IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on August 8, 2012

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

PLAINTIFFS' SUBMISSION
PURSUANT TO JULY 26, 2012 COURT ORDER

I. INTRODUCTION

On July 26, 2012, this Court ordered each party to "file a stand-alone submission, more fully incorporating the parties' legislative history findings into its arguments regarding the statute of limitations and specifically, the stabilization doctrine. The parties' submissions also shall address and further develop their limited arguments regarding plaintiffs' standing . . ." As discussed below, the Government's ongoing drainage obligation under the San Luis Act, which is affirmed by the legislative history, is the key to understanding why Plaintiffs have been justifiably uncertain as to whether drainage water had substantially and permanently invaded their properties until the Government proposed for the first time to shirk its statutory responsibility to provide drainage by transferring its obligations to local water districts in a 2010 letter by the Bureau of Reclamation's Commissioner. Moreover, if the Court accepts that Plaintiffs' claim stabilized in or around 2010, then it is undisputed that each named class representative owned his property by this date and standing is not an issue.

II. THE SAN LUIS ACT AND THE STABILIZATION DOCTRINE

The Government does not dispute that it has a statutory obligation to provide drainage under the San Luis Act as affirmed by the Ninth Circuit in *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000). Docket Number (" Dkt. No.") 9, U.S. Mot. at 17-19; Dkt. No. 34, U.S. 6/8 Supp. Br. at 8-9. The Ninth Circuit found that the 1960 Act "clearly expresses the intent of Congress to provide for the interceptor drain prior to the construction of the San Luis Unit." *Id.* at 574. In fact, the specific words of the statute were so clear on their face that the Ninth Circuit found "**no need to consider the Agency's interpretation of the statute**." *Id.* (emphasis added). In addition, the Ninth Circuit found that subsequent Congressional action, including appropriations riders, did not implicitly repeal the Government's duty under the San Luis Act. *Id.* at 574, 576. The Ninth Circuit, however, did find that Congressional appropriations since the late 1970s allowing the Bureau of Reclamation ("Bureau") to cooperate with State, local water districts and other entities to examine solutions to drainage other than the construction of a master drain "supplement[ed] the drainage solutions available to the Department of Interior" such that "non-interceptor drain solutions" could be implemented by the Government to meet its statutory duty. *Id.* at 577-78 (citing in note 6 to such legislation as the Central Valley Improvement Act, Pub. L. No. 102-575, §§ 3401-3411).

The Government's statutory obligation under the 1960 San Luis Act unequivocally commits the Secretary of the Interior to provide drainage to the San Luis Unit and provides the framework for the stabilization doctrine in this case. Nothing in the available legislative history of the 1960 Act or the later Appropriations Act of 1977, which raised the appropriations ceiling for construction of drainage under the San Luis Act, contravenes this statutory duty. During hearings on the 1977 Act the Secretary of Interior told the Senate that his agency supported the 1977 Act

"because it provides for continued progress on the Unit . . ." 123 Cong. Rec. 16387 (1977). He also stated that he believed that the H.R. 4390 (which ultimately became the 1977 Act) "does not alter or abrogate existing provisions of the San Luis Act or related contracts" except with respect to the amount of appropriated funds that could be spent on the drainage system. *Id.* at 16388. Thus, since 1960, the Government has been under an uninterrupted statutory obligation to provide drainage to landowners in the San Luis Unit.

Application of the stabilization doctrine is premised on Plaintiffs' justifiable uncertainty about whether the Government would provide drainage due to them under the San Luis Act therefore preventing Plaintiffs from determining whether the accumulation of undrained wastewater would permanently damage their property. *See Banks v. United States*, 314 F.3d 1304, 1309 (Fed. Cir. 2003). Given the Government's statutory obligation to provide drainage is uncontroverted, the legislative history of the San Luis Act bears less on the stabilization of Plaintiffs' takings claim than what has happened since the Act's passage to create justifiable uncertainty. Based on the parties previous filings, it is undisputed that the Government has taken a number of actions since passage of the 1960 Act towards the provision of drainage to the San Luis Unit, including partial construction of the San Luis Drain, such that the Government itself conceded "that Plaintiffs' claim may not have stabilized prior to September 1990." Dkt. No. 29, U.S. Reply at 2-3, note 1.

Consequently, the issue before this Court is whether Plaintiffs were justifiably uncertain about the provision of drainage after September 1990 until at the latest 2010, when Plaintiffs allege that their claim stabilized. The Government first argues that the September 1990 Rainbow Report issued by a joint federal and state interagency program is sufficient written evidence that the Government was not going to provide drainage because the solutions discussed in this report did

not include the construction of an interceptor drain.[1] Dkt. No. 9, U.S. Mot. at 10; Dkt. No. 29, U.S. Reply at 2-3. This argument, however, construes the nature of the Government's duty to provide drainage too narrowly. As the Ninth Circuit held, the Government's drainage obligation under the San Luis Act is not limited solely to construction of an interceptor drain to the delta proscribed in the 1960 Act, but can also include "non-interceptor drain solutions" that Congress directed the Secretary to examine subsequent to passage of the Act.[2] *Firebaugh Canal Co.*, 203 F.3d at 577-78.

