

MP Region Public Affairs, 916-978-5100, <http://www.usbr.gov/mp>, July 2016

## Northerly Districts Drainage Agreement

### Background

The San Luis Unit of the Central Valley Project (CVP) serves Westlands Water District (Westlands) and three water districts to the north of Westlands: Pacheco Water District, Panoche Water District and San Luis Water District, collectively referred to as the Northerly Districts. The San Luis Act of 1960, which authorized construction of the San Luis Unit, also authorized construction of facilities necessary to remove drainage water to achieve a long-term, salt and water balance to maintain sustainable agriculture in the San Luis Unit. Initial plans for drainage facilities included the San Luis Interceptor Drain (Drain), which would have collected drainage water and conveyed it for discharge into the Bay-Delta. By 1975, an 82-mile segment of the Drain (terminating at Kesterson Reservoir) had been constructed. In 1983, embryonic deformities were discovered in aquatic birds exposed to elevated levels of selenium at Kesterson Reservoir. The United States halted use of the Drain and emptied Kesterson Reservoir. Litigation commenced shortly thereafter over the United States' obligation to provide drainage service to the San Luis Unit of the CVP and has continued over the past 25 years. In 1995, the United States District Court for the Eastern District of California entered a partial judgment that the federal government's statutory obligation to provide drainage to the San Luis Unit had not been excused or rendered impossible.

### Current Litigation/Background

- In 2000, the Ninth Circuit Court of Appeals in *Firebaugh Canal Water District v. United States*, issued an Order largely affirming the 1995 partial judgment requiring the Secretary of the Interior to provide drainage service to lands served by the San Luis Unit. In 2007, Reclamation signed a Record of Decision selecting a drainage plan and finding that the cost of providing drainage under this plan to drainage-impaired lands would be approximately \$2.6 billion. Those costs are now estimated at approximately \$3.8 billion using April 2015 cost indices. Reclamation began implementing the selected drainage plan in a portion of Westlands and on lands within the Panoche Drainage District in 2010 on a court-ordered schedule (referred to as the Control Schedule). Based on current conditions and recognition of completed drainage projects valued at roughly \$705 million in 2015 dollars<sup>1</sup>, the total remaining cost of providing drainage service within the San Luis Unit has been calculated at roughly \$3.1 billion. Reclamation estimates that it has

---

<sup>1</sup> The cost of implementing Reclamation's 2007 Record of Decision in April 2015 dollars is \$3.8 billion. However, some drainage actions have been implemented over time, particularly in the Northerly District area. These actions have a value of about \$705 million in April 2015 dollars. Therefore, if Reclamation were to implement its 2007 Record of Decision today, it is estimated to cost \$3.1 billion. This accounts for those actions that have already occurred to address drainage.

approximately \$513 million (in 2015 dollars) remaining in available indexed cost ceiling and approximately \$67 million in non-indexed cost ceiling, for a total of \$580 million remaining available under the San Luis Act of 1960. Complicating matters is the risk that Reclamation could be ordered by the Court to provide this drainage service notwithstanding the congressionally authorized construction ceiling under the San Luis Act.

- In 2011, a group of individual landowners within Westlands filed a lawsuit in the Court of Federal Claims alleging that the failure by the United States to provide drainage service to their lands resulted in a physical taking of their property without just compensation in violation of the Fifth Amendment. *Etchegoinberry v. United States*. The Court of Federal Claims denied the government's motion to dismiss the complaint. While the complaint does not specify a dollar amount for damages, estimates suggest that federal liability for just compensation could range from zero to over \$2 billion.
- In January 2012, Westlands filed a lawsuit in the Court of Federal Claims alleging that the government's failure to provide drainage service to the Westlands' service area constituted a breach of Westlands' 1963 Water Service and 1965 Repayment contracts (including the subsequent interim renewal of those contracts). The case is currently pending.
- The United States entered into a drainage Settlement with Westlands in September 2015. This Settlement, among other things, would relieve Reclamation of its obligation to provide drainage service to the San Luis Unit if legislation to authorize implementation of the Settlement is enacted by Congress. Under this Settlement, if approved by Congress, Westlands would assume responsibility for the management of drainage within its boundaries.
- Concurrently with the negotiation and approval of the Westlands Settlement, Reclamation negotiated a separate Northerly Districts Agreement that would secure the Northerly Districts' support for legislation amending the San Luis Act, transfer the legal responsibility for the management of drainage within the boundaries of each Northerly District to that district, and provide funding and other assistance from Reclamation.

