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 OF AMERICA,	)	
	)	
Defendant.	)	

UNITED STATES' SUBMISSION PURSUANT TO ORDER DATED JULY 26, 2012

On July 26, 2012, the Court ordered the parties to file a submission relating to the United States' pending motion to dismiss on statute of limitations and standing grounds (ECF No. 9; "Def.'s Mot."). ECF No. 37. As directed in that Order, the submission is to more fully incorporate the parties' legislative history findings into their respective arguments regarding the statute of limitations and the stabilization doctrine.[1] *Id.* In addition, the submission is to further develop the parties' respective arguments regarding standing. *Id*. The United States hereby files its submission pursuant to the Court's Order.

ARGUMENT

A. PLAINTIFFS FAIL TO PROVE THEIR CLAIM IS TIMELY AND THE LEGISLATIVE HISTORIES SUPPORT THE UNITED STATES' POSITION.

1. The stabilization doctrine provides that a claim may be timely when certain circumstances make its accrual justifiably uncertain.

The stabilization doctrine is of limited scope and is only applicable when an alleged taking occurs by a continuous physical process, e.g., recurrent flooding and erosion. *United*

[1] The parties initially addressed the legislative histories of the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) ("San Luis Act") and the Authorization of the Appropriations of the San Luis Unit, Pub. L. No. 95-46, 91 Stat. 225 (1977) ("1977 Authorization") in supplemental briefs filed by the United States on June 8, 2012 (ECF No. 34; "Def.'s Suppl. Br.") and by Plaintiffs on June 15, 2012 (ECF No. 36; "Pls.' Suppl. Br.").

States v. Dow, 357 U.S. 17, 27 (1958); *Mildenberger v. United States*, 643 F.3d 938, 945-46 (Fed. Cir. 2011). However, whether a claim is stabilized does not turn on when a plaintiff knows the full extent of the damage to their property and, therefore, a plaintiff cannot delay bringing suit until the possibility of further damage is foreclosed. *Mildenberger*, 643 F.3d at 946; *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000). Rather, stabilization occurs when a plaintiff's property has been invaded, substantially and permanently, and the extent of the damage becomes reasonably foreseeable. *Mildenberger*, 643 F.3d at 946; *Boling*, 220 F.3d at 1371-72. Once damage progresses and makes a "substantial encroachment" of the plaintiff's property, there is no justifiable uncertainty as it is unmistakable that damage has occurred. *Boling*, 220 F.3d at 1372-73. United States Court of Appeals for the Federal Circuit ("Federal Circuit") precedent gives direction for determining when this occurs.

In *Boling*, 220 F.3d at 1373, the Federal Circuit provided guidance for determining when, in an erosion case, the invasion of property encroached substantially enough to stabilize a claim. In making this determination, the trial court was directed to consider the uncertainties of the terrain, the difficulty of determining the government's preexisting easements allowing for encroachment of the plaintiffs' property, and the irregular progress of the erosion. *Id.* The "key issue is whether the permanent nature of the taking was evident such that the land owner should have known that the land had suffered erosion damage." *Id.*

In *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994), a case where erosion of a shoreline became public in 1966 and continued very gradually over a period of years, the Federal Circuit focused on "the almost imperceptible physical process [which] delayed detection of the full extent of the destruction – a necessary precondition" for determining whether the takings claim was stabilized. *Id.*; *see also Applegate v. United States*, 28 Fed. Cl. 554, 556-57

(1993) (providing further details regarding the erosion). In addition, the court found that the government's commitment to providing a sand transfer plant – which would preclude further, and repair prior, damage to the shoreline – prevented the plaintiffs from determining the permanency of the taking. *Applegate*, 25 F.3d at 1582-84. The United States Army Corps of Engineers' (the "Corps") efforts to construct the sand transfer plant spanned decades and were never disavowed: (1) the Corps proposed construction plans in 1967; (2) those plans received government approval in 1968; (3) after soliciting construction bids, in 1971, the Corps announced an indefinite delay to construction in order to conduct further research and development while the Corps also contemporaneously proposed an interim beach renourishment plan; and (4) in 1988, within six years of when the complaint was filed, the Corps proposed its revised plans for the plant. *Applegate*, 28 Fed. Cl. at 557-59. Combined with the gradual nature of the physical process at issue, the Federal Circuit found that the Corps' unwavering commitment to provide a sand transfer plant caused justifiable uncertainty and delayed accrual of the claim. *Applegate*, 25 F.3d at 1582-83.

