IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL ETCHEGOINBERRY, *et al.*,	)	Case No. 11-564 L
Plaintiffs,	)	Senior Judge Marian Blank Horn
v.	)	*Electronically filed on September 25, 2020*
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT

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MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the United States moves to dismiss Plaintiffs' amended complaint. As the Court previously held in 2013, Plaintiffs raise a single Fifth Amendment claim: "[T]he government's failure to comply with its statutory obligation to provide drainage to plaintiffs' farmlands has led to a physical invasion of their property, without just compensation." *Etchegoinberry v. United States*, 114 Fed. Cl. 437, 440 (2013). After a stay while the parties evaluated the possibility of settlement, on August 28, 2020, Plaintiffs filed an amended complaint. *See* Am. Compl. (ECF No. 144).

The Court should dismiss Plaintiffs' amended complaint for two reasons. First, although the amended complaint changes some of the verbiage of the original complaint, Plaintiffs improperly base their Fifth Amendment claim on inaction rather than action. Binding Federal Circuit authority holds that "takings liability does not arise from government inaction or failure to act." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1361 (Fed. Cir. 2018). Plaintiffs' amended complaint attempts to avoid that black letter law by engaging in linguistic obfuscation, relabeling their earlier references to government "inaction," for example, as a government "decision not to provide drainage." *Compare* Compl. ¶ 108 (ECF No. 1), *with* Am. Compl. ¶ 77 (ECF No. 144). As discussed in section IV.A of the attached memorandum, the Court should reject Plaintiffs' effort to use semantic labels to avoid Federal Circuit precedent.

Second, Plaintiffs' claim fails because, even if Plaintiffs assert an affirmative government action, they base their claim on an alleged *ultra vires* action. In an effort to avoid using the word "inaction," Plaintiffs now assert that their claim is based on the "deliberate, affirmative, and authorized choice [by the Commissioner of the Bureau of Reclamation] to defy its legal

obligations under statutory law." Am. Compl. ¶ 98 (ECF No. 144). Even assuming the truth of this allegation for purposes of this motion, Plaintiffs' allegation fundamentally misapprehends binding Federal Circuit authority, which holds that "[f]or takings purposes, [the Court] therefore must assume the government conduct at issue . . . was not unlawful." *Acadia Tech. v. United States*, 458 F.3d 1327, 1330-31 (Fed. Cir. 2006); *see also Scott v. United States*, 134 Fed. Cl. 755, 764 (2017) ("A takings claim must be premised on *otherwise lawful* government action.") (emphasis added). As discussed in section IV.B of the attached memorandum, the Court should dismiss Plaintiffs' complaint because a Fifth Amendment claimant cannot base a claim on an *ultra vires* action.

A memorandum in support of this motion follows.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. PRELIMINARY STATEMENT

This Court denied the United States' motion to dismiss Plaintiffs' sole takings count on statute of limitations grounds because "[f]airness directs giving plaintiffs the opportunity to present evidence to the court on whether or not a taking has occurred based on defendant's *failure to provide a drainage solution* for the Westlands for over fifty years." *Etchegoinberry v. United States*, 114 Fed. Cl. 437, 498 (2013) (emphasis added); *see also id*. at 440 ("[T]he government's *failure to comply* with its statutory obligation to provide drainage to plaintiffs' farmlands has led to a physical invasion of their property, without just compensation") (emphasis added). But "takings liability does not arise from government inaction or failure to act." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1361 (Fed. Cir. 2018). The irreconcilable conflict between the basis for Plaintiffs' takings claim and the Federal Circuit's requirement for affirmative government action necessitates dismissal of this lawsuit.

Plaintiffs' effort to obfuscate their inability to allege affirmative government action by wordsmithing their original complaint is unavailing. Substituting a candid allegation that the United States' "failure to provide the required drainage" constitutes a taking," Compl. ¶ 104 (ECF No. 1), with an allegation of the United States' "affirmative policy decision to not comply with its legal obligation," Am. Compl. ¶ 109 (ECF No. 144), does not change the gravamen of Plaintiffs' lawsuit. At bottom, Plaintiffs allege both in their original complaint and in their amended complaint that Reclamation's failure to provide drainage has negatively impacted their farmland.

