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A Battle Between Farmers and Environmentalists: Exploring the Implications of the Westlands Water District Drainage Settlement

Morgan B. McGill





<http://wwd.ca.gov/>

I. Introduction

On September 15, 2015, the United States and Westlands Water District reached a settlement agreement in one of the thorniest issues in California water policy. The issue plaguing California for many years has been “what to do” about highly polluted runoff from the west side of the San Joaquin Valley, and who will pay for the expensive solution. Congress is in the process of considering the settlement proposal. If the settlement is approved by Congress, the United States and Westlands would be bound by the terms of the agreement. The settlement here is controversial—some believe the United States has long shirked its obligations to fund the drainage systems, while others see any payment to the irrigators as more corporate welfare going to some big polluters. Environmentalists view this settlement as an injustice to the environment and tax payers. Westlands will not be obligated to retire more land, and the settlement ultimately gives unlimited access to water at a low price. Farmers argue to the contrary. The agriculture industry supporters within Westlands see this settlement as beneficial to local businesses and taxpayers. Agriculture is a multi-billion-dollar industry that relies on water. Water is the ticket to producing food and keeping people from rural communities employed.

In this note, I explore the background of Westlands Water District, and preexisting issues that lead to the development of the settlement agreement. It is important to understand both the funding history of Westlands pertaining to the Central Valley Project, and litigation surrounding drainage management for the last couple of decades. Because various interest groups from the environment and agriculture industries have been battling drainage issues for years, it would be nearly impossible to satisfy all expectations.

One undeniable issue, however, is the government's poor job of maintenance and oversight of the Westlands district. If the government has continued to fail at adequately managing the district, then it would make sense to give the reins to Westlands. Westlands should of course protect its growers and the environment equally. Although environmentalists are unhappy with the settlement and the alleged give-away to Westlands, Westlands proponents contend that it will abide by environmental protections. Westlands appears to be better suited to maintain day-to-day operations because of the closeness in proximity, general understanding of agribusiness, and most importantly, Westlands' entire existence hinges on its ability to manage and deliver water to growers within its region.

II. Overview of Westlands Water District and The Central Valley Project

A. Westlands Water District

Westlands Water District ("Westlands") was founded in 1952 and has since maintained management and delivery of water supply within the water district. The Westlands Water District is the largest agriculture water district in the United States and is comprised of over 1,000 square miles of farmland in western Fresno and Kings Counties.¹ Westlands has federal contracts to provide water to 700 farms, at an average size of 875 acres in total.² More than 50,000 people live and work in the communities that depend on the agriculture economy in this region. Growers in the Westlands produce more than \$1 billion worth of food and fiber each year, generating about \$3.5 billion in farm-related economic activities for the surrounding communities.³ (Please see the district maps below).

1. Westlands Water District (WWD), <http://wwd.ca.gov/about-westlands/> (last visited Apr. 8, 2016).

2. WWD, *supra*, note 1.

3. *Id.*

B. The Central Valley Project

The Central Valley Project (“CVP”) is a federal water project that allows water to be delivered to Westlands. Water is stored in large reservoirs in Northern California to be used by cities and farms in various areas of California, including the Westlands district.⁴ After water is released from the CVP reservoirs, it is pumped from the Sacramento-San Joaquin Delta and delivered 70 miles through the Delta-Mendota Canal to the San Luis Reservoir.⁵ It should be noted that other CVP units get water from facilities north of the Delta or on the San Joaquin River. In the spring and summer months, water is released from the San Luis Reservoir and delivered to Westlands through the San Luis Canal and the Coalinga Canal.⁶ The Westlands web page acknowledges drainage as being one of the oldest problems faced by irrigated agriculture. Salt found in the Delta waters and west side soil cause problems for the already difficult drainage issue.⁷ With improper drainage, saline water can negatively impact root zones, germination of plants, crop growth, and crop yields.

Additionally, the CVP is one of the nation’s major water conservation developments. It extends from the Cascade Range in the north to the semi-arid but fertile plains along the Kern River in the south.⁸ The CVP was initially created to protect the Central Valley from water shortages and flooding; however, the CVP has allocated some water to be used to benefit the environment. Some might argue the efforts are only in place to mitigate the CVP’s negative consequences for fish and wildlife, but the CVP water nevertheless improves Sacramento River navigation, supplies domestic and industrial water, generates electric power, conserves fish and wildlife, and enhances water quality.⁹ CVP delivers water for farms, homes, factories, and the environment. About 60 percent of CVP’s cost in its creation was allocated to irrigation, municipal, and industrial water.¹⁰ Water from the CVP irrigates more than 3 million acres of farmland and provides drinking water to nearly 2 million people.¹¹ The CVP facilities include reservoirs on the Trinity, Sacramento, American, Stanislaus, and San Joaquin Rivers.¹²

4. WWD, *supra*, note 1.

5. WWD, *supra*, note 1.

6. WWD, *supra*, note 1.

7. WWD, *supra*, note 1.

8. U.S. Department of the Interior, Bureau of Reclamation, *Central Valley Project*, http://www.usbr.gov/projects/Project.jsp?proj_Name=Central+Valley+Project (discussing generally).

9. *Central Valley Project*, *supra*, note 8.

10. *Central Valley Project*, *supra*, note 8.

11. California Department of Water Resources, *California State Water Project and the Central Valley Project*, <http://www.water.ca.gov/swp/cvp.cfm>.

12. *Central Valley Project*, *supra*, note 8.