In *Mildenberger*, 643 F.3d at 947, the Federal Circuit expounded on when the government's mitigating efforts may cause justifiable uncertainty and delay accrual. There, the court made clear that, standing on their own, government "promises" to mitigate damage are insufficient. *Id.* Rather, the government must actually commit to, or undertake, mitigating actions. *Id.* The government's consideration of potential projects which would mitigate damage is not a commitment and cannot serve as a basis for delaying accrual. *Id.* at 948. For example, in *Mildenberger*, the Federal Circuit held that the publication of a government report, which discussed alternative proposals for mitigating damage caused by the government's discharge of pollutants from a lake, was insufficient to cause justifiable uncertainty. *Id.*; *see also*

Mildenberger v. United States, 91 Fed. Cl. 217, 238 (2010) (trial court describing the government's report). And the government's proposal to construct a mitigating structure, with subsequent Congressional authorization to undertake that construction, was also found insufficient. *Mildenberger*, 643 F.3d at 948; *see also Mildenberger*, 91 Fed. Cl. at 239 (discussing proposed construction and Congressional action). Put simply, something more than discussion and proposals, even with Congressional authorization, must occur in order to create justifiable uncertainty and delay accrual. Further, once a claim becomes stale, subsequent mitigation efforts which may cause justifiable uncertainty cannot revive an untimely claim. *See Mildenberger*, 643 F.3d at 948 (affirming that mitigation efforts cannot revive a stale takings claim); *Mildenberger*, 91 Fed. Cl. at 239 ("even if the mitigation efforts cited by plaintiffs could be viewed as reasonably raising an expectation of improvement, those hopes arrived too late in face of a long-expired statute of limitations").

2. The relevant legislative histories support the United States' position that the substantial encroachment of Plaintiffs' farmlands occurred prior to September 2, 2005, six years before they filed their Complaint.

In their last brief, Plaintiffs argue that their claim is timely pursuant to the stabilization doctrine because, among other reasons, (1) the legislative mandate from the San Luis Act, enacted in 1960, to provide drainage, Pls.' Suppl. Br. at 5-6; and (2) the legislative history of the 1977 Authorization demonstrating the United States' commitment to completing the San Luis Unit, Pls.' Suppl. Br. at 9 (quoting 123 Cong. Rec. 16387 (1977)), caused justifiable uncertainty and delayed accrual of their claim. These events do not constitute mitigating efforts which would make the substantial encroachment of the physical invasion at issue justifiably uncertain.

Plaintiffs' claim, therefore, stabilized well before September 2, 2005 and is untimely.[2] The legislative histories of the San Luis Act and the 1977 Authorization support this conclusion.

First, assuming the legislative histories constitute mitigating efforts, these events occurred prior to the United States' rejection of its unilateral obligation to provide drainage, in 1985, and its subsequent cessation of drainage in 1986. ECF No. 15 at 6-7; Def.'s Mot. at 7-9. Thus, these prior events from the 1950s, 1960s, and 1970s, should not decide the question whether the subsequent failure to provide drainage caused the substantial encroachment of Plaintiffs' farmlands. And to accept Plaintiffs' arguments that the San Luis Act's continuing effect, or the United States' recommitment to completing the San Luis Unit in 1977, create justifiable uncertainty would mean that when a statutory duty to act exists, a takings claim predicated on a failure to meet that duty would never be untimely – a position soundly rejected by the Federal Circuit. *See Navajo Nation v. United States*, 631 F.3d 1268, 1275-76 (Fed. Cir. 2011) (when takings claim is predicated on the effect of a statute, the claim accrues when the statute is enacted); *Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995) (in rejecting plaintiffs' assertion of a continuing claim predicated on a statute's effect, holding that if plaintiffs' argument was correct and "damages continue to increase over time, then plaintiffs' cause of action would never accrue and the statute of limitations would never run").

Second, the legislative histories prove that landowners in Westlands were fully aware that the provision of drainage was far from certain and they should not expect the United States to prevent the substantial encroachment of their farmlands by irrigation water. There was no doubt that without irrigation from the San Luis Unit, these farmlands would be abandoned eventually.

[2] The United States maintains that the stabilization doctrine is inapplicable here because, unlike cases of recurrent flooding or erosion, such as in *Boling*, 220 F.3d at 1373, and *Applegate*, 25 F.3d at 1582, the effects of failing to provide drainage are immediately knowable and not difficult to discover. ECF No. 29 at 5-6, 10; ECF No. 15 at 5.

105 Cong. Rec. S6725, 6725-27 (daily ed. May 5, 1959). And everyone knew that this irrigation would require drainage. Def.'s Mot. at 3-6. But the San Luis Act only authorized the construction of a drainage collector system and did not commit the United States to that construction. 105 Cong. Rec. S6882, 6882-83, 6907-08 (daily ed. May 7, 1959); Def.'s Suppl. Br. at 8-9. As shown in *Mildenberger*, 643 F.3d at 948, this is insufficient to create justifiable uncertainty.

Further, by 1977, the alleged commitment to providing drainage was even more tenuous with Congress requiring additional study before committing the United States to completing the interceptor drain. 123 Cong. Rec. H3860-62, 3886-87 (daily ed. May 2, 1977). The 1977 Authorization established a task force to study the feasibility and environmental impacts of completing the interceptor drain while also investigating alternatives. 1977 Authorization § 2(b). In addition, the United States, through the Department of the Interior, made clear its position that another repayment contract, or modification of its preexisting contract, with Westlands was necessary in order to continue construction of the drainage collector system. 123 Cong. Rec. S8495, 8497 (daily ed. May 25, 1977). Because such a contract was the subject of considerable debate, *id.*, this pronouncement cast further doubt on the United States' commitment, or lack thereof, to providing drainage under existing legislative authority. As the Federal Circuit held in *Mildenberger*, 643 F.3d at 948, these actions evidence a lack of commitment which is insufficient to create justifiable uncertainty and delay accrual of Plaintiffs' claim.

