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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GLENN-COLUSA IRRIGATION
DISTRICT,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS; ASSISTANT
SECRETARY OF THE ARMY FOR
CIVIL WORKS JO-ELLEN DARCY,
in her official capacity;
LIEUTENANT GENERAL TODD
SEMONITE, in his official
capacity; and COLONEL DAVID
RAY, in his official
capacity;

Defendants.

CIV. NO. 2:17-0120 WBS GGH

MEMORANDUM AND ORDER RE: MOTION
FOR PARTIAL DISMISSAL

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Plaintiff Glenn-Colusa Irrigation District brought this
action against defendants the United States Army Corps of
Engineers ("USACE"), Assistant Secretary of the Army for Civil
Works Jo-Ellen Darcy, Lieutenant General Todd Semonite, and

1 Colonel David Ray, alleging that the USACE¹ breached a
2 construction contract it and the USACE had entered into by
3 failing to construct an irrigation facility according to the
4 contract's specifications. (Compl. (Docket No. 1).) Before the
5 court is defendants' Motion to dismiss three of the five claims
6 alleged in this action as untimely under the limitations period
7 set forth in 28 U.S.C. § 2401(a). (Defs.' Mot. (Docket No. 13).)

8 I. Factual and Procedural Background

9 Plaintiff is a state government entity that oversees
10 farming irrigation in Glenn and Colusa counties in California.
11 (See Compl. ¶ 14.) The USACE is a subdivision of the United
12 States Army that builds and maintains infrastructure in the
13 United States. (See id. ¶ 17; US Army Corps of Engineers,
14 <http://www.usace.army.mil/About> (last visited June 19, 2017).)
15 The individual defendants are Army personnel who are involved in
16 overseeing USACE operations. (See Compl. ¶¶ 18-20.)

17 In 1999, plaintiff and the USACE entered into a Project
18 Cooperation Agreement ("PCA") whereby the two parties agreed to
19 co-fund the construction of an irrigation gradient facility
20 ("gradient facility") designed to improve the performance of a
21 fish screen plaintiff had implemented at its irrigation pump
22 plant. (See id. ¶¶ 39, 50.) The PCA provides that the USACE
23 would be responsible for constructing the gradient facility and,
24 upon completion of the facility, issue a written notice of
25 construction completion to plaintiff, at which time plaintiff

26 ¹ Plaintiff alleges that the individual defendants in
27 this action are "responsib[le], in whole or in part, for the
28 [USACE's] acts" with respect to this action. (Compl. ¶¶ 18-20
(Docket No. 1).)

1 would become responsible for "maintain[ing], repair[ing],
2 replac[ing], and rehabilitat[ing]" the facility. (Id. ¶ 55; id.
3 Ex. A, Project Cooperation Agreement ("PCA") at 5.)

4 Plaintiff alleges that the USACE "began construction of
5 the Gradient Facility in May 2000 and completed construction in
6 November 2000." (Compl. ¶ 68.)

7 "Almost immediately after construction was completed,"
8 plaintiff alleges, "significant defects associated with the
9 Gradient Facility were observed." (Id. ¶ 69.) Such defects
10 allegedly resulted from the USACE's failure to build certain
11 parts of the gradient facility according to the PCA's
12 specifications. (See id. ¶¶ 127, 129, 133.) Plaintiff reported
13 the defects to the USACE in December 2000. (Id. ¶ 71.)

14 From 2001 to 2003, the USACE took "limited action[s]"
15 to remedy the gradient facility's defects. (See id. ¶¶ 72-78.)
16 From 2004 to 2007, no work was done on the defects. (See id. ¶¶
17 78, 83, 89-90.)

18 "[I]n August 2008, the USACE convened a team of experts
19 to review the Gradient Facility." (Id. ¶¶ 93-94.) The experts
20 allegedly "identified significant areas of concern[]" with the
21 facility stemming from the defects plaintiff had complained about
22 beginning in December 2000. (See id. ¶¶ 71, 96.) Over the next
23 four and a half years, plaintiff and the USACE engaged in a
24 number of unsuccessful efforts to "develop solutions to the
25 Gradient Facility's myriad of issues." (See id. ¶¶ 97-104.)

26 In March 2013, the USACE issued notice of construction
27 completion for the gradient facility to plaintiff, notifying
28 plaintiff that it considered the facility complete for purposes

1 of the PCA and plaintiff would be responsible for maintaining,
2 repairing, replacing, and rehabilitating the facility going
3 forward. (See id. ¶ 105-106.)

4 Plaintiff thereafter brought an action against the
5 United States in the Court of Federal Claims, alleging that the
6 United States breached the PCA by failing to construct the
7 gradient facility according to the PCA's specifications. See
8 Glenn-Colusa Irrigation Dist. v. United States, 129 Fed. Cl. 593,
9 595 (2016). The Court of Federal Claims dismissed that action
10 for lack of jurisdiction. Id. at 599.

