fla. Power & Light Co. v. U.S.*, 41 Fed. Cl. 477, 485-486 (Fed. Cl. 1998).

B. *Firebaugh II* Underscores the Defects in the Government's Statute of Limitations Defense.

Firebaugh II certainly does not dictate that Plaintiffs' takings claim be dismissed, as the Government has argued previously in conjunction with *Firebaugh II*'s underlying District Court opinion. *See* U.S. Resp. to Pls.' Supp. Br., at 4-5 (filed Feb. 20, 2013 [Doc. 74]).

Instead, and at minimum, *Firebaugh II* continues to underscore the defects of the Government's statute of limitations defense to Plaintiffs' takings claim. The Ninth Circuit's language with respect to Interior's pace of implementation and its view that Interior's actions have not yet "become so sluggish" for the court to "rightly say that [Interior] has entirely abandoned its legal duty" (*see id.* at *20) in no way supports the Government's argument that Plaintiffs' takings claim expired long ago. Further, *Firebaugh II*'s generous finding that Interior is "neither withholding nor unreasonably delaying drainage" is entirely inconsistent with the Government's position that Plaintiffs' takings claim is time-barred because Plaintiffs should have foreseen in 1986 that no drainage would ever be provided. *See* Rep. Tr. 5:12-21(Aug. 20, 2012) (hearing on motion to dismiss); U.S. Re-Filed Mot. to Dismiss, at 29 (filed Nov. 16, 2012 [Doc. 56]). These findings that suggest Interior's ongoing commitment to its drainage obligation – which Plaintiffs dispute – certainly do not support an argument for accrual nearly twenty-seven years ago. Instead, they expose the emptiness of the Government's statute of limitations defense and give this Court more reason to deny its motion to dismiss on such grounds.

C. This Court Can Properly Assert Jurisdiction Over Plaintiffs' Takings Claim Because It Accrued in 2010.

Firebaugh II also cannot support any argument that Plaintiffs' takings claim is not ready for adjudication before this Court. The Government's allusion to unripeness – tenuously suggested in the past but now seemingly embraced (to the obvious peril of its untimeliness defense) – falls flat. *Firebaugh II* never considered a takings claim, when it accrued, or how accrual could be delayed by justifiable uncertainty, which are the issues before this Court. On these counts, Plaintiffs' takings claim accrued well within the limitations period.

While accrual of Plaintiffs' takings claim has already been subject to extensive briefing (*see, e.g.,* Pls.' Re-Filed Response to U.S. Re-Filed Mot. to Dismiss (filed Dec. 21, 2012 [Doc. 56]), it is worth repeating to show how different the analysis is compared to review of an APA section 706(1) claim or liability exceptions under the FTCA, the issues at play in *Firebaugh II.* 2013 U.S. App. LEXIS 6904, at *10-*20. The latter are rooted in agency discretion, and their analysis bears no resemblance to a determination of when a takings claim accrues.

A takings claim caused by a continuous process, such as a flood, accrues when the situation becomes stabilized. *U.S. v. Dickinson*, 331 U.S. 745, 749 (1947). The Federal Circuit has defined this point to be "when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined." *Boling v. United States*, 220 F.3d 1365, 1370-1371 (Fed. Cir. 2000). The court in *Hansen v. United States*, 65 Fed. Cl. 76 (2005), marked the point of accrual as follows:

> [I]n a case involving a taking by a continuing physical process, **a claim is ripe for adjudication if the government has caused a substantial invasion of the plaintiff's property and the extent of the harm caused by that invasion is foreseeable**. Under this rule, a plaintiff may seek just compensation for harm to private property that has not occurred, so long as that harm is shown to be reasonably foreseeable.

Hansen, 65 Fed. Cl. at 126 (emphasis added); *see also Boling*, 220 F.3d at 1371 ("[O]nce it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run."). Further, principles of fairness underscore this accrual analysis and discourage applying an excessively rigid rule when the government takes property through a gradual physical process. *Dickinson*, 331 U.S. at 749.

