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Westlands v. United States Settlement

Current Litigation/Background for Settlement

- In 2000, the court in *Firebaugh Canal Co v. United States*, issued an Order requiring the Secretary of the Interior to provide drainage service to lands served by the San Luis Unit of the Central Valley Project. In 2007 Reclamation signed a Record of Decision selecting a drainage plan and finding that the cost of providing drainage for lands served by the San Luis Unit would be approximately \$2.6 billion. The costs are now estimated at approximately \$3.5 billion using 2015 cost indices. Reclamation began implementing the selected drainage plan in a portion of Westlands Water District in 2010 on a court-ordered schedule; Reclamation estimates that it has approximately \$513 million (in 2015 dollars) remaining in available cost ceiling under the San Luis Act.
- In 2011, individual landowners within Westlands Water District filed a takings claim against the United States alleging that failure to provide drainage service has caused a physical taking of their lands 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 breach of contract case 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 interim renewal of those contracts). The case is currently pending.

Reasons Settlement is in Best Interests of the United States

- Total cost exposure to the United States from the Firebaugh injunction is \$3.5 billion (\$513 million authorized), and potential liability in the Etchegoinberry takings litigation ranges from zero to more than \$2 billion.
- Failure to resolve litigation will require providing drainage to lands served by the San Luis Unit, which – at an estimated cost of \$3.5 billion (\$513 million authorized) – will have a significant impact on Reclamation's regional and national budget and potentially disrupt funding for other programs. Complicating matters is the risk that Reclamation could be ordered to provide this drainage service notwithstanding the congressionally authorized construction ceiling under the San Luis Act of 1960. Thus, in order to fully



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implement a drainage solution, there must be an amendment to the construction cost ceiling for the San Luis Unit. Current implementation of the Control Schedule for completion of only a portion of the preferred alternative will take over 10 years and is based on a steady stream of appropriations.

- Removal of the court order to provide drainage service will allow Reclamation to pursue other water-policy initiatives in California.
- There is the potential for significant financial exposure to the treasury in the *Etchegoinberry* litigation.

Proposed Terms of the Settlement

* Implementation of the Settlement is contingent upon congressional authorization of enabling legislation.*

Under the Proposed Terms of the Settlement, Westlands will:

- *Permanently retire not less than 100,000 acres of land from production.* Westlands will agree to permanently retire a total of *not less than 100,000 acres* of lands within its boundaries utilizing those lands only for the following purposes:
 - Management of drain water, including irrigation of reuse areas;
 - Renewable energy projects;
 - Upland habitat restoration projects; or
 - Other uses subject to the consent of the United States.
- *Cap contract deliveries at 75% of its CVP contract amount (from 1.193 million acre-feet to 895 thousand acre-feet).* Any water above this 75% cap, that would have been delivered to Westlands, would instead be available to the United States for other public purposes under the CVP.
- *Assume all responsibility for drainage in accordance with all legal requirements under state and federal law.* Westlands would become legally responsible for the management of drainage water within its boundaries, in accordance with federal and California law.
- *Indemnify the United States for any damages and pay compensation for claims arising out of the Etchegoinberry litigation.* Under the Settlement Westlands will indemnify the United States for any claims (past, present and future) arising out of a failure to provide drainage service with Westlands. Westlands would also intervene in the *Etchegoinberry* case for Settlement purposes and would pay compensation to individual landowners.
- *Continue to wheel water to Lemoore Naval Air Station.* As part of the overall Settlement, CVP water will be made available to Lemoore Naval Air Station and Westlands would

agree to wheel all CVP water made available to Lemoore under the same terms and conditions as Westlands wheels water to other Westlands' contractors.

- *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 Westlands (over 50 years, with no interest, commencing after completion of each separable element). By taking responsibility for drainage, Westlands would also eliminate responsibility for repayment.