Plaintiffs' reformulation of the frank allegations of failure to act in the original complaint creates another error in Plaintiffs' legal theory: that the newly characterized decision not to

provide drainage is *ultra vires*. In an effort to avoid using the word "inaction," Plaintiffs now assert that their claim is based on the "deliberate, affirmative, and authorized choice [by the Commissioner of the Bureau of Reclamation] to defy its legal obligations under statutory law." Am. Compl. ¶ 98 (ECF No. 144). But binding Federal Circuit authority holds that "[f]or takings purposes, [the Court] therefore must assume the government conduct at issue . . . was not unlawful." *Acadia Tech. v. United States*, 458 F.3d 1327, 1330-31 (Fed. Cir. 2006). *See also St. Bernard Parish*, 887 F.3d at 1360 n.3 ("Takings result from authorized acts by government officials, whereas challenges to the propriety or lawfulness of government actions sound in tort.") (citations and quotations omitted); *Scott v. United States*, 134 Fed. Cl. 755, 764 (2017) ("A takings claim must be premised on *otherwise lawful* government action.") (emphasis added). The Court should, therefore, dismiss Plaintiffs' amended complaint because a Fifth Amendment claimant cannot base a claim on an *ultra vires* action.

The United States moves to dismiss Plaintiffs' amended complaint under Rule 12(b)(6) because Plaintiffs' amended complaint did not change the essence of their original complaint and a failure to act does not and cannot state a takings claim. The United States further moves to dismiss under Rule 12(b)(6) because Plaintiffs' reformulation emphasizes that Plaintiffs assert a claim based on government officials' alleged *ultra vires* acts, which also fails to state a claim upon which relief can be granted.

II. BACKGROUND

In 1960, Congress passed the San Luis Act authorizing the United States Department of the Interior to "construct, operate and maintain the San Luis Unit as an integral part of the Central Valley Project." Pub. L. No. 86-488, 74 Stat. 156 (1960) ("San Luis Act"). The San Luis Act provided, among other things, that construction of the San Luis Unit would not

commence until the Secretary of the Interior "received satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley . . . or has made provision for constructing the San Luis interceptor drain to the delta designed to meet the drainage requirements of the San Luis unit . . . ." *Id.* § 1(a)(2). In 1961, California notified the Secretary of the Interior that the State would not provide a master drain and, in response, in 1962, the Secretary of the Interior informed Congress that the Department of the Interior would provide drainage services. *Etchegoinberry*, 114 Fed. Cl. at 443.

The United States began delivering water to Westlands in 1967 and began constructing the San Luis Drain in March 1968. *Id.* at 445. The United States then constructed Kesterson Reservoir to regulate water flows in the San Luis Drain prior to their discharge into the Sacramento-San Joaquin Delta. *Id.* Kesterson Reservoir eventually became the temporary terminal disposal site for the San Luis Drain. *Id.*

By 1975, the United States had constructed approximately eighty-three miles of the San Luis Drain. *Id.* From 1976 to 1986, a sub-surface drainage collection system provided drainage to approximately 42,000 acres of land within Westlands. *Id.* at 445, 447.

By 1982, federal authorities noticed problems with wildlife near Kesterson Reservoir, and subsequent laboratory reports revealed high selenium levels in fish from the reservoir. *Id.* In 1985, California's State Water Resources Control Board issued a cleanup and abatement order, which required the Bureau of Reclamation to submit a plan to clean up the reservoir or shut it down no later than 1988. *Id.* at 447. In 1986, the United States plugged San Luis Drain. *Id.*

In 2000, the Court of Appeals for the Ninth Circuit concluded that the Department of the Interior has a duty to provide drainage service under the San Luis Act, but that "subsequent Congressional action has given discretion to the Department in creating and implementing a drainage solution." *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000). The Ninth Circuit concluded that, although the "district court can compel the Department of [the] Interior to provide drainage service as mandated by the San Luis Act, the district court cannot eliminate agency discretion as to how it satisfies the drainage requirement." *Id.* The *Firebaugh* case, which challenges the United States' efforts to comply with the drainage requirement, remains pending in the United States District Court for the Eastern District of California.