11 In January 2017, plaintiff filed this action.²
12 (Compl.) Citing the same allegations it cited in its Court of
13 Federal Claims action, plaintiff brings causes of action against
14 defendants for: (1) breach of contract, (2) breach of the implied
15 covenant of good faith and fair dealing, (3) breach of implied
16 warranty, (4) declaratory judgment, and (5) violation of the
17 Administrative Procedure Act. (Id. at 20-26.) Defendants now
18 move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to
19 dismiss plaintiff's breach of contract, breach of the implied
20 covenant of good faith and fair dealing, and breach of implied
21 warranty claims as untimely under the limitations period set
22 forth in 28 U.S.C. § 2401(a). (Defs.' Mot.)

23 ///

24 ² The PCA was entered into pursuant to the Flood Control
25 Act, 42 U.S.C. § 1962d-5b. (See Compl. ¶ 7; Defs.' Mot., Mem. at
26 6 (Docket No. 13-1).) This court thus has jurisdiction over this
27 action under 42 U.S.C. § 1962d-5b(c). See 42 U.S.C. § 1962d-
28 5b(c) ("Every agreement entered into pursuant to this section
shall be enforceable in the appropriate district court of the
United States.").

1 II. Legal Standard

2 On a Rule 12(b)(6) motion, the inquiry before the court
3 is whether, accepting the allegations in the complaint as true
4 and drawing all reasonable inferences in the plaintiff's favor,
5 the plaintiff has stated a claim to relief that is plausible on
6 its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009);
7 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "[T]he
8 tenet that a court must accept as true all of the allegations
9 contained in a complaint is inapplicable to legal conclusions."
10 Iqbal, 556 U.S. at 67. "A claim may be dismissed under Rule
11 12(b)(6) on the ground that it is barred by the applicable
12 statute of limitations" Von Saher v. Norton Simon Museum
13 of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010).

14 III. Discussion

15 28 U.S.C. § 2401(a) sets forth a six-year limitations
16 period for "every civil action commenced against the United
17 States." "Under federal law[,], a cause of action accrues when
18 the plaintiff is aware of the wrong and can successfully bring a
19 cause of action." Shiny Rock Min. Corp. v. United States, 906
20 F.2d 1362, 1364 (9th Cir. 1990) (quoting Acri v. International
21 Ass'n of Machinists, 781 F.2d 1393, 1396 (9th Cir. 1986)); see
22 also Padres Hacia Una Vida Mejor v. Jackson, No. 1:11-CV-1094 AWI
23 DLB, 2012 WL 1158753, at *5 (E.D. Cal. Apr. 6, 2012) (same). As
24 federal law governs the three claims defendants are moving to
25 dismiss, see Boyle v. United Techs. Corp., 487 U.S. 500, 504
26 (1988) ("We have held that [the] obligations to and rights of the
27 United States under its contracts are governed exclusively by
28 federal law."), and the parties appear to agree that plaintiff's

1 implied covenant of good faith and fair dealing and implied
2 warranty claims accrued at the same time plaintiff's breach of
3 contract claim accrued,³ the dispositive question with respect to
4 the present Motion is whether plaintiff became aware of and could
5 have brought its breach of contract claim prior to January 2011.

6 Plaintiff contends that it could not have brought its
7 breach of contract claim prior to January 2011 because the USACE
8 did not breach the PCA's construction specifications until it
9 issued notice of construction completion for the gradient
10 facility in March 2013. (See Pl.'s Opp'n at 9 (Docket No. 17).)
11 Defendants contend that plaintiff could have brought its breach
12 of contract claim as early as November 2000, when, according to
13 plaintiff's own allegation, "construction [on the gradient
14 facility] was completed [and] significant defects associated with
15 the . . . Facility were observed," and no later than 2004, when
16 the USACE represented to plaintiff that "it did not have
17 sufficient funds" to "continue [remedial] work" on the facility
18 and plaintiff "would have to pay for a portion of the costs" of
19 such work. (Defs.' Mot., Mem. at 7-8 (citing Compl. ¶¶ 68-69,
20 77) (Docket No. 13-1).)

21 Relevant to the court's analysis of when plaintiff
22 could have brought its breach of contract claim is what
23 constitutes a breach of contract under federal law. "Federal
24 contract law is determined by reference to traditional common law
25 principles." Minidoka Irr. Dist. v. Dep't of Interior of U.S.,

26 ³ The parties discuss the three claims collectively and
27 argue only the accrual date of plaintiff's breach of contract
28 claim in their briefs. (See Defs.' Mot., Mem. at 7-9; Pl.'s
Opp'n at 8-12 (Docket No. 17).)