Under the Terms of the Settlement, the United States will:

- *Be relieved of all statutory obligations to provide drainage.* The Settlement Agreement would relieve the Department of the Interior from all drainage obligations imposed by the San Luis Act, including implementation of the 2007 ROD, which is estimated to cost approximately \$3.5 billion (\$513 million authorized). Westlands will agree to dismiss with prejudice the *Westlands v. U.S.* breach of contract litigation and will 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.
- *Receive a waiver of claims for potential damages due to a failure to provide drainage service.* Westlands will 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 Westlands' service area, and would further agree to indemnify the United States for any and all claims relating to the provision of drainage service or lack thereof within the Westlands service area.
- *Relieve Westlands repayment obligation for CVP construction charges to date (approximately \$375 million).* Westlands will be relieved of its current, unpaid capitalized construction costs for the CVP, the present value of which is currently estimated to be \$375 million. Under the Settlement, Westlands will still be responsible for Operation and Maintenance, the payment of restoration fund charges pursuant to the CVPIA, and for future CVP construction charges.
- *Convert Westlands water service contract into a repayment contract.* The Secretary will convert Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing key terms and conditions. As a "paid out" contractor, the benefit of this conversion is permanent right to a stated share of CVP water. However, the terms and conditions of the contract—including the so called "shortage clause" – will otherwise be the same as in the current 9(e) contract.
- *Retain the right to cease water deliveries if Westlands fails to meet its drainage obligation.* Language in the Settlement makes the United States' obligation to provide water to Westlands under the 9(d) Repayment Contract conditional upon Westlands' fulfillment of its obligations to manage drainage water within its service area.

- *Issue a water service contract to Lemoore Naval Air Station.* As part of the overall Settlement, the United States is authorized to enter into a water service contract with Lemoore Naval Air Station to provide a guaranteed quantity of CVP water to meet the needs of the Naval Air Station associated with air operations and Westlands will agree to wheel all CVP water made available to Lemoore.

How Will Westlands Manage Drainage?

Westlands will use a suite of measures to manage drain water. The mix of measures Westlands uses will depend on the varying needs within the drainage-impaired areas, and will evolve as conditions change. These measures to be used include elements identified in Reclamation’s drainage plan, such as land retirement, source control through more efficient irrigation practices, and collection and reuse of shallow groundwater. It will also depend upon ongoing monitoring and regulation of groundwater under the Long Term Irrigated Lands Regulatory Program being administered by the Central Valley Regional Water Quality Control Board, which is described further below. Options available to Westlands may include: (1) Land Retirement; (2) Groundwater Management; (3) Source Control; (4) Regional Reuse Projects; (5) Drain Water Treatment; and (6) Salt Disposal. Westlands would also take title to certain facilities including the portion of the San Luis Drain that lies within Westlands’ service area

What Happens if Westlands Fails to Manage Drain Water After the Settlement is Approved?

Westlands will be subject to all state and federal laws and regulations regarding its obligation to provide drainage and will be subject to those requirements under the Settlement. Nothing in the Settlement abrogates or interferes with existing or future state and federal authority over any discharges of drain water from Westlands’ service area or groundwater quality. In addition, if Westlands fails to meet its drainage obligation, language in the Settlement makes the United States’ obligation to provide water to Westlands under the 9(d) Repayment Contract conditional upon Westlands’ fulfillment of its obligations to manage drainage water within its service area.

Settlement Concerns Raised by Third Parties

Concern: Westlands is receiving a permanent allocation of water. To appropriately address this concern it is important first to address Westlands’ water service contracts **without** the Settlement, and then compare current contractual rights with Westlands’ rights **under** the Settlement if authorized by Congress.

CONDITIONS NOW: Under section 1(4) of the Act of July 2, 1956, Westlands, like other CVP water service and repayment contractors, has a “first right” to a share of water developed as part of the Central Valley Project (“CVP”), expressed as a “right to renew” a Reclamation contract. This first right means that Reclamation does not offer CVP water that is under current contract (either water service or repayment) to other potential users until the contractor has declined to contract for that water. Westlands’ current interim contract reflects this concept, subject to certain terms and conditions, by providing a right to renew. 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 Westlands;
- Other obligations being met within the Central Valley Project, including other contract priorities and any other applicable requirements of state and federal law, such as the federal Endangered Species Act.

Under current law, Westlands is required to repay the remaining capital allocated to it as part of constructing the CVP by 2030. Once this capital is paid out and appropriate federal accounting certifications are complete, Westlands would (1) no longer be subject to certain provisions of the federal Reclamation Reform Act; and (2) its “first right” to a 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.