Plaintiffs are alleged owners of property located in the San Luis Unit service area of the Central Valley Project, *see* Am. Compl. ¶ 2 (ECF No. 144), and are alleged users of water from the Project, *see* Am. Compl. ¶¶ 40-41 (ECF No. 144). Plaintiffs allege that they have, at all relevant times, used Project "water to irrigate their crops in the normal, ordinary, and intended way." Am. Compl. ¶ 114 (ECF No. 144).

In Plaintiffs' original complaint filed in 2011, Plaintiffs alleged that the United States "has taken Plaintiffs' farmlands for public use without compensation" by imposing "flowage and seepage easements upon Plaintiffs' lands." Compl. ¶ 106 (ECF No. 1). The original complaint alleged that these easements caused "[h]igh water tables and the accumulation of saline groundwater beneath and upon Plaintiffs' properties . . . ." Compl. ¶ 104 (ECF No. 1). Plaintiffs alleged that the easements resulted from inaction (the United States' alleged "continuous and ongoing failure to provide the required drainage to this day"). Compl. ¶ 104 (ECF No. 1).

The United States moved to dismiss Plaintiffs' original complaint on the ground that the six-year statute of limitations barred Plaintiffs' claim. The Court's 2013 Order denied that

motion based on the Court's finding that Plaintiffs' claim accrued upon transmittal of a September 1, 2010, letter from Bureau of Reclamation's Commissioner, Michael L. Connor, to Senator Dianne Feinstein (the "2010 Connor Letter"). *Etchegoinberry*, 114 Fed. Cl. at 498. The 2013 Order highlighted the fact that the 2010 Connor Letter set forth Commissioner Connor's recommendations that (a) the federal government shift responsibility for long-term drainage to the water districts, (b) Congress pass new legislation related to several proposals, including a proposed transfer of drainage responsibility, retirement of land, modification of contract terms, and transfer of title of federally owned facilities, and (3) the Bureau of Reclamation stop delivery of Central Valley Project Water to the water districts unless they took several actions, including dismissal of certain litigation. *Id.* at 494.

Although the federal government has not implemented Commissioner Connor's recommendations, the Court concluded that his articulation of those recommendations represented a final repudiation of Reclamation's 2007 San Luis Drainage Feature Re-Evaluation Record of Decision ("Record of Decision"), a plan that the Bureau of Reclamation had offered to meet its statutory duty and its "court-ordered obligations to provide drainage to the San Luis Unit." *Id.*

The United States has not yet provided drainage to the San Luis Unit, but Reclamation has, since 2009, continued to implement the Record of Decision and "Interior is neither withholding nor unreasonably delaying drainage within the Unit." *Firebaugh Canal Water Dist. v. United States*, 712 F.3d 1296, 1303 (9th Cir. 2013); Joint Status Report, Ex. 1 at 2 (ECF No. 131) (Federal Defs.' Status Report of Oct. 1, 2019, submitted in *Firebaugh Canal Water Dist. v. United States*, Case No. 1:88-cv-634 (E.D. Cal.)) (reporting that the United States "has been implementing the [San Luis Drainage Feature Re-Evaluation Record of Decision] in accordance

with the schedules and cost estimates contained in control schedules provided to the Court and the parties"). These efforts included, among other things, designing and constructing a multi-million dollar "Demonstration Treatment Plant" to evaluate the feasibility of water treatment processes to provide drainage. In addition, the United States has engaged in a multi-year effort to resolve this matter, and related cases, through extensive settlement discussions. *See, e.g.*, Joint Status Report (ECF No. 133). Those efforts are ongoing, and the district court has not issued an injunctive order since the Ninth Circuit issued its decision in *Firebaugh* in 2000. *See, e.g.*, Joint Status Report (ECF No. 138).