Finally, the barriers to providing drainage were well known by the 1970s and put landowners on notice that the United States' alleged commitment rest on shaky ground. Those barriers were studied by the task force established pursuant to the 1977 Authorization and the task force's findings were presented to Congress in 1978. *Hearings Before the Subcomm. on*

Water and Power Res. of the Comm. on Insular Affairs on Report of the San Luis Task Force Established Under Pub. Law No. 95-46 on H.R. 12143 and H.R. 12272, 95th Cong. 1-87 (1978). The barriers were significant and required additional environmental studies by both the federal and state governments in order to be addressed. *See, e.g.*, *id.* at 7-9 (testimony regarding water quality issues in the Sacramento-San Joaquin Delta and the lack of a terminus for the interceptor drain being a barrier to completing its construction), 123-24 (summary of the San Luis Unit Task Force Report provided to Congress discussing water quality and related environmental issues). This further proves that the United States' efforts to mitigate the damage from no drainage were far from reaching the level of commitment *Mildenberger* requires in order to support a finding of justifiable uncertainty. Therefore, when the United States stopped providing drainage altogether in 1986, objective landowners in Westlands could not reasonably expect drainage to recommence or further damage to their farmlands to be prevented.

Plaintiffs also argue that the legislative histories of the San Luis Act and the 1977 Authorization do not bear on their claim's accrual because the United States purportedly conceded that their claim did not stabilize before 1990. Pls.' Suppl. Br. at 2, 9 (citing ECF No. 29 at 2-3 n.1; Def.'s Suppl. Br. at 2). As an initial matter, the United States stated previously that Plaintiffs' claim "may not have stabilized prior to September 1990." ECF No. 29 at 2-3 n.1 (emphasis added). This does not preclude the Court from finding that Plaintiffs' claim stabilized earlier. Further, as discussed above, the legislative histories do bear on the accrual question because they show that the barriers to providing drainage, which the United States regarded as serious impediments to providing drainage, were well known. Thus, when subsequent studies were issued, e.g., the Rainbow Report (ECF No. 9-1) and the 1991 DEIS, objective landowners knew that this was anything but a commitment to a mitigating effort. For this reason, the

plaintiffs in *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) were reasonably certain that their takings claim had accrued when they brought suit in 1991. The subsequent actions, and inactions, of the United States in the 1990s made clear, as found by both the district court and the court of appeals in *Firebaugh Canal Co. v. United States*, No. CV-F88-634 (E.D. Cal. filed Dec. 9, 1988), that the United States refused to provide drainage because it believed its legal obligation to do so had been repealed, superseded, or rendered impossible. This is in stark contrast to the situation in *Applegate* where the Corps never disavowed its commitment to mitigating efforts. Accordingly, this Court should find that Plaintiffs' claim stabilized well before September 2, 2005 and is untimely.

B. IN ORDER TO HAVE STANDING TO BRING THE PRESENT SUIT, PLAINTIFFS MUST PROVE THEIR CLAIM ACCRUED WHEN THEY OWNED THEIR FARMLAND.

In its Motion, the United States argued that if Plaintiffs' claim accrued timely but before they owned their respective farmland, Plaintiffs lacked standing to bring their claim. Def.'s Mot. at 26-27. This argument rests on the well-settled principle that "'only persons with a valid property interest at the time of the taking are entitled to compensation.'" *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); *see also United States v. Dow*, 357 U.S. 17, 20 (1958) (a takings claimant "can prevail only if the 'taking' occurred while he was the owner. For it is undisputed that '(since) compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment'") (quoting *Danforth v. United States*, 308 U.S. 271, 284 (1939)). Plaintiffs concede as much. ECF No. 19 at 27.

Plaintiffs also do not advance a theory that their claim accrued timely, after September 2, 2005, but before any Plaintiff became owner of their respective farmlands. *Id*. According to the Complaint, the dates Plaintiffs acquired their property are as follows:

Plaintiff	Acquisition Date
Erik Clausen	July 12, 2007
Christopher Todd Allen	October 16, 2007
Barlow Family Farms, L.P.	December 10, 2007
Michael Etchegoinberry	April 23, 2008

Compl. (ECF No. 1) ¶¶ 11-14. Thus, if Plaintiffs' claim accrued between September 2, 2005 and July 12, 2007, none of them have standing. And if the claim accrued between July 12, 2007 and April 23, 2008, one or more of the Plaintiffs lack standing. Such a finding would also have implications for putative class members.

The United States maintains its position that Plaintiffs' claim accrued before September 2, 2005 and is untimely. The Complaint, however, provides events that occurred after September 2, 2005 but before every Plaintiff acquired their farmland. Compl. ¶¶ 82-86, 101-03. The Court may find these events sufficient to accrue Plaintiffs' claim, resulting in one or more Plaintiffs failing to have standing to bring their claim.

CONCLUSION

For the foregoing reasons and those briefed previously, the Complaint should be dismissed in its entirety.

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Respectfully submitted,

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