Construction of the CVP began in October of 1937, beginning with the Contra Costa Canal. The first water delivery was made in 1940.¹³ The Shasta Dam, completed in 1945, is the keystone of the Central Valley Project. Water storage began in 1944 and the first power was also delivered in the same year. The U.S. Army Corps of Engineers continued to operate dams in the Central Valley, often containing a surplus of water. As a result, contracts were drawn for the releasing of the surplus water to be used for irrigation, because the Army Corps specialized in flood control as opposed to irrigation water supply.¹⁴

IV. Case Establishing Federal Authority

A. Background

The case discussed below is a key case in establishing federal liability for drainage problems.

In *Firebaugh Canal Co. v. U.S.*, the United States appealed a judgment entered against the Department of Interior and the Bureau of Reclamation that required the Department to “take such reasonable and necessary actions to promptly prepare, file and pursue an application for a discharge permit” with the California Water Resources Control Board (under the San Luis Act).¹⁵ The Court agreed with the district court that the Government’s duty to provide drainage service, under the San Luis Act, had not been excused by Congressional action and the government failed to provide the required drainage service for years.¹⁶ The Court stated irrigation and drainage are inherently linked. Water Projects that bring fresh water to an agricultural area must take the salty water remaining after the crops have been irrigated away from the service area. Because of this, the San Luis Act conditioned the construction of the San Luis Unit on the provision for drainage facilities to be provided by either the State of California or the Department of the Interior.¹⁷

The Secretary of the Interior created the “Feasibility Report” for the project in 1956. This report contemplated a system of tile drains that would empty into an interceptor drain that would convey water 197 miles to the Contra Costa Delta for Disposal.¹⁸ Construction of the San Luis Unit began and in 1968 water deliveries were made to the Westlands Water District. The 1965 Public Works Appropriation Act contained a provision that prohibited

13. *Central Valley Project*, *supra*, note 8.

14. *Central Valley Project*, *supra*, note 8.

15. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 570 (9th Cir. 2000).

16. *Id.*

17. *Id.* at 571.

18. *Id.* at 571.

selecting a final point of discharge for the drain until certain named conditions were met.¹⁹

An appropriations rider with similar language has been included in nearly every annual appropriations act since 1965. The riders prohibited the Secretary of the Interior from establishing the terminus of the drain until the Bureau of Reclamation and the State of California could address environmental concerns regarding the effect of the agriculture waste on the San Francisco Bay²⁰. In 1978 a subsurface drainage collector system was constructed for Westlands. Prior to 1975, the subsurface collector drainage system discharged approximately 7,300 acre-feet of agriculture drainage per year.²¹ The drain carried the drainage water to the Kesterson Reservoir, which was the temporary terminus of the drain. In 1983, waterfowl nesting studies at the Kesterson Reservoir revealed embryo deformity and mortality. Experts suspected selenium in some of the soils in Westlands was being carried with drainage water into the Kesterson Reservoir.²²

Selenium (in high concentrations) can impair the growth of crops and is hazardous to human and animal life. In 1985, the Secretary of the Interior announced that it would close the Reservoir. The Westland drains were plugged, and the middle portion of the interceptor was closed. The United States continued to deliver water without drainage service to Westlands.²³ Affected landowners sued the Department of the Interior in hopes that the master drain to the Contra Costa Delta would be completed. Westlands was included as a plaintiff, and in 1992, the lawsuits were partially consolidated to resolve the mutual allegation that the Secretary of Interior is required by law to construct facilities for agriculture drainage from certain lands in Westlands.²⁴ The district court's unpublished opinion held the San Luis Act required the government to provide drainage service to lands receiving water through the San Luis Unit.²⁵ The Government argued changes in the law and environmental knowledge made complying with the San Luis Act impossible. The district court concluded the Secretary's responsibility to construct a drain had not been excused. The court also issued a partial judgment concluding the San Luis Act established a mandatory duty to provide drainage; this duty had not been excused.²⁶ The Secretary of the Interior was ordered to file and

19. *Firebaugh Canal Co.*, 203 F.3d 568, 571 (9th Cir. 2000).

20. *Id.* at 571. *United States Senate*, Glossary., http://www.senate.gov/reference/glossary_term/rider.htm. (last visited Apr. 5, 2016). (A rider is an informal term for a nongermane amendment to a bill or an amendment to an appropriation bill that changes the permanent law governing a program funded by the bill).

21. *Id.* at 571.

22. *Id.* at 571-72.

23. *Id.* at 572.

24. *Firebaugh Canal Co.*, 203 F.3d 568, 572 (9th Cir. 2000).

25. *Id.* at 572.

26. *Id.* at 572.

pursue an application for a discharge permit with the California Water Resources Control Board. The Government appealed the judgment.²⁷

B. Analysis and Conclusion

The government argued the language of the San Luis Act did not require the Bureau of Reclamation to build the interceptor drain to the Contra Costa Delta. The government also claimed the lower court erred by not deferring to the Agency's reasonable interpretation of the San Luis Act.²⁸ The *Chevron* test is used when reviewing an agency's construction of a statute that it administers. Part one of the test is whether Congress has directly spoken to the precise question of the issue. If the intent of Congress is clear, then that is the end of the matter. The judiciary must reject administrative constructions contrary to clear congressional intent. The second part of the test is, if the answer to part one is no, then is the agency's answer based on a permissible construction of the statute?²⁹ The agency's interpretation is given deference, unless it is arbitrary or capricious.