On July 20, 2020, at Plaintiffs' urging, this Court lifted the stay that had been in place since the Court's 2013 Order. *See* Order (ECF No. 139). On August 28, 2020, Plaintiffs filed an amended complaint. *See* Am. Compl. (ECF No. 144). The amended complaint differs from the original complaint in three ways. First, the amended complaint eliminates Plaintiff Eric Clausen. Plaintiff Clausen claimed standing by virtue of a 2011 assignment from the Jorgen and Kristine Clausen Family Trust. *See* Compl. ¶ 12 (ECF No. 1). Plaintiff Clausen lacked standing to participate in this lawsuit, thus the United States did not oppose Plaintiffs' decision to eliminate him from this lawsuit.

Second, the amended complaint rewords several allegations from Plaintiffs' original complaint to avoid using the concept of "inaction." This rephrasing occurs throughout the amended complaint, and we provide two examples below:

Sample Changes in the Amended Complaint (deletions are in strike through; new additions are in bold)
Currently, none of Plaintiffs' farmlands are receiving any drainage service because the United States has **elected not** ~~failed~~ to provide it. The United States' ~~continuous failure~~ **affirmative policy** to **not** provide **the required** drainage through the present day has resulted in high water tables and in saline groundwater beneath and upon Plaintiffs' properties, which have been the direct, natural ~~or probable~~ **and inevitable** result of the United States' shirking of its drainage obligation. Compl. ¶ 7 (ECF No. 1); Am. Compl. ¶ 7 (ECF No. 144).
As a result of the United States'~~ continuous and ongoing failure~~ **ongoing affirmative policy decision to not comply with its legal obligation** to provide the required drainage~~ to the present day~~, Plaintiffs have incurred, and are threatened with the continuation and increase of various losses as a result of the lack of drainage, with corresponding invasive high water tables and accumulation of saline groundwater salts beneath and upon Plaintiffs' farmlands. Compl. ¶ 104 (ECF No. 1); Am. Compl. ¶ 109 (ECF No. 144).

As we discuss below, these edits do not change the substance of any allegation or the gravamen of Plaintiffs' original complaint; they are merely semantic changes. Plaintiffs also add new language related to actions taken decades ago in relation to Kesterson Reservoir. *See, e.g.*, Am. Compl. ¶ 52 (ECF No. 144) (alleging that the "stoppage of work" and cancellation of construction related to Kesterson Reservoir in the mid-1980s were "authorized acts"); Am. Compl. ¶ 63 (ECF No. 144) (same).

Third, Plaintiffs now contend that the 2010 Connor Letter was "a deliberate, affirmative, and authorized choice by the United States to defy its legal obligations under statutory law and court order, and to assign the responsibility to provide drainage to Plaintiffs' lands to local water districts." Am. Compl. ¶ 98 (ECF No. 144); *see also* Am. Compl. ¶ 17 (ECF No. 144) (alleging

that the taking occurred due to the "United States' knowing and conscious defiance of law in choosing not to construct the required facilities").[1]

III. MOTION TO DISMISS STANDARDS

"To avoid dismissal under RCFC 12(b)(6), a plaintiff 'must allege facts plausibly suggesting (not merely consistent with) a showing of entitlement to relief.'" *Am. Bankers Ass'n v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019) (quoting *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009)) (internal citations omitted). "Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim." *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998).

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief," the complaint should be dismissed for failure to state a claim upon which relief can be granted. *Twombly*, 550 U.S. at 558.

IV. ARGUMENT

A. Plaintiffs' Takings Claim Fails Because It Alleges a Failure to Act.

Dismissal is appropriate because Plaintiffs premise their takings claim on an alleged failure to provide drainage. Plaintiffs cannot evade dismissal by recharacterizing the allegations of inaction in their original complaint as affirmative decisions not to act in their amended complaint because the gravamen of their theory of the case remains the same. In addition, an analysis of how takings law requires this Court to analyze Plaintiffs' theory of the case under the amended complaint demonstrates the ineffectiveness of Plaintiffs' attempted recharacterization.

[1] Plaintiffs amended complaint includes several other edits, most of which are cosmetic or intended to provide more current information, and none of which matter to this motion.

