IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

UNITED STATES' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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2	1956 Feasibility Report – Dep't of the Interior, *San Luis Unit Central Valley Project: Report on the Feasibility of Water Supply Development* (May 1955) (relevant portions)
3	San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960)
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UNITED STATES' MOTION TO DISMISS

Pursuant to Rules of the United States Court of Federal Claims ("RCFC") 12(b)(1) and 12(h)(3), the United States hereby moves to dismiss the Complaint filed by Plaintiffs Michael Etchegoinberry, Erik Clausen, Barlow Family Farms, L.P., and Christopher Todd Allen (collectively "Plaintiffs"). This Court does not have subject matter jurisdiction over the Complaint because Plaintiffs' claim is barred by the applicable statute of limitations codified at 28 U.S.C. § 2501 ("Section 2501"). Plaintiffs' claim accrued more than six years, if not decades, before they filed their Complaint on September 2, 2011. Alternatively, the United States moves to dismiss the Complaint on the ground that Plaintiffs lack standing to bring their claim because they did not own the subject property at the time their claim allegedly accrued.

A memorandum in support of this Motion follows.

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

I. STATEMENT OF THE CASE

A. INTRODUCTION.

As discussed further herein, Plaintiffs allege a continuing and ongoing physical invasion of their property caused by the United States' failure to provide drainage for irrigation water placed on farmlands in the west side of California's San Joaquin Valley. The drainage problem here has a long and storied history, with efforts to address the issue stemming back to at least the mid-1950s and continuing through the present day. And for much of this time period, litigation has constantly followed the efforts, or failures, of the United States to provide drainage service to landowners such as the Plaintiffs.

According to the Plaintiffs, since 1986, there has been no drainage service whatsoever provided to them. Due to this same failure, lawsuits filed in 1991 and 2005, both sought just compensation from the United States due to an alleged taking of those plaintiffs' properties. The events giving rise to these previously-filed lawsuits are nearly the exact same allegations of failure to provide drainage service at issue in this litigation. The only difference here is that Plaintiffs allege additional and recent efforts – and failures – of the United States to provide drainage service to these same lands. Given the long and storied history of the drainage problem, and the multitude of previously-filed lawsuits addressing the same problem, there can be no dispute that Plaintiffs' claim here is barred by Section 2501's statute of limitations. The recent events alleged by Plaintiffs cannot resurrect their claim that has at least twice before been brought against the United States in federal court. Accordingly, the time for bringing takings claims related to the drainage issue should finally come to an end and Plaintiffs' Complaint be dismissed in its entirety.

B. FACTUAL BACKGROUND.

While the legal argument presented in this Motion is concise and straightforward, due to the long and complex factual and litigation history related to the issues set forth by Plaintiffs in their Complaint, the United States presents this extensive discussion of the relevant background.[1]

1. The need for drainage on the west side of California's San Joaquin Valley.

Whenever farmlands are irrigated, adequate drainage is necessary in order to remove the resulting saline water. Compl. ¶ 2; *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000). Without this drainage, saline water steadily accumulates beneath the farmlands, typically resulting in higher water tables and the accumulation of salts in the soil. Compl. ¶ 2; *Firebaugh*, 203 F.3d at 571. Over time, this process results in decreased agricultural productivity, and may ultimately lead to the destruction of the farmlands' ability to sustain crops. This problem, however, is not unique to the San Joaquin Valley and it is certainly not a new problem. *Id.*; 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")[2]

[1] "In addressing jurisdictional challenges, the court is at liberty to consider all the evidence brought to its attention in evaluating the government's motion to dismiss, even matters outside of the pleadings." *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 409 (2010) (citing *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985)). While most of the evidence presented herein is discussed or otherwise incorporated in the Complaint, the United States presents the attached exhibits in order to provide context to Plaintiffs' allegations or to otherwise aid the Court in adjudicating this Motion.

[2] In 1984, a joint Federal and State interagency program, known as the San Joaquin Valley Drainage Program ("SJVDP"), was established by the governor of California and the Secretary of the Interior in order to study the drainage issue in the Valley. Rainbow Report at 38344, 38363.

(relevant portions attached as Exhibit 1) at 38361[3]. "Inadequate drainage and accumulating salts have been persistent problems in parts of the valley for more than a century, making some cultivated land unusable as far back as the 1880s and 1890s." *Id.* 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* (a report prepared for the SJVDP)). These problems are exacerbated by the use of irrigation water on farmlands on the west side of the San Joaquin Valley, which is beset by poor natural drainage conditions. *Id.* at 38362.

2. History of the Central Valley Project's San Luis Unit through 1986.

When Congress passed the Reclamation Act of 1902, Pub. L. No. 57-161, ch. 1093, § 5, 32 Stat. 388, its goals were to encourage people to move west, not in order to engage in speculation, but to grow crops on modest family farms in the country's drier regions. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 297 (1958); *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 815 (9th Cir. 1990); *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1117 (E.D. Cal. 2001) (citation omitted). Congress achieved this result by providing subsidized irrigation water to farmers in order to encourage agriculture on formerly arid and unproductive lands. *Barcellos*, 899 F.2d at 815, 824 (citations omitted); *Westlands*, 134 F. Supp. 2d at 1117.

The Central Valley Project ("CVP") is the nation's largest federal reclamation project with dams and water conveyance facilities spanning the length of California's Central Valley, from Shasta Dam to the north, to Friant-Kern Canal in the south. Compl. ¶ 22; *Firebaugh*, 203 F.3d at 570. "The CVP's purpose is to 'improve navigation, regulate flow of the San Joaquin

[3] Many of the documents cited here were produced as part of the Administrative Record ("AR") filed in the *Firebaugh* litigation discussed *infra* at 13-20. To the extent these documents are cited herein, citations to the Bates numbers used in that litigation are provided.

River and the Sacramento River, control floods, provide for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy.'" *Westlands Water Dist. v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003) (quoting Act of August 26, 1937, Pub. L. No. 75 392, 50 Stat. 844, 840) (internal alterations omitted).