## **Reasons the Northerly Districts Agreement is in the Best Interest of the United States**

- The total remaining cost exposure to the United States from the *Firebaugh* injunction is \$3.1 billion. Of this amount, \$2.5 billion is the estimated cost to provide drainage for Westlands and \$558 million is estimated for the Northerly Districts. (The total remaining authorized cost ceiling for Reclamation to provide drainage to the San Luis Unit is \$580 million. Nevertheless, there is a risk that Reclamation could be ordered by the Court to provide drainage service notwithstanding the congressionally authorized construction ceiling.)
- The Northerly Districts Agreement secures the support of those districts for amendments to the San Luis Act that, if enacted, would eliminate the statutory obligation of the United

States to provide drainage service and result in a substantial savings in future costs to Reclamation. Failure to secure the amendment of the San Luis Act will require Reclamation to provide drainage service to drainage-impaired lands, which – at an estimated remaining cost of \$3.1 billion in April 2015 dollars with \$580 million authorized – will have a significant impact on Reclamation’s regional and national budget and disrupt funding for other programs. The estimated cost of fully implementing Reclamation’s drainage plan (adopted in the 2007 Record of Decision) greatly exceeds the current authorized construction ceiling under the San Luis Act. Thus, in order to fully implement a drainage solution for the San Luis Unit absent both the Settlement Agreement and the Northerly Districts Agreement, Congress would need to amend the construction cost ceiling for the San Luis Unit. However, a risk exists that Reclamation could be ordered to provide this drainage service notwithstanding the current congressionally authorized construction ceiling under the San Luis Act of 1960. Implementation of the Control Schedule for completion of only a portion of the preferred alternative was envisioned to take over 10 years and was based on a steady stream of appropriations that averaged \$34.3 million annually<sup>2</sup> over a 10 year period from 2010 to 2019 (with some years as high as \$80 million in appropriations).

- The Northerly Districts Agreement, if authorized by Congress, would secure the support of those districts for a motion seeking to vacate the 1995 partial judgment and subsequent injunctive orders requiring the Secretary to provide drainage service to the San Luis Unit, including orders directing compliance with Control Schedules.
- The elimination of court-ordered obligations to provide drainage service would provide Reclamation additional flexibility in its budget with respect to other water-policy initiatives in California and throughout the West.

## **Congressional Authorization Needed**

Implementation of the Northerly Districts Agreement is contingent upon congressional authorization through the enactment of enabling legislation. Reclamation anticipates that the Westlands Settlement and the Northerly Districts Agreement would be authorized in a single bill.

## **Under the Proposed Terms of the Northerly Districts Agreement, the Northerly Districts would:**

- *Assume all responsibility for drainage in accordance with all legal requirements under state and federal law.* Each Northerly District would become legally responsible for the management of drainage water within its respective boundaries, in accordance with federal and California law.
- *Indemnify the United States for any damages and pay compensation for any individual landowner claims arising out of litigation related to drainage.* Under the Agreement, each Northerly District would agree to indemnify the United States for any landowner

---

<sup>2</sup> The work contemplated under the Control Schedule is confined to a limited portion of Westlands. The annual expense for that work is but a fraction of the overall work required to provide drainage service to all drainage impaired lands within the San Luis Unit.

claims (past, present and future) arising out of a failure to provide drainage service within its respective boundaries, once the United States has provided the funding under the Agreement. In addition, each Northerly District waives, releases, and abandons all claims against the United States arising from the alleged failure of the United States to provide drainage service.

- *Be relieved from potential drainage repayment.* If the United States were to expend significant funds to provide a drainage solution, Reclamation would seek repayment from the Northerly Districts (over 50 years, with no interest, commencing after completion of each separable element). By taking direct responsibility for drainage, the Northerly Districts' repayment responsibility would also be eliminated.
- *Assume title to certain facilities currently owned by the United States.* Each Northerly District would also take title to certain facilities including the Reclamation facilities that lie within its district boundaries and are operated exclusively for their use. In addition, the Panoche Drainage District would take title to the San Luis Drainage Demonstration Treatment Plant and a willing, but currently unidentified entity would be authorized to take title to the portion of the San Luis Drain from Check 19 to Milepost 78.5. Title to joint-use facilities authorized under the San Luis Act would not be transferred.
- *Receive appropriated funds to assist in drainage implementation.* To assist the Northerly Districts with the completion of certain drainage management actions, Reclamation would seek to provide the Northerly Districts with a total of \$70 million in funds over a 7 year period.