Under this framework, Plaintiffs' takings claim accrued recently, and the Bureau's September 2010 letter effected that accrual. There is no dispute that a substantial physical invasion of foul groundwater to Plaintiff's farmlands has occurred. *See* Compl. ¶¶106-108; U.S. Re-filed Reply Br., at 14 (filed Jan. 11, 2013 [Doc. 59]). And the extent of that harm to Plaintiffs' farmlands only became reasonably foreseeable to Plaintiffs with the Bureau's September 2010 letter. U.S. Dept. Interior, Letter to Sen. Diane Feinstein (Sept. 1, 2010) (Stip. Fact UUU [App. 60 {JA01875-JA01879}]). In that letter, the Bureau openly rejected the agreed-upon drainage solution embodied in its own 2007 Record of Decision. *Id.* at JA01876 ("[T]he alternative selected in the ROD cannot be implemented fully under existing law."). In a clear break from past actions and decisions, the Bureau also purported to then transfer responsibility for its drainage obligations under the San Luis Act to the local water districts. *Id.* ("We believe the best way to accomplish [our] goals is to transfer responsibility for irrigation drainage to local control."). And the Bureau even threatened to withhold water from Westlands if the local water districts in California did not get behind the Government's new plan. *Id.* ("Reclamation should be directed to stop delivery of CVP water that would go to parcels of land for which the districts fail to provide acceptable drainage service within a specified timeframe.").

Importantly, the Bureau's September 2010 letter trailed the Government's consistent failure to pursue the necessary legislation to implement the long-planned, long-term, district-wide

drainage solution required to implement the full 2007 Record of Decision. Notwithstanding this commitment, the Government's Control Schedule for drainage implementation has consistently been limited to just a single sub-unit of the San Luis Unit. *See* Supplemental Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Nov. 18, 2009) (Stip. Fact RRR [App. 57 {JA01847}]) (drainage implementation limited to only Westlands' northern sub-unit).[1] And Interior had made no effort to seek new authorizing legislation to increase the appropriations ceiling required for full Record of Decision implementation beyond this single sub-unit. *See* Federal Defendants' Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Apr. 1, 2010) (Stip. Fact TTT [App. 59 {JA01862-JA01870}]) (no action taken on legislative proposal for long-term drainage strategy that would increase amount of appropriations for ROD implementation).

Accordingly, Interior's September 2010 rejection of its own Record of Decision marked the point where the extent of the harm to Plaintiffs' farmlands became reasonably foreseeable and Plaintiffs' takings claim became readily susceptible to adjudication. Such reasonable foreseeability did not exist in any of the years following Kesterson Reservoir's shut down in 1986, when the Government continued to represent it would make good on its drainage obligation and then court orders requiring the same. *See, e.g.,* Bureau of Reclamation, Draft Environmental Impact

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[1] While the Control Schedule has changed since Plaintiffs filed their lawsuit, its singular focus on one sub-unit has not. Supplemental Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Mar. 30, 2012) (Stip. Fact EEEE [App. 71 {JA01968-JA01969}]) (drainage implementation shifted to central sub-unit instead of northern sub-unit). The Bureau's Control Schedule now fails to address fully drainage facilities for Westlands' northern and southern sub-units and the San Luis Unit's northerly area. *See* Supplemental Status Report, *Firebaugh Canal*, No. CV-88-0634 (E.D. Cal. Nov. 4, 2011) (Stip. Fact CCCC [App. 69 {JA01961-JA01962}]). And its focus on providing drainage service to only 24,000 acres of land is a far cry from the needs of the over 175,000 acres of drainage-impaired lands to which Interior had committed to providing drainage service in its 2007 Record of Decision. *See id.;* Bureau of Reclamation, San Luis Drainage Feature Re-evaluation, Feasibility Report (Stip. Fact NNN [App. 7 {JA003030}] (identifying drainage needs in selected alternative).