In 1956, the Secretary of the Interior ("Secretary"), through the Bureau of Reclamation ("Reclamation"), sent Congress a feasibility report regarding the development of additional water supplies for irrigation in the Central Valley. Compl. ¶ 25; *see also* Dep't of the Interior, *San Luis Unit Central Valley Project: Report on the Feasibility of Water Supply Development* (May 1955) ("1956 Feasibility Report") (relevant portions attached as Exhibit 2) at 38749 (cited by Compl. ¶¶ 25, 27, 28).[4] The 1956 Feasibility Report recognized the need for providing drainage within the area to be serviced by the San Luis Unit:

> Soils of the area which will be served by the San Luis Unit contain salts which will be dissolved and carried by the percolating water into the soils in the lower parts of the service area. If left undrained evaporation and transpiration of the percolating waters would concentrate the salts and make these soils unsuitable for irrigation use. The construction of a drainage system will lower the ground-water table and prevent the concentration of salts. Since the normal summer flows in the natural drainage channels and rivers are insufficient to adequately dilute the saline waste waters which would be discharged by the drains, eventually it will be necessary to provide facilities for disposing of these waters.

1956 Feasibility Report at 38846; *see also* Compl. ¶ 25. As contemplated in the 1956 Feasibility Report, providing drainage would achieve two purposes:

> (1) it will lower the water table which otherwise ultimately might stand in the root zone or on the surface near the lower end of the service area, and (2) it will

[4] The 1956 Feasibility Report is dated May 1955. However, in order to allow time for public comment, it was not transmitted to Congress until 1956, and is therefore typically referred to as the 1956 Feasibility Report in the record and reported decisions. *See, e.g., Firebaugh*, 203 F.3d at 574.

> remove water of poorer quality and thus maintain an overall acceptable quality of ground water and soils.

1956 Feasibility Report at 38821; *see also* Compl. ¶¶ 25, 26. The second purpose was needed not only due to the anticipated increase of drainage water resulting from irrigation, but also because the groundwater being used for irrigation at the time of the Report was already of poor quality due to high salinity and boron concentrations. 1956 Feasibility Report at 38821. The initial plans for the drainage system as proposed in the 1956 Feasibility Report provided for the installation of tile drains on approximately 96,000 acres of lands along the lower eastern edge of the service area, which would carry drainage water to a proposed interceptor drain.[5] Compl. ¶¶ 25-27; *Firebaugh*, 203 F.3d at 571; 1956 Feasibility Report at 38800, 38869-870.

Based in part on the recommendations of the 1956 Feasibility Report, in 1960, Congress passed the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) ("San Luis Act") (attached as Exhibit 3), authorizing the construction, operation, and maintenance of facilities "for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California" (the "San Luis Unit" or "Unit"). *Id.* at § 1(a); *see also* Compl. ¶ 26; *Firebaugh*, 203 F.3d at 571. The San Luis Act, however, conditioned the construction of the Unit on the Secretary making "provision for constructing the San Luis interceptor drain to the [D]elta designed to meet the drainage requirements of the San Luis [U]nit as generally outlined in the [1956 Feasibility Report]." San Luis Act, § 1(a)(2);[6] *see also* Compl. ¶ 26; *Firebaugh*, 203 F.3d at 571.

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[5] Throughout the historical documents in the record and the reported drainage cases, the terms "San Luis Drain" and "interceptor drain" are used interchangeably. Accordingly, the United States uses those terms interchangeably herein.

[6] Alternatively, the San Luis Act conditioned construction of the Unit on the State of California providing a master drainage outlet and disposal channel. San Luis Act, § 1(a)(2). Ultimately, California elected not to undertake this responsibility. *Firebaugh*, 203 F.3d at 571.

In 1962, the Secretary "informed Congress that the Secretary would make provision for constructing the San Luis interceptor drain to the [] Delta," paving the way for the construction of the San Luis Unit. *Firebaugh*, 203 F.3d at 571; *see also* Compl. ¶ 28. Thereafter, construction of the San Luis Unit began, and in 1967, water deliveries to the Westlands Water District ("Westlands") began. *Firebaugh*, 203 F.3d at 571. In March 1968, construction of the interceptor drain began. Compl. ¶ 43; *Firebaugh*, 203 F.3d at 571. By 1975, an 82-mile segment of the interceptor drain was completed and miles of collector drains were constructed in a 42,000-acre area of the northeast portion of Westlands. Compl. ¶¶ 47, 48; *Firebaugh*, 203 F.3d at 571. At that point, construction of the interceptor drain was suspended by the Secretary, citing questions and concerns raised by the public. Compl. ¶ 47; *Firebaugh*, 203 F.3d at 571.

Despite halting construction of the interceptor drain, a subsurface drainage collector system was constructed for Westlands and drainage service began in 1977, Compl. ¶ 52, or 1978. *Firebaugh*, 203 F.3d at 571. This system discharged drainage water into the completed portion of the interceptor drain, where it was carried to Kesterson Reservoir ("Kesterson"). Compl. ¶ 53; *Firebaugh*, 203 F.3d at 571. Kesterson was originally intended to be a regulating reservoir for the San Luis Drain. Compl. ¶ 53. However, because the San Luis Drain was not completed, Kesterson became the temporary terminal disposal site for the 42,000-acre drainage service area. *Id.* at ¶ 55; *Firebaugh*, 203 F.3d at 571. The United States subsequently made efforts to expand the drainage collector system, but they were unsuccessful. Compl. ¶¶ 49-51. As a result, the 42,000 acres of farmlands represent the only service area in Westlands which have received Federal drainage service as originally contemplated by the San Luis Act. Compl. ¶¶ 52-54, 63; *see also* Declaration of Michael C.S. Eacock, dated Dec. 7, 2011, with attached map ("Eacock

Decl.") (attached as Exhibit 4) (showing the location of the 42,000-acre drainage service area within Westlands along with the locations of Plaintiffs' properties within Westlands).