And Plaintiffs' allegations of the plugging of the Kesterson Reservoir do not shield their amended complaint from dismissal, but instead show that a takings claim based on affirmative action Plaintiffs allege concerning San Luis Unit is time-barred.

1. Binding Federal Circuit Precedent Holds that a Takings Plaintiff Cannot Base a Successful Takings Claim on Alleged Government Inaction.

The Court should dismiss the amended complaint pursuant to RCFC 12(b)(6) because Plaintiffs improperly base their Fifth Amendment claim on government inaction, rather than government action. Binding Federal Circuit precedent holds that "takings liability does not arise from government inaction or failure to act." *St. Bernard Parish Gov't*, 887 F.3d at 1361; *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1341 (Fed. Cir. 2018) (reaffirming the "principle that government inaction cannot be a basis for takings liability") (citing *United States v. Sponenbarger*, 308 U.S. 256, 265 (1939) (holding that there was no taking when the government built a flood-protection system but failed to include additional protective features)); *see also L & W Constr. v. United States*, 148 Fed. Cl. 417, 422-23 (2020) ("[T]he government's failure to act or unlawful action does not constitute a taking"); *Ideker Farms v. United States*, 142 Fed. Cl. 222, 231 (2019) ("The Circuit in *St. Bernard Parish* had made clear that the government's failure to act cannot support a taking claim."); *Nicholson v. United States*, 77 Fed. Cl. 605, 621 (2007) ("[O]missions or claims that the Government should have done more to protect the public do not form the basis of a valid takings claim").[2] Instead, "[t]akings liability

[2] The Federal Circuit's binding requirement for affirmative government action in inverse takings cases tracks a similar requirement found in other federal courts. *See, e.g., Martell v. City of St. Albans*, 441 F. Supp. 3d 6, 21-22 (D. Vt. 2020) (dismissing Fifth Amendment claim "based on the City's alleged inaction"); *Funderburk v. S. Carolina Elec. & Gas Co.*, No. 3:15-cv-04660, 2019 WL 3504232, at *5 (D.S.C. Aug. 1, 2019) (granting county's motion for summary judgment where plaintiffs alleged failure to address or repair drainage system, noting "[p]laintiffs do not cite to any case where a government actor incurred Fifth Amendment takings liability based on its inaction"); *Sunflower Spa LLC v. City of Appleton*, No. 14-C-861, 2015 WL

must be premised on *affirmative government acts* . . . [and] Plaintiffs' sole remedy for . . . [government] inactions, if any, lies in tort." *St. Bernard Parish Gov't*, 887 F.3d at 1362 (emphasis added).

The Court has already held that Plaintiffs' Fifth Amendment claim is based on government inaction. In describing Plaintiffs' allegations as worded in the original complaint, the Court correctly noted that Plaintiffs based their claim on "the government's *failure to comply with its statutory obligation* to provide drainage to plaintiffs' farmlands . . . ." *Etchegoinberry*, 114 Fed. Cl. at 441 (emphasis added). The Court precisely defined the legal issue presented in Plaintiffs' claim: "The issue presented here is the effect of a *failure to act*, which has caused gradual physical determent to plaintiffs' property, over a period of time." *Id.* at 483 (emphasis added). Plaintiffs' focus on alleged government inaction was the basis for the Court's accrual decision—"the defendant should not be allowed to rely on its failure to comply with its statutory obligation and disregard court orders to establish certainty regarding an alleged accrual of the statute of limitations." *Id.* at 490-91. The Court justified its decision by reference to what it perceived as "decades of [government] *inaction, inconstancy and failures to deliver* on its statutory duty and court-ordered responsibilities . . . ." *Id.* at 498 (emphasis added) (stating further that it would "set a very perverse precedent, allowing federal agencies by inaction to avoid statutory duties and ignore court orders").