## **Under the Terms of the Northerly Districts Agreement, the United States would:**

- *Be relieved of all statutory obligations to provide drainage.* If authorized by Congress, the Northerly Districts Agreement and the Westlands Settlement together would relieve the Department of the Interior from all drainage obligations imposed under the San Luis Act, including implementation of the 2007 Record of Decision, at an estimated remaining cost of \$3.1 billion in April 2015 dollars. The Northerly Districts would join the U.S. in petitioning for *vacatur* of the 2000 Order Modifying Partial Judgment in the *Firebaugh* case directing implementation of drainage service and control schedules and, in combination with the Westlands Settlement, all other drainage litigation would either be dismissed or settled.
- *Receive indemnification for all drainage related claims.* Each Northerly District would agree to provide for the release, waiver and abandonment of all past, present and future claims arising from the government's failure to provide drainage service under the San Luis Act, including those by individual landowners within its respective service area, and would further agree to indemnify the United States for any and all landowner claims relating to the provision of drainage service or lack thereof within its respective service area.

- *Relieve the Northerly Districts repayment obligation for CVP construction charges to date (currently estimated to be \$52.7 million in 2015 dollars).* The Northerly Districts would be relieved of their current, unpaid capitalized construction costs for the CVP, the present value of which is currently estimated to be \$52.7 million. Under the Agreement the Northerly Districts would still be responsible for operation and maintenance, the payment of restoration fund charges pursuant to the Central Valley Project Improvement Act, and for any future CVP construction charges.
- *Convert the Northerly Districts' water service contracts into repayment contracts.* Under the Northerly Districts Agreement, if authorized by Congress, the Secretary would convert the Northerly Districts' current 9(e) water service contracts to 9(d) repayment contracts consistent with existing key terms and conditions. As "paid out" contractors, the benefit of this conversion is a permanent right to a stated share of CVP water (see below of additional discussion on what a permanent right entails). However, the terms and conditions of the contract – including the so called "shortage clause" – would otherwise be substantially the same as in the current 9(e) contracts.

## **How Would the Northerly Districts Manage Drainage?**

*The Northerly Districts would use a suite of measures to manage drain water in-Valley.* The Northerly Districts have been implementing drainage management for 20 years through a series of local actions, including on-farm and District source control improvements, recirculation and reuse of drainage, interception of groundwater; concentration and local management of salts, and development of treatment and disposal projects. These actions are coordinated into regional projects, such as the Westside Regional Drainage Plan, the Grasslands Bypass Project, and the San Joaquin River Water Quality Improvement Project. Reclamation has provided funding and technical assistance for a number of these actions. The Northerly Districts would continue to use these measures, which are similar to those identified in Reclamation's 2007 Record of Decision. These efforts would continue to be refined and evolve as conditions and technology change over time. The measures would be subject to ongoing monitoring and regulation by the Central Valley Regional Water Quality Control Board.

## **What Happens if the Northerly Districts Fail to Manage Drain Water After the Agreement is Approved?**

*The Northerly Districts would be subject to all state and federal laws and regulations regarding their obligations to provide drainage and would be subject to those requirements under the Agreement.* Nothing in the Agreement abrogates or interferes with applicable existing or future state and federal law or regulation relating to discharges of drain water from the Northerly Districts' service areas or groundwater quality. The Northerly Districts' obligations to manage drain water within their respective service areas would be a specified term in each of the new 9(d) contracts.

## **Potential Concerns that Could be Raised by Third Parties**

*Potential Concern: The Northerly Districts are receiving a permanent allocation of water.* To appropriately address this concern it is important first to understand the Northerly Districts'

water service contracts *without* the Agreement, and then compare current contractual rights with the Northerly Districts' rights *under* the Agreement if authorized by Congress.

WITHOUT AGREEMENT: Under section 1(4) of the Act of July 2, 1956, the Northerly Districts, like any other CVP water service and repayment contractor, have a “first right (to which the rights of the holders of any other type of irrigation contract shall be subordinate) to a stated share or quantity of the project’s available water supply . . . and a permanent right to such share or quantity upon completion of repayment of the amount assigned for ultimate return by the party . . .” The current 9(e) contract further provides that the Northerly Districts have both a right to renew their 9(e) contracts as well as the right to convert the 9(e) contract to 9(d) repayment contracts. The Northerly Districts’ current contracts reflect both of these concepts, subject to certain terms and conditions. Examples of such terms and conditions are:

- Reasonable and beneficial use as defined in state and federal Reclamation law;
- Payment of all operations, maintenance, capital, and other applicable charges appropriately allocated to each of the Northerly Districts; and,
- Other obligations being met within the CVP, including other contract priorities and any other applicable requirements of state and federal law, such as the federal Endangered Species Act.