Drainage water was disposed of at Kesterson by evaporation, which led to a concentration of selenium accumulating in the reservoir. Compl. ¶ 55; *Firebaugh*, 203 F.3d at 571-72. In 1983, studies revealed instances of waterfowl deformities and mortalities at Kesterson, believed to be caused by high concentrations of selenium entering the food chain. Compl. ¶ 56; *Firebaugh*, 203 F.3d at 571-72. In February 1985, the California State Water Resources Control Board ("SWRCB") ordered Reclamation to either clean up Kesterson or close it down. Compl. ¶ 57. In March 1985, the Secretary announced that Interior would close down the reservoir and plug the San Luis Drain. *Id.* at ¶ 58; *Firebaugh*, 203 F.3d at 572.

On April 3, 1985, Westlands and Interior entered into an agreement regarding the closure of Kesterson and the drainage collector system. Compl. ¶ 59; April 3, 1985 Agreement between the Interior and Westlands ("1985 Agreement") (attached as Exhibit 5). Because of the time it would take to plug the drainage area and the San Luis Drain, it "appeared appropriate to cease delivery of water to the lands that drain into the San Luis Drain to the extent necessary to halt the flow of drain water into Kesterson Reservoir." *Id.* at 2-3; *see also* Compl. ¶ 58. In order to avoid such a result, the 1985 Agreement provided for water service to continue under certain conditions. Compl. ¶ 59; 1985 Agreement at 3-4. To meet an agreed-upon schedule for stopping flows into Kesterson, Westlands and Interior agreed that it would "require the cooperation of federal, state and local agencies, and the private sector," and Westlands represented to Interior that it could achieve the schedule. *Id.* at 4. With respect to the parties' long-term goals of continuing irrigation service while also addressing the drainage problem, they acknowledged that

it would require "Federal, state, and local agencies, and interested private parties … to work together" in order to achieve an environmentally responsible solution. *Id*.

Plaintiffs allege that Westlands took steps to meet the agreed-upon schedule for stopping flows into Kesterson, but that it was ultimately unsuccessful. Compl. ¶ 61. Accordingly, in 1986, the drainage system was physically plugged in order to stop flows into the San Luis Drain. *Id*.; *Firebaugh*, 203 F.3d at 572. Despite the plugging of the drainage system, the United States continued to deliver water to Westlands.[7] *Westlands*, 134 F. Supp. 2d at 1125. "This proved to be an improvident course of action, because an essentially impermeable clay layer underlies most of the western San Joaquin Valley (where Westlands is located), which means that the waste water that was not drained could not move downward through the soil to leach out the salts, causing a [thick] layer of salt and selenium to rest on the surface of the farm land, which will continue to cause irreparable harm to the land." *Id.* at 1125 n.33 (citations omitted). "Ultimately, the Government took the position that 'subsequent changes in the law and environmental knowledge made compliance with the San Luis Act impossible, and thereby excused the United States from performing the duty to provide drainage.'" *Id.* (quoting *Firebaugh*, 203 F.3d at 572) (internal alterations omitted). As discussed further below, *see infra* at __, affected landowners eventually filed two lawsuits alleging that the United States was obligated to complete the San Luis Drain in order to provide drainage service to lands in Westlands. *Id.* (citing *Firebaugh*, 203 F.3d at 571); Compl. ¶ 5.

[7] In the 1985 Agreement, the United States agreed to continue water deliveries in 1985, *id.* at 7, and thereafter, it agreed to continue water deliveries pursuant to a settlement entered into in *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, No. CV 79-106 (E.D. Cal. Filed Apr. 26, 1979), discussed *infra* at 13.

3. Efforts to address drainage issues between 1986 and 2000.

"Since June 1986, no drainage service has been provided by the United States to any landowner in the [Westlands Water] District." Compl. ¶ 63. However, as a result of the environmental issues at Kesterson, a Federal and California interagency program, known as the San Joaquin Valley Drainage Program, was established to develop solutions to drainage and drainage-related problems. Rainbow Report at 38363. From 1987, the focus of the SJVDP was on in-valley drainage management measures based on a recommendation from a citizen's advisory committee consisting of water users, environmental advocates, and other public interests. In September 1990, the SJVDP issued the Rainbow Report, which focused its recommendations on methods to reduce the amount of drainage water. *Id.* at 38347-38350, 38432-38438, 38440-38441 (Table 17), 38465-38478. The Report did not provide a recommendation for disposal of drainage water in the Delta as contemplated by the San Luis Act.

As a result of litigation (*see infra* at 13), in 1991, Reclamation submitted a Draft Environmental Impact Statement for the San Luis Drainage Program. *See* San Luis Unit Drainage Program, Central Valley Project, California, Draft Environmental Impact Statement, dated Dec. 20, 1991 ("1991 DEIS") (relevant portions attached as Exhibit 6). The 1991 DEIS described no action and four action alternatives for the San Luis Unit Drainage Program that purported to address drainage needs through the year 2007 in satisfaction of a stipulated judgment. *Id.* at 37796. None of the four action alternatives considered in the 1991 DEIS proposed extending the interceptor drain so that it disposed of drainage water into the Delta as contemplated by the San Luis Act. *See id.* at 37802 (discussing how both ocean and delta disposal options were considered but eliminated from the DEIS), 37807-808 (describing the four action alternatives). The proposed action in the DEIS, alternative four, did not include any

expansion of the interceptor drain. Instead, it relied upon source control and the implementation of new technologies. *Id.* at 37796, 37807-808.

Other salient events during this time period primarily revolved around litigation, discussed *infra* at 12-21.

4. The current status of Federal efforts to provide drainage to Westlands.

The Complaint sets forth many of the relevant drainage events which have transpired since 2000. Compl. ¶¶ 79-99. Events in this time period are also discussed by Judge Wanger in *Firebaugh Canal Water District v. United States*, No. 1:88-cv-0634, 2011 WL 4590810, at *2-5 (E.D. Cal. Sept. 30, 2011) ("2011 *Firebaugh* Decision"). Because Plaintiffs' claim accrued before these events, they are not elaborated upon herein.