The Court found the plain language of the San Luis Act to be in conflict with the government's argument. The Court also found that the San Luis Act authorized (not required) the Secretary to construct, operate, and maintain the San Luis unit. The discretion was limited to the decision as to whether to construct the unit. The statute defined which engineering features must be included in the unit, if it was in fact constructed. Therefore, the Secretary did not have discretion regarding what constituted the San Luis Unit.³⁰ The term "shall" makes a provision mandatory (unless there is evidence stating otherwise).³¹ The statute directed that the features of the unit include necessary drains.³² Once the Department of the Interior decided to construct the unit, it was required to construct the necessary drains. The Department's discretion was limited to the decision of building the unit, it was not permitted to decide which engineering features to pick and choose from.³³

The government argued the necessary drains did not include the interceptor drain. The Court ruled that interpretation conflicted with section (1)(a)(2) of the San Luis Act, because the 1956 feasibility report contemplated providing drainage along with irrigation water. Therefore, it was clear that the State of California or Department of the Interior was required to provide a drainage plan prior to the construction of the San Luis Unit. When the State

27. *Id.* at 572-73.

28. *Id.* at 572.

29. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

30. *Firebaugh Canal Co.*, 203 F.3d 568, 573 (9th Cir. 2000).

31. *Bennett v. Spear*, 520 U.S. 154 (1997).

32. *Firebaugh Canal Co.*, 203 F.3d 568, 573 (9th Cir. 2000).

33. *Id.* at 574.

decided not to provide a master drain, the Interior had the choice to provide one, or end construction of the San Luis Unit.³⁴ The Court also stated the statutory language was clear in that after construction of the San Luis Unit was underway, the Secretary only had discretion to determine which lands within the unit needed drainage service to protect farm land, and the size of the interceptor.³⁵

The Court ruled the San Luis Act expressed the intent of Congress to provide for an interceptor drain prior to the construction of the San Luis Unit. Because the intent was clear, there was no need to consider the Agency's interpretation of the statute (the first part of *Chevron* was met).³⁶ Thus, the district court was proper in finding that the San Luis Act made it mandatory for the Secretary to provide the interceptor drain.

In 1965 (and years after), Congress approved language in the appropriation acts for the Department of the Interior:

None of the funds appropriated or otherwise made available by this Act may be used to determine the final point of discharge for the interceptor drain for the San Luis Unit until development by the Secretary of the Interior and the State of California of a plan, which shall conform with the water quality standards of the State of California as approved by the Administrator of the Environmental Protection Agency ("EPA"), to minimize any detrimental effect on the San Luis drainage water.³⁷

The government and interveners argued the appropriation riders repealed the Secretary's duty to provide drainage under the San Luis Act. The Court disagreed, applying *Tennessee Valley Authority* (repeals by implication are not favored).³⁸ The Court here found the above case to be directly applicable; first, because the appropriation acts did not provide an affirmative showing of intent to repeal the drainage requirements of the San Luis Act.³⁹ Congress placed a condition on the determination of the final point of discharge; it did not excuse (repeal) the Secretary's obligation to provide the drainage itself.⁴⁰ The Court ruled that Congress ordered the Secretary (in fulfilling drainage requirements) to consider and address environmental problems caused by agriculture runoff.⁴¹

The appropriation riders simply prevented the use of funds to determine the final point of discharge until the Secretary and State of California

34. *Firebaugh Canal Co.*, 203 F.3d 568, 574 (9th Cir. 2000).

35. *Id.* at 574.

36. *Firebaugh Canal Co.*, 203 F.3d 568, 574 (9th Cir. 2000).

37. *Id.* at 574-75.

38. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978).

39. *Firebaugh Canal Co.*, 203 F.3d 568, 575 (9th Cir. 2000).

40. *Firebaugh Canal Co.*, 203 F.3d 568, 575 (9th Cir. 2000).

41. *Id.* at 575.

developed a water quality plan. The Court stated the language did not compel the Secretary to stop construction of the drainage facilities, or to stop the drainage service. The duty to develop a water quality plan before selecting the terminus of the interceptor drain did not conflict with the duty to provide drainage services under the San Luis Act.⁴² The appropriations acts did not repeal drainage provisions of the San Luis Act.

The Court looked to whether the district court was correct in finding the Secretary had been neglectful in providing drainage under the San Luis Act. The appropriation riders provided that the Department of the Interior should develop a plan with the State of California to minimize the negative effects of the San Luis drainage water. The government did not provide an explanation as to why the Bureau of Reclamation and the State of California were unable to establish the required environmental standards.⁴³ Westlands had been provided with water, but no drainage during this time. The Westlands were becoming sterile (unproductive or not fertile). The decision to not provide drainage services influenced the Court to determine the Secretary of the Interior was in violation of section one of the San Luis Act.⁴⁴

The government further contended that Congress encouraged the Department of the Interior to investigate and pursue drainage solutions other than the interceptor drain discussed in the San Luis Act. The Court ruled that Congress's action did not terminate the duty to provide drainage, but the subsequent Congressional action supplemented the drainage solutions available to the Department of the Interior.⁴⁵ The San Luis Act limited the drainage solution to an interceptor in the Contra Costa Delta, but the subsequent Congressional action allowed the Department of the Interior to meet drainage requirements using other means. The Department still had a duty to provide drainage, but the Department had the authority to use alternatives other than the interceptor drain to satisfy the language of the San Luis Act.⁴⁶

The lower court ordered the Department of the Interior and Bureau of Reclamation to take proper steps in pursuing a discharge permit with the California Water Resources Control Board. The government argued the order infringed on the broad discretion given to the Department of the Interior in regards to providing a drainage solution for the San Luis Unit; the court here agreed. Even though the Department of the Interior had a duty to provide drainage service under the San Luis Act, subsequent Congressional Action gave discretion to the Department of the Interior in regards to building and maintaining a drainage solution.⁴⁷ Since 1986, the Department of the Interior

42. *Firebaugh Canal Co.*, 203 F.3d 568, 575-76 (9th Cir. 2000).

43. *Id.* at 577.

44. *Id.* at 577.

45. *Firebaugh Canal Co.*, 203 F.3d 568, 577 (9th Cir. 2000).