4276762, at *1 (E.D. Wis. July 14, 2015) ("government inaction—e.g., deferred maintenance [of city's water mains]"—could not form the basis of takings claim); *Bos. Taxi Owners Ass'n, Inc. v. City of Boston*, 84 F. Supp. 3d 72, 80 (D. Mass 2015) ("Plaintiffs fail to proffer any legal support for their contention that the City's inaction constitutes a taking" because "courts have found that the government must act affirmatively to warrant the application of the Takings Clause."); *Valles v. Pima Cty.*, 776 F. Supp. 2d 995, 1003 (D. Ariz. 2011) (same).

After convincing this Court to adopt their view of the case, Plaintiffs now seek to morph their claim by arguing that, despite this Court's 2013 Order, their claim alleges affirmative action, not inaction. Plaintiffs cannot have it both ways—the Court premised the 2013 Order on Plaintiffs' allegations of "inaction" and the Court's 2013 Order makes clear that the gravamen of Plaintiffs' claim is rooted in alleged government inaction. Having succeeded in convincing the Court to adopt that approach to avoid dismissal of their claim as untimely, Plaintiffs cannot now simply ask the Court to ignore its own clear holding to avoid dismissal on a different ground.

2. Plaintiffs Cannot Avoid Binding Federal Circuit Precedent by Semantics.

Plaintiffs' scrubbing of the term "inaction" from their original complaint and introduction of "action" words does not provide safe harbor from a motion to dismiss. Because the basis of Plaintiffs' takings claim remains unchanged, the legal flaw to their takings count is not cured by wordsmithing.

Courts are "not bound by the labels selected by a party in characterizing an action." *Black v. United States*, 84 Fed. Cl. 439, 450 n.13 (2008) (quoting *Wheeler v. United States*, 3 Cl. Ct. 686, 688 (1983)). Thus, the Tucker Act does not confer jurisdiction over a tort claim, even if a plaintiff labels it as a Fifth Amendment takings claim. *Golden v. United States*, 955 F.3d 981, 987 (Fed. Cir. 2020) (affirming the dismissal of plaintiff's purported takings claims because simply labelling action as a taking is not enough) (citing *Schillinger v. United States*, 155 U.S. 163, 168-69 (1894)).

So too here. Plaintiffs' substitution of phrases like "United States' failure to provide drainage," Compl. ¶ 20 (ECF No. 1), with "United States' decision not to provide the required drainage," Am. Compl. ¶ 19 (ECF No. 144), and the like, does not change the core of Plaintiffs' claim. In both pleadings, Plaintiffs contend that the United States has a duty to provide drainage; that Plaintiffs are not satisfied with the steps the United States has taken and think the United

States should have taken different steps; and that Plaintiffs think the United States' failure to provide drainage has damaged their property. *Compare* Compl. ¶¶ 107-11 (ECF No. 1), *with* Am. Compl. ¶¶ 112-16 (ECF No. 144). The new nomenclature Plaintiffs employ in the amended complaint simply reasserts the same failure-to-act allegation with new affirmative-decision-not-to-act labels. As this Court recognized in 2013, "the issue presented here is the effect of a failure to act." *Etchegoinberry*, 114 Fed. Cl. at 483. As Judge Hewitt recognized in the related breach of contract claim—*Westlands Water District v. United States*—"[t]he government's failure to provide drainage is not an affirmative act." 109 Fed. Cl. 177, 208 (2013). Plaintiffs' new labels do not change this fact.

3. The Causation and Relative Benefit Analyses Contemplated by Plaintiffs' Failure-to-Act Claim Are Incoherent and Confirm that the Claim Is Legally Infirm.

If Plaintiffs' lawsuit continues, the Court will need to evaluate (among other issues) but-for causation, which "requires the plaintiff to establish what damage would have occurred without government action." *St. Bernard Parish Gov't*, 887 F.3d at 1363. The Court will also likely need to evaluate the doctrine of relative benefits, which requires the parties to evaluate "what would have occurred absent government action" in order to compare the benefits and harms resulting from the entire government action. *Alford v. United States*, 961 F.3d 1380, 1385-86 (Fed. Cir. 2020). Both analyses will require the Court to evaluate a hypothetical scenario where the United States did not act. Unlike cases where a plaintiff alleges an affirmative government action, it is not feasible to construct such a hypothetical here because the claim itself is premised on an alleged failure to act.