Under current law, the Northerly Districts are required to repay by 2030 the remaining capital costs allocated to them as part of the original construction of the CVP (currently estimated to be \$52.7 million in 2015 dollars). Once all outstanding capital is paid out and appropriate federal accounting certifications are complete, the Northerly Districts would: (1) no longer be subject to certain provisions of the federal Reclamation Reform Act; and (2) their “first right” to a stated share of CVP water would become what is called by law a “permanent right” to the same share. This permanent right would still be subject to terms and conditions of a contract with the United States, and would still be subject to limitations on CVP operations under applicable state and federal law, including the shortage provision of their contracts.

CONDITIONS WITH THE AGREEMENT: The following are the only changes from the current water service contracts to new repayment contracts with the Northerly Districts, entered into under section 9(d) of the 1939 Reclamation Project Act, that would occur if necessary provisions of the Agreement are authorized by Congress and signed into law:

- The capital costs of the CVP allocated to the Northerly Districts would be considered paid out. Thus, the benefits that would have otherwise been available to the Northerly Districts after repayment of all capital would become available upon passage of the legislation;
- All terms and conditions that apply to the delivery of water to the Northerly Districts would still apply, including the so called “shortage clause” which allows the Secretary to provide CVP water for other legal purposes without incurring any legal

liability AND the Northerly Districts will agree that they, and not the United States, are responsible for the management of drainage water within their respective boundaries, in accordance with state and federal law.

*Potential Concern: The United States is forgoing an opportunity to further relieve stress on the Delta by failing to demand additional cuts in water supply under the Agreement.* Water exports would not change based on the Northerly Districts Agreement. The Agreement specifically avoids giving the Northerly Districts any greater rights to an annual allocation of water than they would have had if the 9(e) water service contract remained in place.

*Potential Concern: The forgiveness of capital repayment is unnecessary.* Under the terms of the Northerly Districts Agreement, if authorized by Congress, the Northerly Districts would receive forgiveness on past construction obligations for features of the CVP which amount to approximately \$52.7 million, along with forgiveness of a total of \$37.5 million for the San Luis Drain Feature Re-Evaluation, the Grasslands Bypass Project, and San Luis Drainage Demonstration Treatment Plant. The Northerly Districts would receive this relief for and to partially facilitate taking over the legal and financial responsibility for the management of drainage within their boundaries, which if implemented by the United States has a total remaining cost of roughly \$558 million in April 2015 dollars, and for indemnifying the United States against future drainage claims. In addition, the Northerly Districts would still be responsible for any future repayment obligation associated with the construction of new features of the CVP.

*Potential Concern: No acreage limitations.* As is allowed under current law, the Northerly Districts would be relieved of acreage limitations and full cost pricing under the Reclamation Reform Act. This is consistent with the capital repayment relief afforded the Northerly Districts under the Agreement. It is important to remember that, absent the Agreement, this relief would still occur once the Northerly Districts repaid the capital costs allocated to them as part of the construction of the CVP.

*Potential Concern: Other CVP water contractors and rate payers may be impacted by the forgiveness of capital repayment.* There would be no impact to other CVP contracts and rate payers by the Northerly Districts Agreement. Reclamation would finalize the capitalized construction obligation of the CVP allocated to the Northerly Districts absent this Agreement and forgive that amount. In addition, the Northerly Districts would continue to pay operations and maintenance costs, Central Valley Project Improvement Act Restoration Funds charges, and their share of any future capital construction costs, such as those of the Joint Federal Project at Folsom Dam and any Safety of Dams fix necessary at B.F. Sisk (San Luis Reservoir).

*Potential Concern: The Northerly Districts Agreement may impact the progress of the Grasslands Bypass Project and Delta water quality would be impacted.* Delta water quality would not be impacted by implementation of the Northerly Districts Agreement, and the Agreement will not slow progress in reducing drainage discharges that have been achieved under the Grassland Bypass Project. The Grassland Bypass Project operates under the terms of the 2009-2019 Agreement for Continued Use of the San Luis Drain (Third Use Agreement) between the San Luis & Delta-Mendota Water Authority and Reclamation. Discharges of drain water by the Grassland Bypass Project are regulated under waste discharge requirements issued by the

Central Valley Regional Water Quality Control Board. Under the terms of both the Third Use Agreement and the waste discharge requirements, all drainage discharges must cease by the end of 2019 in order to meet water quality objectives in receiving waters closest to the outlet of the Drain. The Grassland Bypass Project is already meeting all water quality objectives in the San Joaquin River downstream of the Merced River confluence, and therefore in the Delta. Further, the Third Use Agreement includes stiff financial incentives for those discharges to be reduced to zero as quickly as possible. There are no plans to execute another “Use Agreement” for drainage discharges through the Drain. The Northerly Districts Agreement envisions the possible use of the Drain for management of storm water in the future, not the management of drain water.