5. The Westlands Water District and its contracts with Reclamation.

According to the Complaint, Westlands "was formed by the Fresno County Board of Supervisors upon petition by landowners in the region who sought to protect their farmlands." Compl. ¶ 23. Plaintiffs allege that through Westlands, "the landowners sought to bring in [CVP] water to their farmlands on the west side of the San Joaquin Valley." *Id.* "On June 5, 1963, Westlands and the United States entered into the 'Contract Between the United States and Westlands Water District Providing for Water Service,' Contract No. 14-06-200-495A ('1963 Water Service Agreement')." Compl. ¶ 30. "On April 1, 1965, Westlands and the United States entered into the 'Contract Between the United States and Westlands Water District Providing for Construction of a Water Distribution and Drainage Collection System,' Contract No. 14-06-200-2020A ('1965 Repayment Contract')." Compl. ¶ 36. In 2007, and again in 2010, Westlands and the United States entered into interim renewal contracts for the delivery of water. *Id.* at ¶ 41.

6. The named Plaintiffs and the putative class members.

The named Plaintiffs here are relatively new to land ownership in Westlands. Plaintiff Etchegoinberry has owned approximately 139 acres since April 23, 2008, Compl. ¶ 11; Plaintiff Clausen was assigned claims for 638 acres, which the Clausen Family Trust purchased on July 12, 2007, *id.* at ¶ 12; Plaintiff Barlow Family Farms owns 640 acres which were acquired on December 10, 2007, *id.* at ¶ 13; and Plaintiff Allen has owned roughly 165 acres since October 16, 2007. *Id.* at ¶ 14. None of the named Plaintiffs own property within the area of Westlands that temporarily received drainage service prior to the closure of Kesterson in 1986. *See* Map attached to Eacock Decl. The Complaint alleges a class action under RCFC 23(b) on behalf of a class of putative members defined as:

> All landowners located within the Westlands Water District … and served by the San Luis Unit of the Central Valley Project whose farmlands have not received the necessary drainage service the United States is required to provide under the San Luis Act.

Compl. ¶ 16 (citation omitted).

C. LITIGATION HISTORY REGARDING DRAINAGE IN THE SAN LUIS UNIT.

Litigation has embroiled the San Luis Unit for decades. Most of these lawsuits originated in the U.S. District Court of California, Eastern District, and since the early 1990s, almost all of the relevant district court opinions are the work product of recently retired Judge Wanger. Some of his decisions were appealed to the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"). Related cases have also been filed in the Court of Federal Claims. This section does not purport to summarize the entire, expansive litigation history of the San Luis Unit; rather, it focuses on those cases most salient to the Motion at hand.

1. *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, No. CV-F-79-106 (E.D. Cal. filed Apr. 26, 1979) and *Westlands Water Dist. v. United States*, No. CV-F-81-245 (E.D. Cal. filed Apr. 26, 1979) (jointly referred to as "*Barcellos*").

In 1979, landowners from both inside and outside of the San Luis Unit service area, filed a class action lawsuit against Westlands and junior water right holders. *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 491 F. Supp. 263, 265 (E.D. Cal. 1980). In another action, Westlands sued federal defendants (*inter alia*, the United States, Interior, and Reclamation) and then joined them as indispensable parties in the *Barcellos* lawsuit, and the two lawsuits were consolidated. The lawsuits' allegations revolved around the amount and price of water to be supplied by the San Luis Unit and the parties' respective rights and duties under the 1963 Water Services Agreement and reclamation law. Class Notice, *Barcellos*, No. 79-106 (E.D. Cal. Dec. 10, 1981) ("*Barcellos* Class Notice") (attached as Exhibit 7); *Barcellos*, 491 F. Supp. at 265. The duty to provide drainage service, and whether that duty required the completion of the San Luis Drain and how its construction would be funded, were also relevant. *Barcellos* Class Notice at 4, 6; Compl. ¶ 65.

The court certified the class action, consisting of all landowners within Westlands. *Barcellos* Class Notice at 5, 7-8. On August 29, 1986, the parties stipulated to a judgment and on December 30, 1986, the court entered that judgment, commonly known as the *Barcellos* Judgment, No. 81-245 (E.D. Cal. Dec. 30, 1986) (attached, without exhibits thereto, as Exhibit 8). Compl. ¶ 65. The Judgment provides that the 1963 Water Services Agreement "is a valid, enforceable and implementable contract entitling [Westlands] through the end of 2007 to water and other service specified therein." *Barcellos* Judgment at 12 of 56. The Judgment addresses, *inter alia*, the provision of drainage service to Westlands. *Id.* at 20 of 56.

2. *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) ("*Sumner Peck*") and *Firebaugh Canal Co. v. United States*, No. CV-F88-634 (E.D. Cal. filed Dec. 9, 1988) ("*Firebaugh*").

In 1988, two water districts down-slope of the San Luis Unit (the "*Firebaugh* Plaintiffs"), filed suit against Westlands and Reclamation for various forms of relief, including seeking

completion of the interceptor drain. Compl. ¶ 67; *Firebaugh*, 203 F.3d at 572. In 1991, certain landowners within Westlands (the "*Sumner Peck* Plaintiffs") filed suit against Westlands and federal defendants (the Bureau of Reclamation, Department of the Interior, and the United States), seeking, *inter alia*, compensation from both Westlands and the federal defendants for an unconstitutional taking of their property for public use and also seeking completion of the interceptor drain. *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 721, 737 (E.D. Cal. 1993); *see also* 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.") (relevant portions attached as Exhibit 9) (alleging inverse condemnation claims and seeking declaratory relief for failing to complete the interceptor drain or provide drainage services); Compl. ¶ 67.[8]

