IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on January 9, 2012

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

THE UNITED STATES' SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to this Court's Order of December 15, 2011 (ECF No. 13) ("Order"), the United States herein submits its supplemental brief in support of its Motion to Dismiss (ECF No. 9), filed on December 8, 2011 ("Motion").

In its Motion, the United States seeks dismissal of the Complaint because Plaintiffs' takings claim is barred by the applicable statute of limitations codified at 28 U.S.C. § 2501 ("Section 2501"). Section 2501 bars Plaintiffs' claim because it accrued more than six years before the Complaint was filed on September 2, 2011. Alternatively, the United States seeks dismissal of the Complaint because Plaintiffs lack standing to bring their claim as they did not own their property at the time their claim allegedly accrued. On December 16, 2011, the Court conducted a telephonic status conference with the parties to discuss a number of items. As a result of that status conference, the Court ordered the United States to "file a supplemental brief or notice, either more specifically addressing the accrual date for its statute of limitations argument, or indicating that defendant believes no supplement to its motion to dismiss is required at this time." Order. The United States believes that a supplemental brief addressing

the accrual date for its statute of limitations defense is warranted. Accordingly, pursuant to the Court's Order, the United States hereby submits this supplemental brief in support of its Motion.

I. ARGUMENT

A. It is Plaintiffs' Burden to Prove their Claim is Timely.

As an initial matter, it is not necessary for this Court to determine a specific accrual date in order to dismiss the Complaint as untimely. *See, e.g.*, *Mildenberger v. United States*, 643 F.3d 938 (Fed. Cir. 2011) (affirming dismissal of takings claim when damage caused by United States' actions was foreseeable prior to six year period before complaint was filed; specific claim accrual date was not found). Further, as the party invoking this Court's jurisdiction, it is Plaintiffs, and not the United States, that must prove that their claim accrued within Section 2501's six-year statute of limitations (and after Plaintiffs acquired their property in order for them to have standing). *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (Section 2501's statute of limitations is jurisdictional); *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002) ("Plaintiff bears the burden of showing jurisdiction by a preponderance of the evidence."). Failing to meet this burden, even without the Court identifying a specific accrual date, is sufficient grounds to divest this Court of jurisdiction.

The indisputable facts here show Plaintiffs cannot meet their burden. There can be no serious dispute that the events giving rise to Plaintiffs' claim have been known for well over six years before Plaintiffs filed their Complaint on September 2, 2011. However, to the extent a specific accrual date is needed here, there are a number of events which may suffice.

B. Plaintiffs' Claim Accrued before September 2, 2005 and is therefore Time-Barred.

Before determining such an accrual date, however, it is necessary to analyze Plaintiffs' claim. Plaintiffs allege a Fifth Amendment taking as a result of a physical invasion of groundwater caused by the United States' failure to provide drainage to the Westlands Water

District ("Westlands"). Compl. ¶¶ 104-11. Plaintiffs allege that this invasive groundwater has caused a reduction in the value of their farmland due to high water tables and accumulating salts. *Id.* ¶ 104. These adverse effects, they allege, have resulted in "reduced crop yields, limited crop rotations, restrictions on the types of crops that can be grown, and changes to soil quality and conditions." *Id.* Finally, Plaintiffs allege a class action for all landowners within Westlands and served by the San Luis Unit "whose farmlands have not received the necessary drainage service the United States is required to provide under the San Luis Act." *Id*. ¶ 16.

These adverse effects allegedly caused by the United States' failure to provide drainage to the San Luis Unit have been foreseeable since before the Unit was envisioned. When farmlands are irrigated, they must be drained or the damage alleged by Plaintiffs will occur. Compl. ¶ 2; *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000). Specific to the Central Valley, the inherent drainage problems in the area of Westlands has been known since the 19th century. U.S. Dep't of the Interior & Cal Res. Agency, *A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley*, Final Report of the San Joaquin Valley Drainage Program (Sept. 1990) ("Rainbow Report") (Motion Ex. 1) at 38361-362 (citing Ogden, G. R., Mar. 1988, *Agricultural Land Use and Wildlife in the San Joaquin Valley, 1769-1930: An Overview: SOLO Heritage Research*). Thus, absent drainage, the events giving rise to Plaintiffs' claim were known as soon as irrigation service to their lands began.