1 154 F.3d 924, 926 (9th Cir. 1998). One source of "traditional
2 common law principles" is "the content of the forum state's law."
3 Seagate Tech. LLC v. Dalian China Express Int'l Corp., 169 F.
4 Supp. 2d 1146, 1154 (N.D. Cal. 2001) (citing 19 Charles A.
5 Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and
6 Procedure, § 4518). "California law recognizes that a contract
7 may be breached by nonperformance, by repudiation, or a
8 combination of the two." Cent. Valley Gen. Hosp. v. Smith, 162
9 Cal. App. 4th 501, 514 (5th Dist. 2008) (citing 1 Witkin, Summary
10 10th Contracts § 849). Nonperformance is "an unjustified failure
11 to perform a material contractual obligation when performance is
12 due." Id. (citing Restatement (Second) of Contracts § 251).
13 Repudiation is "a clear, positive, and unequivocal refusal to
14 perform" a contractual obligation or "conduct . . . so as to make
15 substantial performance [of the obligation] . . . impossible."
16 Taylor v. Johnston, 15 Cal. 3d 130, 137 (1975).

17 The facts alleged in plaintiff's Complaint do not
18 indicate that the USACE failed to perform or repudiated its
19 alleged obligation to construct the gradient facility according
20 to the PCA's specifications prior to January 2011.

21 As to performance, the PCA does not provide a timetable
22 for completing the gradient facility, instead providing that when
23 the USACE "determines that the entire [facility] is complete . .
24 . [it] shall so notify [plaintiff] in writing." (PCA at 5.) The
25 USACE did not issue notice of construction completion for the
26 gradient facility until March 2013, (Compl. ¶ 105), indicating
27 that the time for performing on the PCA's construction
28 specifications did not expire until March 2013. It cannot be

1 said that the USACE failed perform on the PCA's construction
2 specifications prior to June 2011 when, under the terms of the
3 PCA, the time for such performance did not expire until March
4 2013.⁴

5 As to repudiation, the only allegation the court is
6 aware of that could conceivably be construed as "a clear,
7 positive, and unequivocal refusal" by the USACE to perform on the
8 PCA's construction specifications prior to January 2011, is the
9 allegation that in 2004, the USACE represented to plaintiff that
10 "it did not have sufficient funds" to "continue [remedial] work"
11 on the gradient facility and plaintiff "would have to pay for a
12 portion of the costs" of such work. (Defs.' Reply at 5-6 (citing
13 Compl. ¶ 77) (Docket No. 18).)

14 It is not clear, from the face of this allegation, that
15 the USACE's representations to plaintiff in 2004 constituted a
16 refusal on the USACE's part to perform further remedial work on
17 the gradient facility absent unwarranted financial contributions
18 from plaintiff. Other allegations stated in plaintiff's
19 Complaint, however, indicate that the representations were not a
20 refusal to perform further work in the absence of financial
21 contributions. Four years after the representations were made,
22 the USACE allegedly "convened a team of experts to review the
23 Gradient Facility" and thereafter "accepted responsibility for
24 correcting the [facility's] deficiencies" and "develop[ed] an

25 ⁴ The court acknowledges that it is somewhat confusing
26 that plaintiff states the gradient facility was "completed . . .
27 in November 2000." (Compl. ¶ 68.) Plaintiff explained at oral
28 argument that that by "completed," it merely meant that initial
construction efforts on the gradient facility were finished, not
that the USACE had completed performance on the PCA.

1 action plan to address the [facility's] outstanding
2 issues/deficiencies." (Compl. ¶¶ 93, 98.) There are no
3 indications that the USACE's rekindled willingness to perform
4 remedial work on the gradient facility was due to financial
5 contributions from plaintiff. The USACE's post-2008 activities
6 are thus inconsistent with, and undermine, the theory that the
7 USACE's representations to plaintiff in 2004 were "a clear,
8 positive, and unequivocal refusal" to perform further remedial
9 work on the gradient facility in the absence of unwarranted
10 financial contributions from plaintiff.

11 There are no allegations in plaintiff's Complaint that
12 the USACE engaged in any "conduct . . . so as to make substantial
13 performance" of the PCA's construction specifications
14 "impossible" prior to January 2011.

15 Thus, the facts alleged in plaintiff's Complaint do not
16 indicate that the USACE repudiated its alleged obligation to
17 construct the gradient facility according to the PCA's
18 specifications prior to January 2011.

19 Having found that the facts alleged in plaintiff's
20 Complaint do not indicate that the USACE failed to perform or
21 repudiated its alleged obligation to construct the gradient
22 facility according to the PCA's specifications prior to January
23 2011, the court finds that such facts do not indicate that
24 plaintiff could have brought its breach of contract, breach of
25 the implied covenant of good faith and fair dealing, and breach
26 of implied warranty claims prior to January 2011.

27 IT IS THEREFORE ORDERED that defendants' motion for
28 partial dismissal of plaintiff's Complaint be, and the same

1 hereby is, DENIED.

2 Dated: June 27, 2017



WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

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