The *Sumner Peck* Plaintiffs alleged that the defendants' failure to provide drainage caused their farmland soil to be "rendered barren by excess salt" and their crops "killed by water inundating the root zone." *Sumner Peck*, 823 F. Supp. at 722 (discussing plaintiffs' tort claim allegations against Westlands). The *Sumner Peck* Plaintiffs alleged that Westlands' continued delivery of irrigation water without providing drainage for the resulting subsurface saline water was a substantial causative factor of plaintiffs' drainage problems. *See id.* at 735 (discussing plaintiffs' inverse condemnation claim against Westlands). The *Sumner Peck* Plaintiffs also sought just compensation from the federal defendants, alleging that their actions had effected a taking of their property by causing it to be inundated with drainage water. *Id.* at 749. On May 28, 1993, the court dismissed the takings claim against the federal defendants because it lacked jurisdiction to consider such a claim. *Id.* (citing 28 U.S.C. § 1491; *Ruckelshaus v. Monsanto Co.*,

[8] The *Sumner Peck* Amended Complaint was filed by 147 plaintiffs, comprising 17 family groups, which owned and operated approximately 36,285 acres of farmland in Westlands. *Id*. at ¶¶ 1, 28. The copy attached as Ex. 8 contains highlighting and underlining. This was the only copy located prior to filing the present Motion. Efforts are underway to obtain a clean copy.

467 U.S. 986, 1020 (1984)). The inverse condemnation claim against Westlands was not dismissed, however, and the *Sumner Peck* Plaintiffs continued pursuing that claim against Westlands in district court.

"In May 1992, the [*Sumner Peck* and *Firebaugh*] cases were partially consolidated to resolve the mutual allegation that Interior was required by law under the San Luis Act to construct facilities to drain subsurface water from [Westlands] farmlands." Compl. ¶ 68; *accord Firebaugh*, 203 F.3d at 572. In an unpublished opinion filed on May 17, 1993, the district court entered partial summary judgment in favor of the *Sumner Peck* and *Firebaugh* Plaintiffs, holding that the San Luis Act required the United States to provide drainage service to lands receiving water through the San Luis Unit. Compl. ¶ 69 (quoting *Sumner Peck*, Order dated May 17, 1993); *Firebaugh*, 203 F.3d at 572. "Following the partial summary judgment, the Government argued that subsequent changes in the law and environmental knowledge made compliance with the San Luis Act impossible, and thereby excused the United States from performing that duty." *Id.*

In 1994, a three-week bench trial was held in the consolidated *Sumner Peck* and *Firebaugh* action to determine whether the Secretary's obligation to provide drainage to the San Luis Unit was excused and if not, whether any appropriate non-monetary relief should be ordered. *Sumner Peck* and *Firebaugh*, Findings of Fact and Conclusions of Law, No. 88-634 (E.D. Cal. Dec. 16, 1994) (Doc. No. 426) ("Consolidated Findings") (attached as Exhibit 10), at 34187; Compl. ¶ 70. The court found that the activities funded and undertaken by Reclamation "since the mid-1980s have been directed at managing the drainage problem 'in-valley' by reducing the volume of drainage water" and that Reclamation "has not undertaken any efforts to complete the San Luis Drain in order to physically remove saline subsurface agricultural

drainage water from the drainage service area." Consolidated Findings at 34200; *see also* Compl. ¶ 71 (quoting Consolidated Findings). The court also found that Reclamation's existing policy at the time of its decision (Dec. 1994) was to not further consider, much less construct, facilities to dispose of drainage water in the Delta as contemplated by the San Luis Act. Consolidated Findings at 34200-01. This result was in spite of the court's May 1993 order declaring that Section 1(a) of the San Luis Act required completion of a drain. *Id.* at 34201. As a result, the court found that the federal defendants "have failed to take necessary steps to provide drainage service for a number of years" and are "unlikely to undertake efforts to provide drainage service unless ordered to do so by the Court." *Id.*; *see also* Compl. ¶ 71 (quoting Consolidated Findings). The court also found that the federal defendants' breach of their duty to provide drainage service was not excused. *Id*. at ¶ 72 (citing Consolidated Findings). The court, therefore, concluded that the federal defendants responsible for providing drainage service "have not effectively addressed the serious problems of water-logging and salt accumulation that are destroying the plaintiffs' ability to farm their lands in the San Luis Unit." *Id.* at ¶ 71 (quoting Consolidated Findings). Accordingly, the court held that Reclamation's "policy decision not to complete the San Luis Drain, in violation of Section 1 of the San Luis Act" constituted unlawfully withheld agency action and that in "view of the actual, extensive, and continuing harm suffered by plaintiffs in the loss of productivity and value of their farmlands," the court ordered the federal defendants to "take all reasonable and necessary actions to apply for a discharge permit [from the SWRCB] for the San Luis Drain" in order to comply with the United States' obligation to provide drainage to the San Luis Unit. Consolidated Findings at 34232, 34226; *see also* Compl. ¶ 73 (quoting Consolidated Findings); *Firebaugh*, 203 F.3d at 572-73

(citing same).[9] In March 1995, the court entered partial judgment on its findings of fact and conclusions of law. Consolidated Partial Judgment; *Firebaugh*, 203 F.3d at 572-73; Compl. ¶ 74.

The United States timely appealed the Consolidated Partial Judgment to the Ninth Circuit. *Id.*; *Firebaugh*, 203 F.3d at 570. In 2000, the Ninth Circuit issued its decision, affirming in part, reversing in part, and remanding for further proceedings. The Ninth Circuit agreed with the district court "that the San Luis 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. The Ninth Circuit also agreed with the district court that subsequently enacted appropriation riders – which required the Secretary and California to develop a water quality plan before determining the final point of discharge for the interceptor drain – "did not implicitly repeal the drainage provisions of the San Luis Act." *Id.* at 575-76; *see also id.* at 574-75 ("Beginning in 1965, and continuing for almost every year up through the present time [2000], Congress has approved language in the appropriation acts…"). Next, the Ninth Circuit affirmed the district court's finding that the Secretary had breached the duty to provide drainage:

> The Government provides no explanation why the Bureau of Reclamation and the State of California have been unable to establish the requisite environmental standards sometime during the past thirty-four years. In the meantime, for the past thirteen years [Interior] has been providing water service to the Westlands, but no drainage. As a result, the lands within Westlands are rapidly becoming sterile. Based on these facts, we agree with the district court that the Secretary of Interior, through the Bureau of Reclamation, has made the policy decision not to provide drainage service, in violation of section 1 of the San Luis Act.