Admittedly, however, the United States' actions during the early years of the San Luis Unit may have obscured the picture for landowners in Westlands. Up through the 1970s, it appears as though the United States continued efforts to provide drainage throughout Westlands. Motion at 7. However, those efforts ceased in the 1970s, *id.*, and since the closure of the

Kesterson Reservoir ("Kesterson") in "June 1986, no drainage service has been provided by the United States to any landowner in the [Westlands Water] District." Compl. ¶ 63. From that point forward, there can be little doubt that landowners in Westlands knew that damage was occurring, and would continue to occur, to their farmlands. Thus, it is at that point "when the events giving rise to the Government's alleged liability have occurred and the claimant is or should be aware of their existence." *Mildenberger*, 643 F.3d at 945 (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

However, as Plaintiffs indicated during the December 16, 2011 telephonic status conference with the Court, they believe their claim was not sufficiently stabilized until some, later unstated date. *See Mildenberger*, 643 F.3d at 945 ("The stabilization doctrine recognizes that determining the exact point of claim accrual is difficult when the property is taken by a gradual physical process rather than a discrete action undertaken by the Government such as a condemnation or regulation.") (citing *Navajo Nation v. United States*, 631 F.3d 1268, 1273-74 (Fed. Cir. 2011)). Plaintiffs further explained that they believe their claim did not accrue because it fell within the "justifiable uncertainty doctrine" set forth in *Banks v. United States*, 314 F.3d 1304 (Fed. Cir. 2003). Plaintiffs did not elaborate on how, from June 1986 through September 2, 2005, their claim did not stabilize or otherwise accrue and the United States will not speculate as to their argument here. However, the indisputable facts show that such a position is without merit.

1. <u>The stabilization doctrine does not make Plaintiffs' claim timely</u>.

Pursuant to the stabilization doctrine, the "accrual of a takings claim where the government leaves the taking of property to a gradual physical process occurs when the situation has 'stabilized.'" *Banks*, 314 F.3d at 1308 (quoting *Boling v. United States*, 220 F.3d 1365, 1370

(Fed. Cir. 2000)). "'[S]tabilization occurs 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.'" *Id.* (quoting *Boling*, 220 F.3d at 1370-71). "The extent of the taking must be 'reasonably foreseeable,' … but the damage need not be 'complete and fully calculable before the cause of action accrues…'" *Banks v. United States*, __ Fed. Cl. __, No. 05-1353, 2011 WL 6812824, at*7 (Dec. 22, 2011) (quoting *Boling*, 220 F.3d at 1371; *Fallini v. United States*, 56 F.3d 1378, 1382 (Fed. Cir. 1995)).

As an initial matter, the stabilization doctrine is inapplicable here. "Both the Supreme Court and [the Federal Circuit] have acknowledged that the … stabilization doctrine is only applicable in cases involving gradual physical processes." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1359 (Fed. Cir. 2006), *aff'd on other grounds*, 552 U.S. 130 (2008) (citing *United States v. Dow*, 357 U.S. 17, 27 (1958); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998)). The doctrine is typically applied in the limited circumstances of flooding because the frequency of the physical invasion may be unknown initially. *Ariadne Fin. Servs.*, 133 F.3d at 879. The United States' failure to provide drainage, however, is not a gradual physical process like that of flooding. Rather, this failure is a distinct non-event. Plaintiffs knew that as soon as they irrigated without proper drainage, they were causing damage to their farmlands. Compl. ¶ 2. Therefore, the stabilization doctrine is inapposite.