As discussed above, Plaintiffs allege losses resulting from "high water tables and accumulation of saline groundwater salts beneath and upon Plaintiffs' farmlands." Am. Compl. ¶ 109 (ECF No. 144). That impact occurred, the amended complaint asserts, because (a)

Plaintiffs accepted Central Valley Project water deliveries and (b) the government failed to provide drainage. Am. Compl. ¶¶ 114, 109 (ECF No. 144). If the Court agrees with Plaintiffs that those are government "actions," the causation analysis would require Plaintiffs to establish what would have occurred without those "actions." *St. Bernard Parish Gov't*, 887 F.3d at 1363. In that hypothetical, (a) Plaintiffs would not have accepted (and the United States would not have provided) any Central Valley Project water and (b) the United States would have provided drainage. The hypothetical requires, first, an analysis of how Plaintiffs' properties would have been used and the degree of productivity of that use in the absence of any Central Valley Project water. Plaintiffs' theory may also require an analysis of a scenario where the United States provided drainage in the absence of CVP water deliveries.

That hypothetical is incoherent. First, it would assume drainage services where no Central Valley water is delivered and, therefore, no drainage is mandated. *See Firebaugh Canal Co.*, 203 F.3d at 571 ("Irrigation and drainage are inherently linked."). Second, Plaintiffs' theory would presumably require the Court to evaluate how the United States would have provided the hypothetical drainage, perhaps by (1) keeping open Kesterson Reservoir in violation of state law, (2) engaging in land retirement or land purchase, (3) continuing to pursue water treatment options, (4) undertaking some combination of those actions, or (5) taking some alternative actions. Choosing among these competing alternatives, however, would place this Court in direct conflict with the Ninth Circuit's holding that Interior has discretion on how to comply with the San Luis Act. *Id.* at 578. Because Interior has discretion on how to comply with the San Luis Act, it is not feasible to know what hypothetical drainage would look like or when Interior should have taken action. As a result, any attempted analysis of causation and the doctrine of relative benefits here is not feasible.

In short, evaluation of causation and the doctrine of relative benefits will require the Court to assess what actions Interior allegedly should have taken, when it should have taken them, and what the effect of those actions might have been (both positive and negative). But those are tort-like questions, which are inappropriate in a Fifth Amendment claim. *See St. Bernard Parish Gov't*, 887 F.3d at 1360 ("While the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim.").

4. Plaintiffs' New Allegations About Kesterson Reservoir Cannot Save Plaintiffs' Claim.

Plaintiffs add new language to their amended complaint to assert an affirmative action. At paragraph 63, for example, Plaintiffs allege that "[u]pon information and belief, the closing of Kesterson and the plugging of the San Luis Drain were authorized acts of the United States." Am. Compl. ¶ 63 (ECF No. 144); *see also* Am. Compl. ¶ 65 (ECF No. 144) (same); Am. Compl. at 30 (ECF No. 144) (Request for Relief ¶ 1) (stating that Plaintiffs base their claim, in part, on the United States' decision "to deactivate existing drainage infrastructure"). These new allegations are affirmative actions, but they cannot save Plaintiffs' claim because the United States took those actions more than six years before Plaintiffs filed suit.

The United States suspended construction of the San Luis Drain in 1975 and plugged the drains leading to Kesterson Reservoir no later than 1986. *Etchegoinberry*, 114 Fed. Cl. at 445, 447. The only affirmative actions Plaintiffs raise, then, are barred by the six-year statute of limitations. 28 U.S.C. § 2501.

This discussion underscores the importance of the Court's 2013 Order. To save their claim from dismissal as untimely, Plaintiffs had to base their claim on an alleged failure to act. Having convinced the Court that their failure-to-act claim is timely, Plaintiffs now seek to avoid

that decision by arguing that their claim is based on some affirmative government action. The Court should reject Plaintiffs' revision and dismiss the amended complaint on the ground that the claim is based on alleged government inaction, rather than government action.