[9] In order to complete construction of the interceptor drain, a SWRCB discharge permit is required under California law. *Sumner Peck* and *Firebaugh*, Partial Judgment on Findings of Fact and Conclusions of Law re Statutory Duty, No. 88-634 (E.D. Cal. Mar. 12, 1995) (Doc. No. 442) ("Consolidated Partial Judgment") (attached as Exhibit 11), at 34003 (citing Cal. Water Code §§ 13263, 13320, 13953.2).

Id. at 577. "This finding, however, does not end the inquiry." *Id.* "Since the late 1970s, Congress has appropriated funds so that the Bureau of Reclamation could, in cooperation with the State, local water districts, and other entities, examine solutions to drainage other than the construction of the [interceptor] drain." *Id.* (citing appropriating statutes). The Ninth Circuit rejected "the Government's contention that this action has eliminated the Bureau's duty to provide drainage; however, we do find that the subsequent Congressional action supplements the drainage solutions available to the Department of the Interior." *Id.* (citations omitted). "[A]lthough the San Luis Act limits the drainage solution to an interceptor drain to the [] Delta, the subsequent Congressional action indicates that the Department of the Interior can meet its drainage obligations through means other than the interceptor drain." *Id.* "Therefore, we hold that the subsequent Congressional action has not eliminated the Department's duty to provide drainage, but that it has given the Department the authority to pursue alternative options other than the interceptor drain to satisfy its duty under the San Luis Act." *Id.*

Despite finding that the United States' duty to provide drainage could be satisfied by pursuing alternatives other than the interceptor drain, the Ninth Circuit affirmed the district court's finding that since 1986, Interior had unlawfully withheld drainage service from Westlands, in violation of section 1 of the San Luis Act, and that the "lack of drainage service has seriously diminished the viability of agricultural land within Westlands, including certain locations where the land is completely sterile." *Id.* at 578. The Ninth Circuit, however, reversed the district court's order to the extent it required Interior to apply for a discharge permit from SWRCB because it wrongly eliminated Interior's discretion on how to provide drainage service. *Id.* Despite this, the Ninth Circuit did agree with the district court that Interior must act promptly to provide drainage service:

> The Bureau of Reclamation has studied the problem for over two decades. In the interim, lands within Westlands are subject to irreparable injury caused by agency action unlawfully withheld. Now the time has come for the Department of Interior and the Bureau of Reclamation to bring the past two decades of studies, and the 50 million dollars expended pursuing an "in valley" drainage solution, to bear in meeting its duty to provide drainage under the San Luis Act.

Id. The Ninth Circuit remanded the case for further proceedings consistent with the court's directive that the United States promptly provide drainage service. *Id.*; *see also* Compl. ¶¶ 75-76 (discussing the Ninth Circuit's holding).

Litigation of the consolidated *Sumner Peck* and *Firebaugh* cases continued on remand. The district court first issued a permanent injunction directing the United States to provide drainage to the San Luis Unit, though, rather than directing it to implement the original drainage plan, the court ordered the United States to submit a new drainage plan. Compl. ¶ 77 (citing *Sumner Peck*, Order dated Dec. 18, 2000 ("Drainage Order")). "Since issuing the Drainage Order, the district court has been overseeing its implementation, and the parties in the partially consolidated *Firebaugh* and *Sumner Peck* actions regularly apprise the court of the status of compliance with the order." Compl. ¶ 78.

On March 29, 2002, the district court issued a memorandum order addressing various motions, including cross-motions on summary judgment filed by the federal defendants against the plaintiffs, the *Sumner Peck* Plaintiffs against Westlands and the federal defendants, and Westlands against the federal defendants. *Sumner Peck* and *Firebaugh*, Mem. Order, No. 91-048 (E.D. Cal. Mar. 29, 2002) (ECF No. 554), at 5-9. In its ruling on the plaintiffs' motion for summary judgment against the United States, the district court found that 1963 Water Services Agreement, 1965 Repayment Contract, and the *Barcellos* Judgment did not create a separate contractual duty for the United States to provide drainage service independent of the San Luis Act. *Id.* at 71-72, 75-78.

On May 24, 2002, the district court issued a supplemental memorandum order denying Westlands' motion for summary judgment on the *Sumner Peck* Plaintiffs' inverse condemnation claim. *Sumner Peck* and *Firebaugh*, Supp. Mem. Order, No. 91-048 (E.D. Cal. May 24, 2002) (ECF No. 595). Subsequently, in 2003, Westlands settled with the *Sumner Peck* Plaintiffs. *Westlands Water Dist. v. Zurich American Ins. Co.*, No. 1:03-CV-05747, 2006 WL 279310, *1 (E.D. Cal. Feb. 6, 2006). The settlement obligated Westlands to pay $5 million in damages to resolve the *Sumner Peck* Plaintiffs' claims. *Id.* Litigation continued in *Firebaugh*, however, and on his last day before retiring from the bench, Judge Wanger granted the federal defendants' motions for summary judgment in that action. *See generally* 2011 *Firebaugh* Decision.

3. *Firebaugh Canal Water Dist. v. United States*, No. 05-262L (Fed. Cl. filed Feb. 28, 2005) ("*Firebaugh* CFC Case").

While *Firebaugh* was still pending, the *Firebaugh* Plaintiffs filed a takings claim against the United States in the Court of Federal Claims. *Firebaugh Canal Water Dist. v. United States*, 70 Fed. Cl. 593, 594 (2006). The *Firebaugh* Plaintiffs alleged that their water rights, along with related rights, were taken by the failure of the United States to provide drainage to the San Luis Unit, thereby causing damage to the plaintiffs' down-slope property outside of the Unit. *Id.* Because the *Firebaugh* Plaintiffs still had tort claims arising from the same operative facts pending in the *Firebaugh* case in district court, the *Firebuagh* CFC Case was dismissed pursuant to 28 U.S.C. § 1500. *Firebaugh Canal Water Dist.*, 70 Fed. Cl. at 597-99.