Assuming *arguendo*, however, that the stabilization doctrine does apply, it is Plaintiffs' burden to show that the damage to their farmland was not foreseeable when the United States failed to provide drainage service as required by the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) ("San Luis Act") (Motion Ex. 3). According to Plaintiffs, no drainage service has been provided to any landowner in Westlands since June 1986. Compl. ¶ 63. Further, for the

named Plaintiffs, none of whom own land within the area that received drainage service prior to June 1986, Motion at 7-8, Motion Ex. 4, they did not receive drainage service prior to June 1986. Thus, for every landowner in Westlands, the harm alleged by Plaintiffs has been occurring since June 1986, and for the named Plaintiffs, this damage has been occurring since the San Luis Unit was constructed and the landowners began irrigating their farmlands. Under these circumstances, it is inconceivable how Plaintiffs may assert that the events giving rise to their claim were not foreseeable long before September 2, 2005.

2. <u>There was no justifiable uncertainty surrounding the accrual of Plaintiffs' claim</u>.

Under the justifiable uncertainty doctrine set forth in *Banks*, 314 F.3d at 1308, Plaintiffs must prove that the United States "was attempting to mitigate actions that would otherwise constitute a permanent taking." For example, in *Banks*, the United States repeatedly made promises to mitigate the alleged harm, erosion, which "'made accrual of the landowner's claim uncertain.'" *Id.* at 1309 (quoting *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994)). This was arguably the case here up until April 3, 1985, when the United States entered into an agreement with Westlands regarding the closure of Kesterson ("1985 Agreement"). Motion Ex. 5. At that point, the United States stopped taking sole responsibility for providing drainage service as required by the San Luis Act. Instead, both Westlands and the United States recognized that in order to continue providing irrigation service to the Unit while also addressing the drainage problem, it would require "Federal, state, and local agencies, and interested private parties … to work together" in order to achieve an environmentally responsible solution. *Id*. at 4. Thereafter, the situation was undoubtedly different, with the United States seeking to work jointly with interested stakeholders – including the putative class members in this lawsuit – in finding a solution to the drainage issue. Instead of repeatedly promising to fix the drainage

problem akin to the situation in *Banks*, in the years following the 1985 Agreement, the United States took the position that the drainage issue was a complex problem that would take all stakeholders working together to solve. *See, e.g.*, Rainbow Report (Motion Ex. 1) at 38424 (noting that comprehensive action by "local, State, and Federal entities" is needed "to solve drainage problems"), 38425 (the Report assumes that "[t]he present trend toward less Federal government participation and more privatization would occur… More responsibility for natural resources management would fall on State and local governments and the private sector").

However, instead of working jointly with the United States, Westlands, affected landowners, and others engaged the United States in decades-long litigation. *See, e.g.*, Motion at 12-20 (detailing some of this lengthy litigation history). Most notably, in 1991, putative class members here filed suit against the United States for the exact same harm as alleged by Plaintiffs in the Complaint. *See* Am. Compl., No. CV-F-91-048, ¶¶ 102-14, 132-34, 151-53 (E.D. Cal. filed Apr. 8, 1991) (Doc. No. 4) ("*Sumner Peck* Am. Compl.") (Motion Ex. 9-S) (alleging inverse condemnation claims for failing to provide drainage services to landowners within Westlands); Motion at 13-15 (discussing takings allegations of *Sumner Peck* Plaintiffs). Thus, to be timely under the justifiable uncertainty doctrine set forth in *Banks*, Plaintiffs must prove why any alleged mitigation efforts of the United States made their claim's accrual justifiably uncertain, while the claim of the *Sumner Peck* Plaintiffs – whom would qualify as putative class members here – were so certain their claim had accrued by 1991 that they filed the exact same claim as the present action. Plaintiffs simply cannot meet this burden. To allow otherwise, would have the justifiable uncertainty doctrine completely swallow Section 2501's jurisdictional limitation.

