

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

*Electronically Filed on November 14, 2014*

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

**SIXTH JOINT STATUS REPORT REGARDING SETTLEMENT DISCUSSIONS**

Pursuant to the Court’s Order dated May 15, 2014 (ECF No. 87), Plaintiffs and Defendant United States of America (the “Parties”) respectfully submit the following Sixth Joint Status Report regarding the progress of their settlement discussions.

1. As reported by the Parties during the October 24, 2013, status conference in this matter, settlement discussions between the Parties have been ongoing. As a result, the Parties requested and received a six-month stay of this case in order to pursue settlement. Order, Oct. 25, 2013 (ECF No. 82). Pursuant to that Order, the Parties filed joint status reports on January 14, March 14, and May 14, 2014, to indicate the progress of their settlement discussions. In their Third Joint Status Report, filed on May 14, 2014, the Parties acknowledged that the six-month stay of this case expired on April 25, 2014, and respectfully requested that the Court further stay this action for another six-month period. ECF No. 86. On May 15, 2014, the Court issued an order staying this action for six months and ordering the Parties to file joint status reports on July 14, September 15, and November 14, 2014, to indicate the progress of settlement discussions and whether it continues to be appropriate for the case to be stayed. Order, May 15, 2014 (ECF No.

87). The Parties last Joint Status Report was filed, as ordered, on September 15, 2014. ECF No. 91.

2. As was reported previously, the United States and Westlands Water District (“Westlands”) have identified principles on which to negotiate a potential settlement agreement which, if approved, would resolve all pending claims in this case and in *Westlands Water Dist. v. United States*, Case No. 2013-5069 (Fed. Cir.) (“*Westlands*”), and which may affect the provision of drainage service under orders issued by the district court in *Firebaugh Canal Water Dist., et al. v. United States, et al.*, Case No. 88-cv-634-LJO (E.D. Cal.) (“*Firebaugh*”).

3. Based on the progress of discussions with Westlands, counsel for the United States in this case and in *Firebaugh* conferred with Department of Justice leadership and are pursuing the negotiation of specific settlement terms based generally on the broad principles outlined by the United States and Westlands. The United States is also exploring potential terms of a drainage settlement with San Luis Unit water districts located to the north of Westlands (known as the Northerly Districts). The United States met with one of the Northerly Districts on August 27, 2014, and met with the remaining districts on September 24, 2014. A further meeting with representatives of the Northerly Districts is scheduled for November 25, 2014.

4. On March 20, 2014, the United States and Westlands met in Sacramento, California to continue settlement negotiations, and have continued negotiations in Sacramento and Washington, D.C. on June 18 and July 29. Those negotiations have addressed incorporation of the draft principles of agreement into a proposed settlement agreement. The United States and Westlands have made substantial progress in reaching a proposed settlement agreement that could be recommended for approval. The United States and Westlands also expressed intent to conduct briefings for members of Congress and other interested parties and stakeholders. The

first of these meetings occurred with United States Senator Dianne Feinstein on May 12, 2014. Briefings with additional members of Congress and staff, stakeholders, federal and state agencies, and potentially interested parties have since occurred.

5. The *Etchegoinberry* Plaintiffs' counsel and representatives of Westlands also continue to be engaged in negotiations regarding a potential settlement that would resolve the claims of Plaintiffs and other drainage-impacted landowner class members in Westlands which are predicated on the alleged lack of drainage or drainage service. As previously reported, Plaintiffs have retained an expert consultant to assist in the evaluation of the potential settlement terms that relate to the resolution of Plaintiffs' claims. Since the last Joint Status Report, Plaintiffs and Westlands have also engaged a third-party neutral (Justice Nickolas J. Dibiaso, Ret., California's Fifth District Court of Appeal) to assist in resolving any disputes with respect to the potential settlement terms.

6. On October 28, 2014, Plaintiffs' counsel and the *Etchegoinberry* class representatives engaged in an all-day mediation in Fresno, California with Westlands (including members of its Board of Directors, staff, and both in-house and outside counsel) under the supervision of Justice Dibiaso. Plaintiffs and Westlands endeavored to resolve issues relating to the potential settlement terms. While some progress was made, the mediation ultimately ended in an impasse. However, Plaintiffs and Westlands have agreed to continue the mediation to resolve still outstanding issues. The next mediation session is tentatively scheduled for February 26, 2015, subject to final confirmation by necessary participants. In the meantime, the Parties expect to continue to cooperatively work on issues where negotiations to date have shown the parties are provisionally in agreement.