CONDITIONS WITH SETTLEMENT: The following are the only changes from the current water service contract to a new repayment contract with Westlands, entered into under § 9(d) of the 1939 Reclamation Project Act, that would occur if the Settlement is authorized by Congress and signed into law:

- The capital costs of the CVP allocated to Westlands would be considered paid out. Thus, the benefits that would have otherwise been available to Westlands starting in 2030, would become available upon passage of the legislation;
- All terms and conditions that apply to the delivery of water to Westlands will still apply, AND two additional conditions would be added to a new repayment contract, as follows:
 1. Water deliveries to Westlands would be conditioned on fulfillment of its obligation to manage drainage water within its boundaries, and consistent with federal and state law; and
 2. Although the contractual share of CVP water available to Westlands is, and will continue to be, 1,193,000 acre feet, actual deliveries of water to Westlands will not exceed 895,000 acre feet, and Westlands agrees that any CVP water available in excess of 895,000 to which it may otherwise be entitled absent the Settlement, would be available to the Secretary to use for any other authorized purpose.

Concern: The contract quantity is still too large. Westlands is agreeing to a 25% reduction in deliveries as the maximum amount allowed under its contract. It is important to note this is the maximum delivery amount allowed under the contract. Westlands is still subject to beneficial use requirements under state law.

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 Settlement. Water exports will not increase based on the Settlement. The Settlement specifically avoids giving Westlands any greater rights to an annual allocation of water than Westlands would have had if the 9(e) water service contract had remained in place. Westlands is also subject to state law requirements for beneficial use, and may decide to retire additional lands as a means of managing drainage water.

Concern: The Settlement mandates insufficient land retirement. The Settlement secures the permanent retirement of lands now largely owned by Westlands; absent the Settlement, lands acquired by Westlands but currently fallowed could be brought back into production in the future. However, the land retirement requirement of 100,000 acres under the Settlement is not a cap on land retirement. Westlands will be able to target the acquisition and retirement of additional drainage-impacted lands to address local conditions and without the distorting effects of higher mandated retirement acreage on land prices.

Concern: The debt forgiveness is inappropriate. Under the terms of the Settlement Westlands is receiving debt forgiveness on past construction obligations for features of the CVP which amounts to approximately \$375 million. Westlands is receiving this in return for undertaking the drainage obligation, which if implemented by the United States would cost in excess of \$3.5 billion (\$513 million authorized), and for indemnifying the United States against future drainage claims. In addition, Westlands will still be responsible for any future repayment obligation associated with new features of the CVP.

Concern: No acreage limitation. As is allowed under current law, Westlands will be relieved of acreage limitations and full cost pricing under the Reclamation Reform Act. This is consistent with the capital repayment relief afforded Westlands under the Settlement.

Concern: How are other CVP water contractors and rate payers protected from increased rates as a result of the debt forgiveness? The Settlement protects other contractors from any shift in costs and specifically mandates that Westlands will continue to pay operation, maintenance and replacement costs in addition to any future new construction costs. Specifically, paragraph 17 of the Settlement provides that “[i]mplementation of the provisions of this Agreement shall not alter the repayment obligation of any other long-term water service or repayment contractor receiving water from the Central Valley Project, or shift any costs to other such contractors that would otherwise have been properly assignable to Westlands absent this action, including operations and maintenance costs, construction costs, or other capitalized costs to Westlands after the date of this Agreement.”

The Settlement further provides in section 9(c)(v) “the repayment relief afforded to Westlands in subsection (iv) shall not extend to Westlands’ operation, maintenance and replacement obligations...or to construction costs or other capitalized costs not yet allocated to or incurred by Westlands as of the date of this Agreement....”

Concern: Delta water quality will be impacted as a result of the Settlement. Delta water quality will not be impacted by the Settlement Agreement. Currently, Westlands does not discharge subsurface drainage water outside of its boundaries. Under the Settlement Agreement, Westlands will be obligated to manage drain water within its boundaries and will not be

permitted to discharge drainage to the Delta. Also, under the Settlement Agreement, Westlands' management of drainage water will continue to be regulated under current state and federal laws. Ultimately, if Westlands does not comply with its obligation to manage drain water, under the terms of the Settlement, its water supply can be cut off.