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Westlands Drainage Settlement: A Primer

Background

The Westlands Water District provides water to users in the Western San Joaquin Valley. It is located within the San Luis Unit of the U.S. Bureau of Reclamation's ("Reclamation") Central Valley Project. In its initial feasibility report for the San Luis Unit, Reclamation indicated that drainage facilities would be required to carry away waste irrigation water in order to prevent salt accumulations that would render the soil unfit for irrigation. For that reason, the San Luis Act, P.L. 86-488, 74 Stat. 156 (1960), which authorized the creation of the San Luis Unit, prohibited Reclamation from commencing construction of the San Luis Unit until it either received assurances from the state of California that it would provide a master drainage outlet for the San Joaquin Valley or Reclamation had provided for the construction of an "interceptor drain" (as described in Reclamation's feasibility study) that would meet the drainage requirements of the San Luis Unit. After the state of California notified Reclamation that it would not provide a master drain for the San Joaquin Valley, Reclamation informed Congress that it would make provision for the construction of the San Luis interceptor drain.

Reclamation began delivering water to Westlands Water District ("Westlands") in 1967, but construction of the interceptor drain did not begin until 1968. Between 1968 and 1975, Reclamation constructed over 80 miles of the planned 207 miles of the interceptor drain before halting construction of the interceptor drain, citing public concerns. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000). The interceptor drain originally was intended to end at the confluence of the Sacramento and San Joaquin Rivers Delta with San Francisco Bay ("Bay-Delta") near Contra Costa, but in 1975 it reached only to the Kesterson Reservoir, which originally was meant to serve as a regulating reservoir. However, beginning in 1964, riders to appropriations legislation prohibited Reclamation from selecting a terminus for the interceptor drain until it and the state of California had established water quality standards for discharge of the drainage water. As of 1975, no such standards had been established. Thus, when Reclamation halted construction, Kesterson Reservoir served as a temporary terminus for the drain.

In 1983, studies revealed embryo deformity and mortality among waterfowl nesting at Kesterson Reservoir. It was suspected that these problems were caused by selenium from soils in Westlands that had been carried to Kesterson Reservoir through the drain. For that reason, in 1985, Reclamation announced that it would close Kesterson Reservoir, and by June 1986 it had plugged the drains in Westlands and closed the interceptor drain. Since then, Reclamation has not provided any drainage in Westlands.

Firebaugh Canal/Sumner Peck Ranch Litigation

After Reclamation closed Kesterson Reservoir and the interceptor drain, in *Firebaugh Canal Co. v. United States*, No. CV-F-88-634 (E.D. Cal.), and *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048, landowners, from both within and without the San Luis Unit, filed suit against Reclamation (Westlands is both a co-defendant and a cross-claimant against Reclamation) to force Reclamation to complete a master drain to the Bay-Delta, as envisioned in Reclamation's original feasibility study, among other reasons. In 1995, the United States District Court for the Eastern District of California found that the San Luis Act required Reclamation to provide drainage to the San Luis Unit, and that the appropriations riders had not relieved it of this duty. The district court therefore ordered Reclamation to obtain a discharge permit from the California Water Resources Control Board in order to complete the interceptor.

In 2000, the United States Court of Appeals for the Ninth Circuit affirmed the district court's finding that the San Luis Act required Reclamation to provide drainage within the San Luis Unit, and that it had failed to comply with this duty since it plugged and closed the interceptor drain in 1986. However, the Ninth Circuit concluded that subsequent acts of Congress had granted Reclamation discretion in how it would comply with this duty other than through the interceptor drain envisioned in the original feasibility study. For that reason, the court concluded, the district court had overstepped its authority when it required Reclamation to apply for a discharge permit to complete the interceptor drain.