Statement for San Luis Unit Drainage Program (Dec. 1991) (Stip. Fact GG [App. 23 {JA00667, JA00672-JA00679}]; *Sumner Peck*, No. CV-F-91-048 (E.D. Cal. May 17, 1993 (order re partial summary judgment) (Stip. Fact J [App. 09 {JA00373-JA00395}]; *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}]). The Bureau's September 2010 Letter – which is not referenced at all in *Firebaugh II* – serves as a valid, timely event that accrues Plaintiffs' takings claim within the limitations period and makes it ripe for adjudication.[2]

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[2] Had the Government asserted a direct ripeness challenge, the result would be no different since the stabilization doctrine articulated in *Dickinson* is the proper standard to measure accrual and the ripeness of Plaintiffs' takings claim. *See Hansen*, 65 Fed. Cl. at 126. But even under the standard for determining ripeness of takings claims which the United States Supreme Court presented in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) and which has been applied to physical takings claims by several circuits, Plaintiffs' claim would be ripe. *See King v. City of Seminole*, 2009 U.S. Dist. LEXIS 85648, at *7-*8 (E.D. Okla. Sept. 18, 2009) (First, Second, Eighth and Ninth Circuits require *Williamson* ripeness test to be satisfied for a physical takings claim). Under *Williamson*, a takings claim is not ripe until (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner; and (2) the plaintiff has sought and been denied just compensation for an alleged taking by a local or state governmental entity through whatever adequate procedure the state provides. *Id.* 473 U.S. at 186, 195.

Plaintiffs' takings claim would readily pass this ripeness test. First, as a physical takings claim, Plaintiffs' claim would automatically satisfy the first "finality" element. *See Vacation Village, Inc.*, 497 F.3d 902, 912 (9th Cir. 2007) (noting that "finality" element is "automatically satisfied at the time of the physical taking because where there has been a physical invasion, the taking occurs at once"); *see also Peters v. Clifton*, 498 F. 3d 727, 731-732 (7th Cir. 2007) (physical takings claim subject to streamlined ripeness analysis); *McKenzie v. City of White Hall*, 112 F.3d 313, 316 (8th Cir. 1997) (same). Plaintiffs have alleged an uncompensated physical taking of their farmlands resulting from high water tables and the accumulation of saline groundwater beneath their farmlands due to Interior's long-time failure to provide drainage. Compl. ¶¶ 1-3. Second, landowners can satisfy the "exhaustion" element by demonstrating the futility of state court relief and by showing that state procedures are either unavailable or inadequate. *Williamson County*, 473 U.S. at 196-197. Because Plaintiffs complaint involves a taking by the federal government pursuant to its obligations under the San Luis Act, the *Williamson* requirement that a landowner must first utilize procedures created by the state to seek just compensation has no bearing and is inapposite. *See Lover Terminal Partners v. U.S.*, 97 Fed. Cl. 355 (Fed. Cl. 2011) (limiting *Williamson* exhaustion requirement to takings by state not takings under federal law); *see also Del-*

III. CONCLUSION

The Government brought a motion to dismiss based on Plaintiffs' takings claim being barred by the applicable six-year statute of limitations. It made no motion on ripeness grounds. To the contrary, it has made repeated representations to this Court in support of its pending motion that rules out any contention on its part that Plaintiffs' takings claim is not yet ripe.

The Government's position has always carried with it this underlying tension where it can be seen as urging both that the claim is stale and not yet ripe. But the Government cannot have it both ways, and Plaintiffs cannot be forever faulted as being too late or too early to sue. The record here shows that the timing of Plaintiffs' suit has struck the proper balance between being too early or too late and that the Government's motion to dismiss should be denied. The Government's own difficulty in committing to an accrual date and its own inability to say consistently that suit is too early or too late are, perhaps, the best indicia that Plaintiffs have filed suit at the proper time. *Firebaugh II* certainly provides no support for time-barring Plaintiffs' takings claim, since the stabilization doctrine provides the proper standard for determining when Plaintiffs' takings claim accrued and became ripe for adjudication. Under this standard, Plaintiffs' claim has stabilized within the limitations period and is now ripe. For these reasons, this Court's jurisdiction over Plaintiffs' claim now is entirely proper.

Rio Drilling Programs, Inc. v. U.S., 146 F. 3d 1358, 1363-1364 (Fed. Cir. 1998) ("If the government appropriates property without paying just compensation, a plaintiff may sue in the Court of Federal Claims on a takings claim regardless of whether the government's conduct leading to the taking was wrongful, and regardless of whether the plaintiff could have challenged the government's conduct as wrongful in another forum.").

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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