Further, in the lawsuits brought by Westlands, landowners, and others, the United States argued that it had no obligation to provide drainage service to the San Luis Unit, and once it lost that argument, the United States argued that its performance under the San Luis Act was excused. Motion at 15-16 (discussing *Sumner Peck* and *Firebaugh* lawsuits). Indeed, in 1994, the district court found that the United States "failed to take necessary steps to provide drainage service for a number of years" and is "unlikely to undertake efforts to provide drainage service unless ordered to do so by the Court." *Sumner Peck* and *Firebaugh*, Findings of Fact and Conclusions of Law, No. 88-634 (E.D. Cal. Dec. 16, 1994) (Doc. No. 426) (Motion Ex. 10); *see also* Compl. ¶ 71. The United States, however, maintained its position that it was excused from providing drainage service until it lost its appeal to the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in February 2000. Motion at 15-19; *Firebaugh*, 203 F.3d 568. In rejecting the United States' argument, the Ninth Circuit found that from 1986 to 2000, the United States had not provided any drainage service to Westlands, that during this time period the lands within Westlands were being irreparably harmed and becoming sterile, and that the United States' failure to provide drainage was unexcused. *Id.* at 577-78. Under such circumstances, there could be no justifiable uncertainty surrounding the accrual of Plaintiffs' claim.

3. Mitigation efforts subsequent to 2000 cannot resurrect Plaintiffs' untimely claim.

Both in the Complaint, ¶¶ 79-103, and during the December 16, 2011 status conference, Plaintiffs focus on post-2000 events where the United States purported to promise drainage service to Plaintiffs yet, failed to do so. Presumably, Plaintiffs believe these events created justifiable uncertainty and thus, their claim did not accrue until sometime after 2000. However, such a view ignores the preceding history and claim accrual as discussed above. There is simply no support for belated promises reviving an untimely takings claim after the statute of limitations

has run. *Banks*, 2011 WL 6182824, at *14 n.13. Such a result would eviscerate Section 2501's jurisdictional limitation on the United States' waiver of sovereign immunity. Otherwise, a claimant could revive any untimely claim by simply persuading the United States to address a long-past wrong. This is clearly not the intent of the justifiable uncertainty doctrine and this Court should not hold otherwise.

II. CONCLUSION

For Plaintiffs' claim to be timely, Plaintiffs must prove that their claim accrued after September 2, 2005. While there is no need for the Court to find a specific accrual date, there are a number of historic events which reasonably foretold Plaintiffs of the damage the United States' actions – or inactions – were causing to their farmlands and accrued their claim:

- no drainage service was ever provided to the named Plaintiffs' farmlands before the closure of Kesterson. Motion at 7-8; Motion Ex. 4;
- the April 1985 Agreement where the United States forsook its sole responsibility for providing drainage service. Motion at 8-9; *supra* at 6-7;
- the June 1986 closure of Kesterson and the plugging of the San Luis Drain. Motion at 7-9;
- the April 1991 filing of the *Sumner Peck* Amended Complaint where landowners similarly situated to Plaintiffs, *i.e.*, putative class members here, filed the exact same claim as the present one. Motion at 13-15; *supra* at 7;
- the May 1993 district court finding that the United States failed to provide drainage service as required by the San Luis Act. Motion at 15;
- the December 1994 district court finding that the United States not only failed to provide drainage service, but that it would refuse to do so absent court order and that its failure to act was inexcusable. Motion at 15-17; *supra* at 8; and
- the February 2000 Ninth Circuit opinion finding that the United States had unlawfully withheld drainage service since 1986 while farmlands within Westlands were irreparably injured. Motion at 17-19; *supra* at 8.

Subsequent to the Ninth Circuit's February 2000 opinion, no amount of claimed mitigation promises by the United States can revive Plaintiffs' untimely claim. Accordingly, the Complaint should be dismissed in its entirety.

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Respectfully submitted,

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