Next, the Government argues that the Draft Environmental Impact Statement ("DEIS") for the San Luis Unit Drainage Program issued by the Bureau of Reclamation in December 1991 does not provide justifable uncertainty because "that document did not commit the United States to providing drainage." Dkt. No. 34, U.S. 6/8 Supp. Br. at 4, note 4. This argument is a red herring because the Government was already under a statutory obligation to provide drainage. Morever, the argument is contrary to the Bureau's own statements in the 1991 DEIS that the "ultimate goal of the Program is to provide a long-term solution to the agricultural drainage problem in the San Luis Act of the Central Valley Project" and that "[t]he proposed action described in this draft fulfills the requirements of the Barcellos Judgment by presenting an implementable drainage plan

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[1] The San Joaquin Valley Drainage Program ("SJVDP") was a federal and State interagency program established in 1984 by the Secretary of the Interior and the Governor of California to study agricultural drainage problems in the San Joaquin Valley. Dkt. No. 20-28 at 42-43. The 1990 SJVDP final report, *A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley* (also referred to by the Government as the "Rainbow Report"), recommended a variety of measures that be taken to solve the drainage problem short of construction of a master drain. Dkt. No. 9-2 at 30-34.

[2] Various recommendations made in the Rainbow Report were specifically referenced by Congress in the Central Valley Improvement Act, which the Ninth Circuit in turn cited as the type of Congressional action that supplemented the Government's drainage obligation and allowed the Secretary to pursue "non-interceptor drain solutions." *See* Pub. L. No. 102-575, §§ 3405(e), 3408(h).

by December 31, 1991." [3] Dkt. No. 20-16, Ex. 12 at 37796.

Less than two years after issuance of the DEIS in December 1991, Judge Wanger of the Eastern District of California issued a Memorandum Opinion and Order Re: Plaintiffs Motions for Partial Summary Judgment on May 17, 1993 in *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048, holding that "[t]he San Luis Act requires the Secretary to make provision for drainage for the San Luis Unit as specified in the Act. The failure to do so violates the Act." Dkt. No. 20-22 at 23. Less than two years after that opinion and a bench trial, Judge Wanger issued a Partial Judgment on Findings of Fact and Conclusions of Law Re: Statutory Duty on March 10, 1995 holding that "[t]he San Luis Act . . . obligates the Federal Defendants to construct the San Luis Drain and drainage collector system in the Westlands Water District. . . . Any unexcused failure to provide drainage violates the San Luis Act." Dkt. No. 20-24 at 6. Thus, less than five years after September 1990, a federal judge affirmed the Government's duty to provide drainage under the San Luis Act.

The Government's argument that its litigation position in *Sumner Peck* (that it did not have a duty to provide drainage under the San Luis Act or that any such duty was excused) was sufficient to stabilize Plaintiffs' claim is unavailing because it misapprehends the meaning of justifiable uncertainty under the stabilization doctrine. *See Banks*, 314 F.3d at 1309. It is nonsensical to argue that Plaintiffs' takings claim stabilized during the *Sumner Peck* litigation, and in particular in the wake of Judge Wanger's orders, when that litigation specifically affirmed the Government's statutory duty to provide drainage. To hold otherwise, would require Plaintiffs to assume that the Government would refuse to comply with a court order directing it to provide

[3] Under the stipulated judgment in *Barcellos & Wolfsen, Inc. v. Westlands Water District*, the United States agreed to adopt and submit a plan by December 31, 1991 for drainage service facilities in the Westlands Water District containing certain conditions. Dkt. No. 20-15 at 4.

drainage under the San Luis Act without any explicit Government refusal to do so.

Moreover, the creation of justifiable uncertainty is not limited solely to Government promises or mitigation measures as previously suggested. Such a cramped interpretation of the stabilization doctrine was expressly discouraged by the Supreme Court when it stated that "procedural rigidities should be avoid" when dealing with situations where the Government chooses "to bring about a taking by a continuing process of physical events." *See United States v. Dickinson*, 331 U.S. 745, 749 (1947). Rather, the Supreme Court held that the principles of fairness underlying the Fifth Amendment dictate. *Id*. at 747 ("The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'").

In this case, Plaintiffs have been faced with justifiable uncertainty for over 50 years because of the drainage obligation set forth in the 1960 San Luis Act, the actions taken by the Government to implement its statutory duty up through a drainage plan proposed in the 1991 DEIS, the 1995 U.S. District Court Order directing the Government to drain the San Luis Unit, the Ninth Circuit affirmance of that Order in 2000, the extensive post-2000 Government actions to identify a drainage solution, including issuance of a Record of Decision, and the existing contracts between the Westlands Water District and the United States going back to 1963 for supply of irrigation water and drainage of that water. It was not until the Bureau washed its hands of the Record of Decision and instead proposed transferring its drainage duty to local water districts in its September 2010 letter did the Plaintiffs' claim finally stabilize such that permanent damage to their property from drainage water was reasonably foreseeable. Dkt. No. 20-38 at 6-10.

III. STANDING

It is undisputed that that only the owner of the property on the date of a taking may bring a

takings claim in this Court. Dkt. No. 9, U.S. Mot. at 26; *see, e.g., Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992). Here, if the Court agrees that Plaintiffs' taking stabilized no earlier than September 2010, that test is easily satisfied since each Plaintiff owned the farmland alleged to have been taken as of that date and the Government has not disputed the ownership dates. Compl. ¶¶ 11-14*;* Dkt. No. 9, U.S. Mot. at 27. If the Court finds that Plaintiffs' claim stabilized at some time prior to July 12, 2007 (the earliest date of ownership alleged in the Complaint), then Plaintiffs will seek leave to amend their complaint to identify other Plaintiffs in the class who satisfy the standing requirements.

IV. CONCLUSION

Based on these facts, the statute of limitations has not run and jurisdiction with this Court is proper. For these reasons, the Plaintiffs respectfully request that the Government's motion to dismiss be denied.

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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