*Potential Concern: The \$70 million for the completion of the Westside Regional Drainage Plan provided in the Northerly Districts Agreement continues to place a financial burden on Reclamation’s budget.* Reclamation’s Mid-Pacific Region budget has averaged \$202 million from fiscal year 2007 to fiscal year 2016 and absent additional funds for the American Recovery and Reinvestment Act and Drought Management funds, has remained relatively stable. Over the last 10 years, funding provided for drainage-related actions has averaged \$11.6 million. The Northerly Districts Agreement envisions providing the Northerly Districts with \$70 million over 7 years, or approximately \$10 million per year to continue to carry out drainage actions. This approximately \$10 million per year is within the range and slightly less than the average funding that Reclamation has provided for drainage-related actions over the last 10 years.

It is important to note that absent the Northerly Districts Agreement, the Westland Settlement, and the legislation that authorizes both, Reclamation would likely need to return to implementing the Control Schedule, and would be required to provide drainage service to the San Luis Unit per the court order described above. The Control Schedule alone calls for an average annual appropriation of \$34.3 million.<sup>3</sup> This is 17 percent of Reclamation’s Mid-Pacific Region budget over the last 10 years. This substantial amount dedicated to drainage would likely mean that other high priority actions, funds for restoration projects, along with other areas of the Mid-Pacific Region’s budget would either remain at current levels or be cut to meet the substantial funding need to implement a court-ordered Control Schedule.

*Potential Concern: Westlands and the Northerly Districts can complete drainage actions for less than the remaining cost to implement Reclamation’s 2007 Record of Decision (\$3.1 billion).* Westlands and the Northerly Districts can realize efficiencies, such as using local or in-house labor, reduced travel, and different purchasing requirements than Reclamation, that reduce their cost to implement drainage as compared to the costs if Reclamation were to implement its 2007 Record of Decision. In addition, with Westlands and the Northerly Districts responsible for drainage, there is more incentive to increase irrigation efficiencies as new technology is developed in the future, place non-irrigation easements on additional lands as they are urbanized or are used for renewable energy purposes, or to implement similar, new and adaptive actions and technologies – all components of managing drainage that are largely outside of Reclamation’s control. Therefore, it is highly likely that Westlands and the Northerly Districts will be able to complete drainage actions for less than the remaining cost to implement Reclamation’s 2007 Record of Decision and to complete these actions in a way that is much more adaptive and responsive to changing technology and opportunities. However, it would take Reclamation a

---

<sup>3</sup> See fn. 2, supra.

number of years to complete a re-assessment of drainage actions, which may not result in significant cost savings. Currently, Reclamation's selected alternative, from the 7 action alternatives evaluated in its Final Environmental Impact Statement, is its 2007 Record of Decision, which has a remaining cost of \$3.1 billion in April 2015 dollars.

*Potential Concern: The drainage problem has lessened over the last decade and if fully implemented today, Reclamation might implement it differently than in its 2007 Record of Decision.* It is widely recognized that the drainage issue may have lessened over the last few years due to drought and irrigation efficiencies, but Reclamation is of the view that, long term, there will be a need for substantial financial investment to alleviate drainage concerns in the San Joaquin Valley. While California has experienced a series of dry years recently, the historical hydrologic record indicates that wet cycles will return and drainage will again become a substantial challenge in the San Luis Unit. Again, Reclamation's selected alternative, from the 7 action alternatives evaluated in its Final Environmental Impact Statement, is its 2007 Record of Decision.

*Potential Concern: The provision of project power for the San Luis Drainage Demonstration Treatment Plant and the transfer of facilities puts a further strain on project power resources.* The Northerly Districts Agreement includes providing project power for the San Luis Drainage Demonstration Treatment Plant and to facilities transferred to the Northerly Districts that previously had project power for pumping CVP project water. With regard to the San Luis Drainage Demonstration Treatment Plant, the Agreement caps the amount of project power provided in any year to 3 gigawatts. This is approximately half of the power needed to operate the facility at full capacity and represents a savings in project power needs if the facility were to be owned and operated by Reclamation. With regard to the facilities transferred to the Northerly Districts, project power will be provided for those facilities that previously were provided project power and only for the operation of said facility for pumping CVP project water. Said another way, project power will be provided as if these facilities were to remain in Reclamation ownership. Non-CVP project water pumped through these facilities or facilities that do not currently have project power will not be provided project power. It is important to note that the Northerly Districts will continue to pay for project power as they have in the past as well as commercial power for pumping non-CVP project water.