II. ARGUMENT

A. STANDARD OF REVIEW.

When deciding a motion to dismiss based on lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), "the court will 'normally consider the facts alleged in the complaint to be true and correct,'" but "'if [plaintiffs'] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, [plaintiffs] must support them by competent proof.'" *Wayne ex rel. MYHUB Group, LLC v. United States*, 95 Fed. Cl. 475, 477 (2010) (quoting *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); quoting *McNutt v. Gen. Motors Acceptance Corp*., 298 U.S. 178, 189 (1936)); *see also Mildenberger v. United States*, 643 F.3d 938, 944 (Fed. Cir. 2011) ("When the factual underpinnings of the Court of Federal Claims' jurisdiction are contested, the Court of Federal Claims 'may weigh relevant evidence.'"); *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 409 (2010) ("In addressing jurisdictional challenges, the court is at liberty to consider all the evidence brought to its attention in evaluating the government's motion to dismiss, even matters outside of the pleadings.") (citing *Indium Corp. of Am. v. Semi-Alloys, Inc*., 781 F.2d 879, 884 (Fed. Cir. 1985)).

"Plaintiffs bear the burden of proving that the Court of Federal Claims 'possesse[s] jurisdiction' over their complaint." *Wayne*, 95 Fed. Cl. at 477 (quoting *Sanders v. United States*, 252 F.3d 1329, 1333 (Fed. Cir. 2001)). Plaintiffs must meet this burden of proving jurisdiction by a preponderance of the evidence. *Id.* (quoting *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

B. PLAINTIFFS' CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

"Suits against the United States are subject to a six-year statute of limitations pursuant to 28 U.S.C. § 2501." *Sabree v. United States*, 90 Fed. Cl. 683, 691 (2009). "This statute sets an express limitation on the jurisdiction granted to this court under the Tucker Act." *Id.* "The six-year time bar on actions against the United States is jurisdictional, because filing within the six-year period is a condition of the waiver of sovereign immunity in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1)." *Id.*; *accord John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-39 (2008). "The start date to begin a statute of limitations calculation for a claim against the United States is 'when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment....'" *Sabree*, 90 Fed. Cl. at 691 (quoting *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003)). "'The court determines whether the pertinent events have occurred under an objective standard.'" *Gary v. United States*, 67 Fed. Cl. 202, 210 (2005) (quoting *McDonald v. United States*, 37 Fed. Cl. 110, 114 (1997)).

The Complaint was filed on September 2, 2011. Therefore, pursuant to Section 2501, in order for Plaintiffs' claim to be timely, Plaintiffs bear the burden of proving that they could not have reasonably known the facts fixing the United States' alleged liability prior to September 2, 2005. *See Mildenberger*, 643 F.3d at 945 ("Claims accrue when the events giving rise to the Government's alleged liability have occurred and the claimant is or should be aware of their existence.").

Plaintiffs assert a claim for a taking of their property without just compensation in violation of the Fifth Amendment to the United States Constitution. Compl. ¶¶ 105-111. The property allegedly taken includes flowage and seepage easements, *id.* at ¶ 106, resulting in a

reduction in the value of their farmlands caused by invasive high water tables and accumulation of salts beneath and upon their farmlands. *Id.* at ¶ 104.[10] As a result of the United States' failure to provide drainage to the San Luis Unit, Plaintiffs claim that the adverse impacts to their farmlands include "reduced crop yields, limited crop rotations, restrictions on the types of crops that can be grown, and changes to soil quality and conditions." *Id.* Plaintiffs' claim is one for a physical taking caused by the "substantial, intermittent, frequent and inevitably recurring … interference and physical invasion" of "[h]igh water tables and the accumulation of saline groundwater beneath and upon Plaintiffs' properties," which "has stabilized and become permanent in nature." *Id.* at ¶¶ 107, 108; *see also id.* at ¶ 3 (same), 27 (Plaintiffs' Request for Relief stating that "this matter be maintained and certified as a class action on behalf of all those landowners in the Westlands Water District whose lands have been physically invaded by saline groundwater as a result of the United States' failure to provide drainage to their farmlands").

According to the Complaint, "[s]ince June 1986, no drainage service has been provided by the United States to any landowner in the [Westlands Water] District." Compl. ¶ 63. Plaintiffs further allege that the "United States' continuous failure to provide drainage through the present day … has resulted in the high water tables and saline groundwater that had *long been recognized* as a threat to the agricultural productivity of District farmlands, including Plaintiffs' properties." *Id.* at ¶ 64 (emphasis added). Plaintiffs are well aware that absent drainage, "wastewater settles beneath [their] lands, resulting in high water tables and the accumulation of saline groundwater." *Id.* at ¶ 2. Given these allegations, there can be no serious

[10] Plaintiffs vaguely state that the property taken includes, *but is not limited to,* flowage and seepage easements, resulting in a diminution of the value of their farmlands. Compl. ¶¶ 104, 106. Pursuant to RCFC 9(i), "[i]n pleading a claim for just compensation under the Fifth Amendment of the United States Constitution, a party must identify the specific property interest alleged to have been taken by the United States." Accordingly, no other property interests are at issue other than these explicitly pled interests.

dispute that Plaintiffs were, or should have been, aware of the events giving rise to their takings claim well before September 2, 2005.