46. *Firebaugh Canal Co.*, 203 F.3d 568, 577 (9th Cir. 2000).

47. *Id.* at 578.

withheld drainage services from Westlands, violating section one of the San Luis Act. This has ultimately impacted the quality of the agriculture land within Westlands.⁴⁸

The district court may compel the Department of the Interior to provide drainage service, but they cannot terminate agency discretion as to how the agency will satisfy the drainage requirement. The district court ordered the Department of the Interior to apply for a discharge permit, thus precluding other solutions to the drainage duty, however; the Department of the Interior was still required to provide drainage services.⁴⁹

The Court affirmed the district court's decision to require the government to provide drainage services, but reversed the judgment that eliminated solutions to the problem that were not "interceptor drain solutions." The case was remanded to the district court.

C. A Final Word on the Dissent

It is worth mentioning a few words from the Dissent by Judge Trott. The judge explains the problem in finding a place for pollution or runoff from drainage. Judge Trott states it is difficult to find a solution that opposing parties find acceptable. He writes that this has become a political issue, way beyond the authority of the courts. He also contends that decisions on this matter are not appropriate under our Constitution's allocation of powers.

Judge Trott further acknowledges sympathy for the farmers and families of farmers that rely on irrigation for their livelihoods, and the possible destruction of their land. He balances the issue with the fear of those who might be burdened by the pollution from the drainage. Although both arguments are mentioned, he maintains that the answers to the problem in this case are outside of the Court's powers. Judge Trott concludes that Congress and the State of California should determine difficult policy choices, such as the one in this case.⁵⁰ This note discusses legislation that seeks to answer the tough question as to who should bear the responsibility of maintaining Westlands' drainage system. It should not be up to the courts to decide the best course of action and remedies to this drainage problem. Here, Westlands and its growers came to an agreement with the United States government. The Obama administration deemed this settlement to be at least, good enough in addressing environmental concerns. Although environmentalists raise valid points to preserving land and keeping people safe, Westlands upkeep might be best achieved without major government oversight.

48. *Id* at 578.

49. *Firebaugh Canal Co.*, 203 F.3d 568, 578 (9th Cir. 2000).

50. *Firebaugh Canal Co.*, 203 F.3d 568, 580 (9th Cir. 2000).

V. Westlands Settlement Agreement

The Department of the Interior has not been successful in managing the drainage system in Westlands' district. Current photos depict the condition of the San Luis drain. The San Luis drain has been shut down for over twenty years. Despite its deplorable condition, growers are still responsible for paying for the drain's preservation as part of their fees to Westlands. Seen in the photos below, the drain is littered with trash, weeds, and is deteriorating in some places.⁵¹ Growers continue suffering losses because the federal government has failed in maintaining a proper drainage system. The settlement would allow Westlands to take over and begin the process of resolving not only the drainage issue, but the general clean-up of structures in the district.⁵²



51. Gayle Holman, Westlands Interview (2017). Photos are of the San Luis drain located in the Southeast region of Mendota. Citizens of this region of Mendota are unhappy with the aesthetic issues regarding trash so close to their homes.

52 *Id.*



A. Timeline

On September 16, 2015, the United States and Westlands executed and filed a settlement agreement regarding the management of drainage service within Westlands. Implementing the agreement will depend on the enactment of authorizing federal legislation.⁵⁴

The timeline with disputes leading up to this settlement are as follows: On December 18, 2000, the United States District Court for the Eastern District of California entered an Order Modifying Partial Judgment on Findings of Fact and Conclusions of Law Re: Statutory Duty to Conform to Ninth Circuit Opinion in *Firebaugh Canal Water Dist. v. United States*, directing the Secretary to provide drainage to the San Luis Unit pursuant to the statutory duty imposed by section 1(a) of the San Luis Act.⁵⁵ On March 9, 2007, The Bureau of Reclamation's Mid-Pacific Region issued a Record of Decision selecting a drainage service plan for the San Luis Unit. On September 2, 2011, some landowners within the Westlands service area filed a putative class action in the United States Court of Federal Claims (*Etchegoinberry, et al. v. United States*, No.11-564L (Fed. Cl.)) ("*Etchegoinberry*"), alleging that the United States' failure to provide drainage service to their lands effected a physical taking of their property without just compensation in violation of the Fifth Amendment.⁵⁶

On January 12, 2012, Westlands filed a breach of contract action in the United States Court of Federal Claims (*Westlands Water District v. United States*, No.12-12C (Fed. Cl.)), alleging that the United States' failure to provide drainage service to Westlands' service area constituted a breach of Westlands' water service contracts and 1965 Repayment Contract. On January 15, 2013, the Court of Federal Claims granted the United States' motion to dismiss. Westlands appealed to the United States Court of Appeals for the Federal Circuit (Fed. Cir. 13-5069).⁵⁷ This settlement is an agreement to settle *Etchegoinberry*. The settlement is subject to final approval, the execution of the settlement is contingent upon the enactment of Enabling Legislation.

53. *Id.*

54. Defendant's Notice of Filing Settlement Agreement. *Firebaugh Canal Water District and Central California Irrigation District v. United States of America, et al.*, and Westlands Water District, *et al.* No. 1:88-cv-00634-LJO-DLB (Sept. 16, 2016), Doc. 1001, <http://www.usbr.gov/mp/docs/Notice-of-Filing-Settlement-Agreement-AS-FILED-with-attachment-091615.pdf>. Please note that the agreement came on September 15, but was filed on September 16.