7. In addition, in late June and in July 2014, Plaintiffs' counsel and counsel for the United States conferred regarding various settlement issues. Based on those discussions and the Parties' respective discussions with Westlands, the United States prepared a draft term sheet containing proposed principles of agreement for settling this litigation. The draft term sheet was provided to Plaintiffs on November 13, 2014.

8. In addition, on March 12, 2014, in the *Westlands v. United States* action, the Federal Circuit granted a stay of the appeal in that case for 60 days from that date, with direction to the parties to provide the court of appeals with a status report in 60 days indicating whether the stay should continue. Order, Mar. 12, 2014, *Westlands* (ECF No. 38). This was an additional 60-day extension of the 90-day stay the *Westlands* court had previously granted. See Order, Dec. 6, 2013, *Westlands* (ECF No. 36). On May 12, 2014, Westlands and the United States filed their Joint Status Report and Further Motion for Stay of Proceedings in that matter. Jt. Status Report and Further Mot. for Stay of Proceedings, May 12, 2014, *Westlands* (ECF No. 39). The parties reported to the court that "discussions between the parties have progressed" since the court's last stay order and requested an additional 60-day stay until July 11, 2014, to continue settlement discussions and to resolve disputed issues in the appeal. *Id.* On June 17, 2014, the Federal Circuit issued a 60-day stay of the appeal and directed the parties to file a status report at the end of those 60 days to indicate whether the stay should continue. Order, June 17, 2014, *Westlands* (ECF No. 40). On August 18, 2014, Westlands and the United States filed another Joint Status Report and Further Motion for Stay of Proceedings in that matter. Jt. Status Report and Further Mot. for Stay of Proceedings, August 18, 2014, *Westlands* (ECF No. 43). The parties requested an additional 60-day stay to continue settlement discussions. *Id.* On

September 29, 2014, the Federal Circuit extended the stay to November 28, 2014, due to pending settlement discussions. Order on Mot., Sept. 29, 2014 (ECF No. 44).

9. The first six-month partial suspension of the Revised Control Schedule entered in the *Firebaugh* matter which was ordered by United States District Court for the Eastern District of California in November 2013 in order to allow parties to pursue settlement initially expired on May 12, 2014. Order Temporarily Suspending Federal Defendants' Drainage Activities Within Westlands, Nov. 13, 2013, *Firebaugh*, at 3 (ECF No. 973). However, due to the progress of the ongoing settlement discussions, on April 30, 2014, upon a motion made by Westlands, and with the concurrence of the United States and all other parties to the *Firebaugh* litigation, the District Court approved a second six-month extension of the suspension of the Revised Control Schedule as it relates to the construction of drainage facilities in Westlands, so that Westlands and the United States could continue their settlement negotiations. Order Extending Temporary Suspension of Federal Defendants' Drainage Activities Within Westlands, *Firebaugh*, at 4 (ECF No. 979). The District Court cautioned the parties that "further extension requests will be viewed with disfavor and must be supported by specific showings of: (a) substantial progress toward settlement; and (b) the absence of harm to the public interest resulting from further delay." *Id.* On November 6, 2014, Westlands filed a motion for an order further extending the temporary suspension of drainage for another six months based on substantial progress made towards settlement since April 2014. Westlands Water District's Mem. In Support of Mot. for Order Further Extending Temporary Suspension of Federal Defendants' Drainage Activities Within Westlands, Nov. 6, 2014, *Firebaugh*, at 2:5-9 (ECF No. 984). Federal Defendants in *Firebaugh* are preparing a response to Westlands' most recent motion which they expect to file no later than November 25, 2014. Westlands indicated that in six months, it would be able to lay

out the settlement terms as well as the process and projected schedule for implementing the settlement agreement. *Id.* at 3:5-8.

10. Based on the foregoing, the Parties remain optimistic that a settlement can be reached. Accordingly, the Parties respectfully request that the Court enter another six-month stay of proceedings. If granted, the Parties propose to continue filing joint status reports every 60 days on January 15, 2014, March 16, 2015, and May 15, 2015, while settlement discussions continue. The Parties further propose that in the May 15, 2015 Joint Status Report, the Parties discuss proposals regarding how to proceed in this case and include a proposed timeline.

11. As in the Third Joint Status Report, Plaintiffs again request that any stay granted by the Court provide allowances to the Parties to make motions with or otherwise seek relief from the Court during the stay period that will facilitate settlement (e.g., motion to preliminarily approve a proposed settlement class and motion for final approval of the proposed settlement) in the event settlement negotiations progress to the point where such requests are necessary and timely.

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