B. Plaintiffs' Takings Claim Independently Fails Because It Relies on Unlawful Government Action.

Even if this Court endorses Plaintiffs' recasting of their claims and holds that the plugging of the San Luis drain and/or the 2010 Conner Letter constitute affirmative action upon which a takings claims may be based, Plaintiffs' amended complaint should be dismissed because it alleges a taking based on unlawful action. Binding Federal Circuit precedent holds that "[f]or takings purposes, [the Court] therefore must assume the government conduct at issue . . . was not unlawful." *Acadia Tech.*, 458 F.3d at 1330-31; *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) ("The principle underlying this rule is that when a government official engages in *ultra vires* conduct, the official 'will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, cannot create a claim against the Government 'founded upon the Constitution.'") (quoting *Hooe v. United States*, 218 U.S. 322, 335 (1910)); *L & W Constr.*, 148 Fed. Cl. at 422-23.

Plaintiffs base their claim on an alleged decision by Commissioner Conner to "renege on its mandatory obligation to provide drainage" by failing to act in "knowing and conscious defiance of law in choosing not to construct the required facilities to drain subsurface wastewaters from these properties." Am. Compl. ¶ 17 (ECF No. 144). Plaintiffs specifically allege that the 2010 Connor Letter represents a "deliberate, affirmative, and authorized choice by the United States to defy its legal obligations under statutory law and court order . . . ." Am. Compl. ¶ 98 (ECF No. 144). These new allegations assert that Commissioner Connor knowingly

and intentionally violated the law and (unspecified) court orders. But Commissioner Connor has no authority to intentionally violate federal law or court orders. These acts are, therefore, allegedly *ultra vires*, and cannot form the basis of a Fifth Amendment claim.

It is true that a takings claimant may allege that 'property was taken *regardless of* whether the [government] acted consistently with its statutory and regulatory mandate.'" *Rith Energy v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001) (emphasis in original). But that exception is irrelevant here because Plaintiffs' allegations that the United States acted illegally are a necessary component of their claim. In their amended complaint, Plaintiffs allege that they are "entitled to prevail *because* the [government] acted in violation of statute or regulation." *Id.* at 1366 (emphasis in original); *L & W Constr.*, 148 Fed. Cl. at 422-23 (same).[3] The Court should, therefore, dismiss the amended complaint because Plaintiffs base their claim on an alleged illegal action.

[3] This motion presumes the accuracy of the factual allegations in the amended complaint. But we note that some of Plaintiffs' key factual allegations concerning the 2010 Conner Letter are inaccurate. The 2010 Connor Letter reflects a set of recommendations communicated by the Executive Branch (a component of the Department of the Interior) to a member of the Legislative Branch. Plaintiffs' assertion that the letter reflects an affirmative decision by the United States to violate federal law overreaches. In addition to the fact that the letter simply makes recommendations (not a final policy decision), *none of the recommendations were implemented*—the United States did not "transfer responsibility for irrigation drainage to local control," Congress did not direct Reclamation "to stop delivery of CVP water that would go to parcels of land for which the districts fail to provide acceptable drainage service," and Congress did not pass new legislation requiring "Unit contractors and exchange contractors [to] waive any past, current, or future drainage claims against the U.S." 2010 Connor Letter at 2-4 (attached as Ex. 33 to Pls.' Resp. to U.S. Mot. to Dismiss (ECF No. 20-38)). Commissioner Connor ended his letter with a commitment to "continue to work with your staff and provide assistance in your efforts to secure a long-term resolution of drainage issues for the Unit." *Id.* at 4. Events since 2010 demonstrate the accuracy of that statement.

V. CONCLUSION

This Court should dismiss the amended complaint for failure to state a claim upon which relief can be granted because Plaintiffs base their claim on alleged government inaction and alleged *ultra vires* acts. Allowing this case to continue would, in addition to contravening accepted Federal Circuit precedent, require analysis of infeasible analyses of causation and the doctrine of relative benefits. The Court should dismiss the amended complaint pursuant to RCFC 12(b)(6).

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Respectfully submitted,

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