55. Defendant's Notice of Filing Settlement Agreement, *supra*, at 6.

56. Defendant's Notice of Filing Settlement Agreement, *supra*, at 6-7.

57. Defendant's Notice of Filing Settlement Agreement, *supra*, at 7.

B. Overview of the Proposed Settlement of Etchegoinberry

The settlement includes the provision for payment of compensation by Westlands to owners of land within Westlands' service area impacted by the failure of the United States to provide drainage service. All claims asserted or that could have been asserted in *Etchegoinberry* will be judged and dismissed with prejudice. Westlands must use best efforts to obtain a release, waiver and abandonment of all past, present, and future claims of each landowner within its service area against the United States arising from the (alleged) failure of the United States to provide drainage service (including but not limited to those in *Etchegoinberry*).⁵⁸

Once legislation is enacted, the Secretary will initiate and complete all actions necessary to convert Westlands' existing water service contract, or any renewal, entered into under section 9(e) of the Reclamation Project Act of August 4, 1939, 43 U.S.C. § 485h(e), to a repayment contract under section 9(d) of said Act, upon mutually agreeable terms and conditions.⁵⁹

C. Brief Discussion of the Settlement

The Court in *Firebaugh Canal Co. v. United States*, ordered the Secretary of the Interior to provide drainage service to lands served by the San Luis Unit of the Central Valley Project. The cost of providing drainage is estimated at \$3.5 billion (as of 2015).⁶⁰ In 2010 drainage was implemented to a portion of the land on a court-ordered schedule. In 2011, the dispute in *Etchegoinberry v. United States* regarded the landowners' complaint that the United States failed to provide drainage service (constituting a physical taking of their lands without compensation; a violation of the Fifth Amendment). In 2012, Westlands filed a complaint alleging breach of contract, because the government did not provide drainage services.⁶¹

58. Defendant's Notice of Filing Settlement Agreement, *supra* page 7-8.

59. Section 9(d) provides no water may be delivered for irrigation of land in connection with a new project until the organization has entered into a repayment contract with the United States (satisfying to the Secretary). Section 9(e) provides in lieu of entering a repayment contract pursuant to Section 9(d), the Secretary may enter into a short or long-term contract to furnish water for irrigation purposes. See, e.g., 43 U.S.C. § 485 (1939).

60. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016)

61. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016)

D. The Role of Westlands after the Settlement

Under the proposed settlement, Westlands would agree to retire a minimum of 100,000 acres of land from production. The retired lands would be used for managing drain water (including irrigation reuse), renewable energy projects, upland habitat restoration projects, or other uses subject to the consent of the United States.⁶² The contract with the CVP allowing 1.193 million acre-feet of water delivered would be reduced to 895,000 acre-feet, anything in excess of that amount would be available to the United States for public use.⁶³ Westlands would be responsible for all drainage in accordance with California law, as well as federal law.⁶⁴ Claims alleging failure to provide drainage between Westlands and the United States for the past, present, and future would be indemnified. And, Westlands would intervene in *Etchigionberry* to reach settlement, and would compensate (monetarily) the individual landowners.⁶⁵ CVP water must be made available to the Lemoore Naval Air Station, the contract would be the same as is with other contractors. Westlands can avoid repayment responsibility. If the United States funded the drainage solution, Reclamation would request repayment from Westlands over a 50-year time period, with no interest, beginning at the completion of each element.⁶⁶

E. The Role of the United States after the Settlement

The United States would be relieved of all statutory obligations to provide drainage to Westlands.⁶⁷ The Department of the Interior would no longer be subject to the drainage demands in the San Luis Act.⁶⁸ Westlands would agree to dismiss (with prejudice) the breach of contract claim, and it will join the United States in petitioning to vacate the 2000 Order Modifying Partial Judgment in *Firebaugh*, which directed implementation of service and scheduling matters.⁶⁹ The United States would be free from all past, present, and future claims arising from its failure to provide drainage service under the San Luis Act, including all claims relating to the Westlands Service area (individual landowners included).⁷⁰ Westlands must be responsible for

62. WWD, *supra*, note 58.

63. WWD, *supra*, note 58.

64. WWD, *supra*, note 58.

65. WWD, *supra*, note 58.

66. WWD, *supra*, note 58.

67. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016)

68. WWD, *supra*, note 64, at 3.

69. WWD, *supra*, note 64, at 3.

70. WWD, *supra*, note 64, at 3.

operation and maintenance, and future CVP construction charges, however; the unpaid costs of \$375 million for previous construction would be waived.⁷¹

The Secretary would convert the Westlands water service contract into a repayment contract. The benefit here, is Westlands' permanent right to a stated share of CVP water.⁷² The United States can refrain from delivering water to Westlands, if Westlands does not meet its drainage obligation. The United States is also authorized to enter into a water service contract with Lemoore Naval Air Station ("Lemoore NAS"). The contract would guarantee a quantity of CVP water to meet the needs of the Air Station associated with air operations; Westlands would make the water available to Lemoore NAS.⁷³

VI. Third Party Comments and Concerns

One major concern is that Westlands will receive a permanent allocation of water. As of now, Westlands has a first right to a share of water as part of the CVP. This means that the Reclamation does not offer CVP water that is currently under contract to other potential users until the contractor has declined to contract for that water.⁷⁴ Westlands' current contract reflects the above concept subject to terms and conditions by providing a right to renew. Some of the terms and conditions include reasonable and beneficial use as defined by Reclamation law (both state and federal).⁷⁵ Among other conditions, payment of all operations, maintenance, capital, and other applicable charges appropriately allocated to Westlands must be made, as well as an adherence to federal laws such as the Endangered Species Act.⁷⁶ The current law requires Westlands to pay the remaining balance for the construction of the CVP by 2030. Once the remainder is paid, Westlands would not be subject to certain provisions of the Reclamation Reform Act, and the first right to a share of water would become a permanent right.⁷⁷

A. Possible Positive Changes

Several major changes would alter the current Westlands contract. If Congress authorized the agreement and signed it into law, the original contract entered into under Section 9(d) of the 1939 Reclamation Project Act would be altered. The benefits that would have originally been available after

71. WWD, *supra*, note 64, at 3.

72. WWD, *supra*, note 64, at 3-4.

73. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016).

74. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016).

75. WWD, *supra*, note 71, at 4.

76. WWD, *supra*, note 71, at 4-5 (See ESA; 16 U.S.C. § 1531).

77. WWD, *supra*, note 71, at 5.

the balance paid in 2030 would be available upon the passing of this legislation.⁷⁸ The conditions regarding the delivery of water would remain, with two conditions added to the repayment contract. First, water deliveries to Westlands would be contingent upon fulfillment of its obligation to manage drainage water within boundaries (consistent with federal and state law).⁷⁹ Actual deliveries of water to Westlands will not exceed 895,000 acre feet; Westlands agreed the Secretary would be entitled to any water in excess of 895,000 acre feet to be used for “any other authorized purpose.”⁸⁰ It can be argued that this amount is still too large, and Westlands should have agreed to more than a 25% reduction in deliveries, but there may be negative implications to growers by reducing more than 25% in the current state of Westlands.

Another argument against this Settlement, is that the United States did a poor job in demanding additional cuts in water allocated to Westlands. It should be noted that the settlement does not increase water rights given to Westlands as it would have if Section 9(e) remained intact.⁸¹ Land retirement is among environmental concerns. The Settlement secures permanent retirement of lands owned by Westlands; without this, Westlands could bring back some sections of land for production in the future.⁸² There is no cap on land retirement, so Westlands will be able to retire additional drainage-impacted lands to address local conditions.⁸³ The terms of the Settlement offers debt forgiveness to Westlands on past construction obligations of the CVP that amount to around \$375 million. The debt forgiveness is offered in return for Westlands’ drainage obligation that would have cost the United States over \$3.5 billion. The United States would not be responsible for any future drainage claims, and Westlands will be responsible for future repayment associated with the CVP.⁸⁴

Westlands will no longer have any acreage limitations and full cost pricing under the Reclamation Reform Act.⁸⁵ This condition meets the repayment relief provided to Westlands under the Settlement. The

78. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016).

79. WWD, *supra*, note 71, at 6.

80. WWD, *supra*, note 71, at 6.

81. WWD, *supra*, note 71, at 6.

82. WWD, *supra*, note 71, at 6.

83. WWD, *supra*, note 71, at 6.

84. Westlands Water District (WWD), <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016).

85. Full cost pricing is a practice where the price of a product is calculated by a firm on the basis of its direct costs per unit of output plus a markup to cover overhead costs and profits. The overhead costs are generally calculated assuming less than full capacity operation of a plant in order to allow for fluctuating levels of production and costs. See, e.g., *Glossary of Statistical Terms*, <https://stats.oecd.org/glossary/detail.asp?ID=3223> (last visited Oct 30, 2016).

Settlement protects CVP water contractors from shifts in costs and mandates Westlands' continued payment toward operation, maintenance, replacement, and future construction costs.⁸⁶

The Bureau of Reclamation promises delta water quality will not be impacted by the Settlement Agreement.⁸⁷ Before the implementation of the Settlement (technically, currently), Westlands did not discharge subsurface drainage water outside its boundaries. The Settlement obliges Westland to manage drain water within its boundaries, and is not permitted to discharge drainage to the Delta.⁸⁸ Drainage water management will continue to be under state and federal law regulation. If Westlands fails to comply with the terms in the Settlement to manage the drainage, the water supply may be shut off.⁸⁹ The information in subsection "A" was retrieved from the United State Department of Bureau Reclamation. The Bureau lists the positive attributes to the Settlement and offers reassurance to doubts as to Westlands' resource management.

B. Settlement Skepticism and Approval

The Los Angeles Times interviewed Estevan Lopez, the Bureau of Reclamation Commissioner, who maintained the Settlement was necessary. Estevan was quoted stating without the Settlement, important conservation investments, environmental restoration, and water infrastructure would be in jeopardy.⁹⁰ Other critics condemned the agreement as a "sweetheart deal" for Westlands. The agreement allows Westland to permanently have access to large quantities of cheap water; there are no guarantees that the drainage problems will be solved to satisfy environmental issues.⁹¹ Congressman Jerry McNerney referred to the Settlement as an "outrageous windfall for Westlands," while Barbara Barrigan-Parilla of Restore the Delta condemned the Obama administration for making such a terrible mistake.⁹²

The soil in a large section of Westlands contains mineral salts and selenium (a natural trace element); salts can be harmful to crops. Selenium in a concentrated field drainage are toxic to wildlife. The effect of excessive salinity can lead to the loss of crops, damage to plumbing; salinity can be toxic to fish, and waterfowl causing substantial harm to the ecosystem and in

86. Westlands Water District (WWD), *Westlands v. United States Settlement*, <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf> (last visited Oct 30, 2016). See, e.g., paragraph 17 of the Settlement.

87. *Westlands v. United States Settlement*, *supra*, note 71, at 6.

88. *Westlands v. United States Settlement*, *supra*, note 71, at 6.

89. *Westlands v. United States Settlement*, *supra*, note 71, at 6.

90. Bettina Boxall, *Federal Government Settles Long Dispute over Central Valley Water*, L.A. Times: Local (Sept. 15, 2015, 3:55 PM), <http://www.latimes.com/local/lanow/la-me-westlands-water-settlement-20150915-story.html>.