In addition to the allegations in the Complaint, the litigation history of the San Luis Unit is replete with evidence of such events occurring well before September 2, 2005. *See supra* at 12-20. Most telling, inverse condemnation claims premised on the exact same failure of the United States to provide drainage to the San Luis Unit have been filed against the United States in at least two separate federal lawsuits, *Sumner Peck* , No. 91-048 (E.D. Cal. filed Jan. 31, 1991) and *Firebaugh*, No. 05-262 (Fed. Cl. filed Feb. 28, 2005). *See supra* at 13-15 (discussing the tort and inverse condemnation claims of the *Sumner Peck* and *Firebaugh* Plaintiffs). The allegations of the *Sumner Peck* Amended Complaint nearly mirror those in the present case:

- "Plaintiffs own and operate farmlands located at lower elevations on the west side of the San Joaquin Valley. This action seeks to establish and enforce their rights under federal and state law and under governing contracts with respect to the drainage from their lands of subsurface wastewaters. These undrained wastewaters are destroying plaintiffs' lands and killing their crops." *Id.* at ¶ 1; *compare with* Compl. ¶¶ 2, 3, 8, 104.

- "The defendants are the federal, state, and local government agencies responsible for draining the lands in question. These agencies were and are bound under the governing laws and contracts to provide the plaintiffs and their neighbors with two interrelated and inseparable forms of service: (a) the delivery of fresh water to their lands to irrigate crops; and (b) the drainage from their lands and the disposal of subsurface wastewater. Water service has been provided, but drainage service has not." *Sumner Peck* Am. Compl. ¶ 2; *compare with* Compl. ¶¶ 2-5, 26, 29, 32, 36.

- "The government agencies have acknowledged for many years that drainage service is essential and mandated. Its authorized representatives at the federal, state, and local levels have promised and represented to plaintiffs and the public on numerous occasions that the required drainage service would be provided. Indeed, facilities designed to drain the lands in question were partially built, but they have never been completed. Drainage service was once initiated, but only partially and only temporarily. None of the lands of plaintiffs or their neighbors are now receiving drainage service." *Sumner Peck* Am. Compl. ¶ 3; *compare with* Compl. ¶¶ 3, 4, 7.

- "Recent events reveal that the responsible government agencies have abandoned their efforts to finish construction of the authorized drainage works and have reneged on their obligations to drain the wastewater from the lands of plaintiffs and their neighbors." *Sumner Peck* Am. Compl. ¶ 5; *compare with* Compl. ¶¶ 6, 102-04.

- "The Federal Defendants have permanently or temporarily taken plaintiffs' property for public use, but have failed to pay them just compensation. The property taken includes flowage and seepage easements upon plaintiffs' lands…" *Sumner Peck* Am. Compl. ¶ 133; *compare with* Compl. ¶¶ 3, 106.

Under such circumstances, it is indisputable that Plaintiffs should have been aware of the events giving rise to their claim well before September 2, 2005.[11] *See Mildenberger*, 643 F.3d at 946 (claimed harms in lawsuit barred by the statute of limitations "mirrored" those harms known decades earlier and "therefore, the environmental damage was foreseeable and manifested prior to" the expiration of the limitations period); *cf. Duncan v. United States*, No. 2011-5095, 2011 WL 5400117, at *1-*2 (Fed. Cir. Nov. 9, 2011) (per curiam) (in dismissing claim as barred by Section 2501, holding that filing of lawsuit which sought to discern existence of property interest is evidence that plaintiff should have been aware of events giving rise to alleged takings claim).

Further, the historical record is inundated with evidence that (1) the United States was not providing drainage to the San Luis Unit; (2) it refused to provide drainage service as contemplated by the San Luis Act between 1986 and 2000; and (3) lands within Westlands were being flooded with rising groundwater and accumulations of salt. *See supra* at 7-11. Thus, there can be no serious dispute that the events giving rise to the United States' alleged liability

[11] Indeed, the *Sumner Peck* Plaintiffs, landowners within Westlands that are served by the San Luis Unit but have not received drainage service, could arguably qualify as putative class members here if this case is certified as a class action. Further, one of the family groups of *Sumner Peck* Plaintiffs was the Allen Family. *Summer Peck* Am. Compl. ¶ 10(e). At this time, it is undiscovered whether this family is related to, or perhaps, one in the same as Plaintiff Allen, the trustee of the Todd Allen and Cheryl Lynn Allen Family Trust. Compl. ¶ 14.

occurred years before September 2, 2005. Accordingly, Plaintiffs' Complaint should be dismissed in its entirety because this Court lacks jurisdiction over Plaintiffs' untimely claim.

C. ALTERNATIVELY, PLAINTIFFS LACK STANDING TO BRING THEIR CLAIM.

"It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' *Grace v. American Central Ins. Co*., 109 U.S. 278, 284 [] (1883), but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "And it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' *McNutt v. General Motors Acceptance Corp*., 298 U.S. 178, 189 [] (1936), 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *FW/PBS*, 493 U.S. at 231 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Thus, Plaintiffs must "'allege facts essential to show jurisdiction.'" *Id.* (quoting *McNutt*, 298 U.S. at 189).

"It is well established 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)). Accordingly, in order to have standing to bring a takings claim, a claimant must have owned its affected property at the time the alleged taking occurred.

If the Court finds that Plaintiffs' claim is not barred by Section 2501's statute of limitations, Plaintiffs must prove that they possessed their property at the time their claim

accrued. Therefore, Plaintiff Etchegoinberry lacks standing if his claim accrued before he acquired his property on April 23, 2008, Compl. ¶ 11; Plaintiff Clausen lacks standing if his claim accrued before he acquired his property on July 12, 2007, *id*. at ¶ 12; Plaintiff Barlow Family Farms lacks standing if its claim accrued before it acquired its property on December 10, 2007, *id.* at ¶ 13; and Plaintiff Allen lacks standing if his claim accrued before he acquired his property on October 16, 2007. *Id.* at ¶ 14. While the Complaint discusses numerous events which occurred after July 12, 2007 (the earliest date a Plaintiff, here Clausen, owned property within Westlands), *id.* at ¶¶ 87-99, none of those events evidence a physical invasion of Plaintiffs' property caused by rising groundwater or accumulating salts in their farmlands, *i.e.*, none of those events give rise to an alleged physical taking of Plaintiffs' property. Accordingly, it is indisputable that Plaintiffs did not own their property when their farmlands were allegedly taken, and thus, they lack standing to bring this lawsuit.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety.

Dated: December 8, 2011

Respectfully submitted,

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