91. Boxall, *supra*, note 87.

92. Boxall, *supra*, note 87.

some cases, humans.⁹³ The salinity in soils and waters is made up of dissolved mineral salts. Salt in the root zone decreases the osmotic potential of the soil solution, and subsequently reduces the availability of water to plants.⁹⁴ Typical examples of salt-sensitive crops are beans, onions, almonds, peaches, oranges, and grapefruits. Moderately sensitive crops include corn, alfalfa, clover, cabbage, lettuce, potatoes, and grapes.⁹⁵

The United States Environmental Protection Agency (“EPA”), considers selenium to be potentially harmful to human health if it appears in drinking water.⁹⁶ Plants can accumulate enough of certain trace elements such as selenium to cause acute toxicity or chronic metabolic imbalances in consumers of the plant.⁹⁷ Salt-affected, waterlogged croplands require additional considerations and special management practice. Options for disposing agriculture drainage waters include: (1) deep percolation into the underlying groundwater basin; (2) discharge into surface waters (oceans or inland sinks); (3) disposal into agriculture evaporation ponds; and (4) deep-well injection into permeable substrata.⁹⁸

There is a widespread practice for discharging collected surface irrigation into streams and lakes. But, increasing restraints are placed on these types of discharges as more stringent water quality standards for receiving water are enacted.⁹⁹ One example of disposal into agriculture evaporation ponds is the Kesterson Reservoir. The Reservoir was originally constructed to evaporate saline drainage water, and to maintain a waterfowl habitat.¹⁰⁰ The evaporation pond facility was shut down in 1989 because selenium concentration exceeded average levels, and was said to be hazardous waste.¹⁰¹ The drain water that allegedly poisoned the Waterfowl came from Westlands. That environmental turmoil ultimately led to a court order mandating the federal government to provide drainage under legislation that authorized the extension of the CVP.¹⁰²

93. The National Academy of Sciences, Engineering, and Medicine (NAP), *Soil and Water Quality: An Agenda for Agriculture* (1993), Nap.edu, <https://www.nap.edu/read/2132/chapter/14> (last visited October 2016) at 369.

94. *Soil and Water Quality: An Agenda for Agriculture*, *Supra*, note 90, at 375.

95. *Soil and Water Quality: An Agenda for Agriculture*, *Supra*, note 90, at 376.

96. The National Academy of Sciences, Engineering, and Medicine (NAP), *Soil and Water Quality: An Agenda for Agriculture* (1993), Nap.edu, <https://www.nap.edu/read/2132/chapter/14> (last visited October 2016).

97. *Soil and Water Quality: An Agenda for Agriculture*, *supra*, note 90, at 381.

98. *Soil and Water Quality: An Agenda for Agriculture*, *supra*, note 90, at 394.

99. *Soil and Water Quality: An Agenda for Agriculture*, *supra*, note 90, at 394.

100. *Soil and Water Quality: An Agenda for Agriculture*, *supra*, note 90, at 395.

101. *Soil and Water Quality: An Agenda for Agriculture*, *supra*, note 90, at 395.

102. Bettina Boxall, *Federal Government Settles Long Dispute over Central Valley Water*, L.A. TIMES: Local (Sept. 15, 2015, 3:55 PM), <http://www.latimes.com/local/lanow/la-me-westlands-water-settlement-20150915-story.html>.

Farmers in the Westlands service area are among the supporters of the settlement approval. This Settlement relieves the federal government from providing drainage for Westlands' farms, and Westlands will assume responsibility for providing drainage that takes away tainted irrigation water.¹⁰³ The agreement includes a provision for Westlands to pay Michael Etchegoinberry and other farmers in the lawsuit against the Interior Department for the failure to provide damaged land, resulting in a "taking" by the government.¹⁰⁴ Westlands will retire 100,000 acres of farmland, but some of the land that has already been taken out of production may count toward the 100,000 acres. Westlands will also gain ownership of the federal pipes, canals, and pumping plants that serve the district.¹⁰⁵ Congressmen Jim Costa (D) and David Valadao (R) have been anticipating the introduction of the settlement bill.¹⁰⁶

Congressman Jared Huffman described the Settlement as a "giveaway" to Westlands.¹⁰⁷ Mr. Huffman characterized the agreement as "giving away the store to Westlands," as opposed to a middle of the road agreement.¹⁰⁸ The Trump administration appointed Westlands' lobbyist, David Bernhardt to head the Interior Department transition team. One of Bernhardt's priorities is the Settlement; lobbying registration records filed by Bernhardt's firm (Brownstein, Hyatt, Farber, and Schreck) show Westlands paid the firm \$245,000.¹⁰⁹

Along with Valadao, Congressman Devin Nunes (R), was appointed to the executive committee of Trump's overall transition team. Nunes is considered another ally of the Westlands Settlement.¹¹⁰ Democratic Senator, Diane Feinstein noted the need for an agreement over the past 20 years; the drainage deal was ultimately negotiated under the Obama administration.¹¹¹ Perhaps the Settlement Agreement was a result of pressure from a federal court ruling mandating the federal government to provide drainage. Drainage

103. Michael Doyle, *California Farm Drainage Deal Faces Capitol Hill Currents*, SACRAMENTO BEE: WATER & DROUGHT (Sept. 16, 2015, 2:43 PM), <http://www.sacbee.com/news/state/california/water-and-drought/article35488728.html>.

104. Doyle, *supra*, note 100. A "taking" occurs when a government actually, or constructively takes private property for public use, that government must pay "just compensation" to the property's former owners; *see e.g.*, <https://www.law.cornell.edu/wex/takings>.

105. Doyle, *supra*, note 100.

106. Doyle, *supra*, note 100.

107. Michael Doyle, *Election Over, California Water District May Get Win with Controversial Drainage Plan*, FRESNO BEE: WATER & DROUGHT (Nov. 15, 2016 4:26 PM), <http://www.fresnobee.com/news/local/water-and-drought/article115013113.html>.

108. Doyle, *supra*, note 104.

109. Doyle, *supra*, note 104.

110. Michael Doyle, *Election Over, California Water District May Get Win with Controversial Drainage Plan*, FRESNO BEE: WATER & DROUGHT (Nov. 15, 2016 4:26 PM), <http://www.fresnobee.com/news/local/water-and-drought/article115013113.html>.

111. Doyle, *supra*, note 104.

is necessary to avoid poisoning fertile soil with mineral salts and selenium.¹¹² The House Natural Resources Committee approved the Settlement by a party-line 27-to-12 vote.¹¹³ Congressman Jim Costa was one of three Democrats on the committee that supported the legislation. The Settlement or “irrigation drainage deal,” is likely to win approval in Congress, as it is Republican controlled.¹¹⁴

The Settlement was negotiated under Obama’s administration, but is disapproved of by most California Democrats and environmentalists who have fought Westlands for several years.¹¹⁵ Congressmen Huffman (D) and Costa (D) had heated debates; Huffman was dissatisfied with the bill and argued it would hurt taxpayers. He also took issue with Federal officials who previously worked or lobbied for Westlands in the past 10 years overseeing any implementation of the drainage deal.

Proponents of the Settlement argue this bill will be beneficial to taxpayers. Prior to the Settlement, taxpayers would have been responsible for funding the \$3.5 billion cost to meet the Reclamation’s contractual obligation.¹¹⁶ The Settlement forgives \$350 million in debt owed by Westlands for the CVC construction, but even with the debt forgiveness, there is a 10-1 payoff in favor of taxpayers when compared to the solution cost.¹¹⁷ The argument against retiring over 200,000 acres in farmland is that it would cost \$2.8 to \$3.6 billion based on the current market value of farmland (if Reclamation chose to buy out landowners). Local economies and jobs depend on farming, and there is a correlation between land fallowing and unemployment.¹¹⁸

Food banks stated an increase in the number of families served because of water supply cuts and the drought. Andrew Souza, CEO of Fresno-based Community Food Bank, is quoted from a statement alleging one out of three children in the Central Valley goes hungry every day, and the state’s drought worsened the problem.¹¹⁹

Farms in the Westlands region are important. All regions in California play a crucial role in food supply, because of the variety of climates and growing seasons.¹²⁰ When farmers in the Westlands district harvest crops, they are filling a place in the market that is not being filled with crops from

112. Doyle, *supra*, note 104.

113. Michael Doyle, *Another Step in Long March Toward California Water Deal in Congress*, McClatchy DC Bureau: Congress (Nov. 16, 2016 3:07 PM), <http://www.mcclatchydc.com/news/politics-government/congress/article115172958.html>.

114. Doyle, *supra*, note 110.

115. Doyle, *supra*, note 110.

116. California Farm Water Coalition (CFCW), *Westlands Water District Settlement Agreement*, <http://www.farmwater.org/farm-water-news/westlands-water-district-settlement-agreement/> (last visited October 2016).

117. *Westlands Water District Settlement Agreement*, *Supra*, note 113.

118. *Westlands Water District Settlement Agreement*, *supra*, note 113.

119. *Westlands Water District Settlement Agreement*, *supra*, note 113.

120 *Westlands Water District Settlement Agreement*, *supra*, note 113.

another region (including regions across the United States). This process keeps produce available in stores at an affordable rate.¹²¹ Westlands produces \$1 billion in food and fiber products each year, with a \$3.5 billion impact on the local economy. Rural communities depend on farms for jobs, so the impact of water crises impact people with great magnitude.

VII. Conclusion

Now that the United States is under the Trump administration, the Westlands Water District Settlement is likely to be approved by Congress. Strong support of the bill by proponents such as Congressman Nunes (R)-Visalia, California; Jim Costa (D)-Fresno, California; and David Valadao (R)-Hanford, California carries powerful weight to streamline the agreement. Although the Republican-backed-bill faces strong opposition from environmentalists, there appears to be very little, if any, options to prevent the bill from being implemented.

Westlands may consider retiring more land to meet environmental concerns in the future, as the highly-polluted run-off poses health risks to humans and other animal species. It is crucial to maintain the balance between health and safety, while keeping in mind the impact agriculture has on rural communities. Farmers' lives depend on cultivating crops. Crops are dependent on receiving an adequate supply of water. Without prosperous farming, job availability decreases and families suffer. For years farmers and environmentalists have struggled with working together to come up with a logical agreement to address drainage management and cost. Any settlement implemented would address one issue to the detriment of another, that is to say, some entity would be disappointed no matter what the terms of the agreement consist of.

The United States and Westlands took the first step in ending, or at least mending the relationship between environmental quality and thriving agriculture. Whether Westlands takes responsibility and does not falter on drainage obligations, is to be determined. It would be safe to say that (to some degree) Republicans, Democrats, environmentalists, and farmers are hopeful that this Settlement will have a positive impact on people, the environment, and the economy.

On March 28, 2017, Representative David Valadao introduced H.R. 1769, the San Luis Drainage Resolution Act to the Committee on Natural Resources. This bill would affirm the agreement between the United States and Westlands. On April 4, 2017, the bill was referred to the Water, Power, and Oceans Subcommittee. H.R. 1769 can be tracked in the Current Legislation section on Congress.gov.¹²²

121. *Westlands Water District Settlement Agreement*, *supra*, note 113.

122. Congress.gov, H.R. 1769 – *San Luis Unit Drainage Resolution Act*, <https://www.congress.gov/bill/115th-congress/house-bill/1769> (last visited April 2017).