The Westlands Settlement Agreement

Following the Ninth Circuit's decision, the district court ordered Reclamation to develop a detailed plan of action for complying with the San Luis Act. In April 2001, Reclamation submitted its initial plan of action, which called for an analysis of feasible alternatives for providing drainage within the San Luis Unit. From these analyses, Reclamation developed three categories of drainage service methods: (1) in-valley alternatives; (2) out-of-valley alternatives; and (3) beneficial use alternatives. Although Reclamation identified several variations within each of these alternatives, generally the in-valley alternatives focused on options that would dispose of the drainage water within the San Joaquin Valley, the out-of-valley alternatives involved disposal of drainage water in the Pacific Ocean and/or the Bay-Delta, and the beneficial use alternatives would employ reverse osmosis technology to clean the drainage water, after which the clean water and possibly the salts removed from the drainage would be put to beneficial

use. Following several years of planning reports and environmental analyses, in March 2007 Reclamation issued a Record of Decision (ROD), in which it selected an option that would involve a combination of in-valley disposal and land retirement (i.e., removal of certain land from agricultural use). In a March 2008 feasibility study, Reclamation estimated that the total cost of construction of the drainage plan selected in the ROD would come to \$2.69 billion. The feasibility study also identified several legislative changes that would be necessary to construct the drainage plan selected by the ROD. These changes included an increase in appropriations authority, which at that time was limited to \$429 million for construction of the drainage system. Additionally, the feasibility study determined that Reclamation would need to seek legislative authorization to charge water districts less than the full capital, operation, and maintenance costs associated with the ROD drainage plan, which otherwise would be required by law, as the feasibility study found that the districts would not be able to pay these costs in full. Reclamation submitted the feasibility study to Congress in July 2008.

Although no legislation has been passed to increase Reclamation's construction authorization or to relieve the water districts of their full payment obligations under existing law, Reclamation has proceeded with some portions of the ROD drainage plan. For instance, according to an April 2015 status report filed with the district court, Reclamation has constructed a demonstration treatment plant in the northern portion of the San Luis Unit, which began test operations in 2014 (although testing later was suspended due to problems with certain parts of the bioreactor at the plant).

In April 2015, Reclamation informed the district court that it and Westlands had completed a draft settlement agreement, which had been submitted to the Department of Justice for review. Reclamation did not provide the court with any specifics; however, a document dated December 6, 2013, titled "Principles of Agreement for a Proposed Settlement between the United States and Westlands Water District Regarding Drainage" ("Principles of Agreement"), purports to lay out several provisions that Reclamation may intend to include in the draft agreement currently under review (it appears that Reclamation was involved in drafting the Principles of Agreement). Among other things, the Principles of Agreement provide the following:

1. Congress would amend the San Luis Act to relieve Reclamation of its obligations to provide drainage in the San Luis Unit;
2. Westlands would assume legal responsibility for management of drainage water for lands in its boundaries;
3. Reclamation would relieve Westlands of its existing capital repayment obligations;
4. Landowners within the Westlands Water District would be exempt from the Reclamation Reform Act's (P.L. 97-293, 96 Stat. 1263 (1982)) acreage restrictions and full-cost pricing provisions;
5. Reclamation would convert Westlands' water service contract to a repayment contract;
6. Reclamation would be allowed to enter into a water service contract for delivery of water to Lemoore Naval Air Station;
7. Westlands' water deliveries would be capped at 75% of the amount allowed under existing contracts;
8. Westlands would permanently retire 100,000 acres of lands in its service area, including land that it had acquired through prior settlements, and that these lands would be used for management of drain water, renewable energy projects, habitat restoration projects, or other purposes approved by Reclamation;
9. Westlands would indemnify Reclamation against any takings claims by individual landowners based on Reclamation's alleged failure to provide drainage; and
10. Westlands would intervene in *Etchegoinberry v. United States*, No. 11-564-L (Fed. Cl.), for purposes of settlement, and Westlands would be responsible for any compensation due to landowners within its service area (this litigation involves takings claims based on alleged damage to property caused by the lack of drainage in the San Luis Unit).

The Principles of Agreement provide that points 1-6 listed above would be included in enabling legislation (upon which, presumably, any settlement would be contingent). However, it is unclear which, if any, of the points listed above are in the draft settlement agreement under review by the Department of Justice.

Issues for Congress

As outlined in the Principles of Agreement, it is possible that some of the identified actions may require congressional authorization. Additionally, the \$2.69 billion cost for the drainage plan selected in the 2008 ROD was of concern to many observers at the time and, in part, has led to the ongoing negotiations. If a settlement agreement is not reached, Congress may be faced with the decision of whether to appropriate significant funding for a drainage solution.

Contrariwise, Congress could relieve Reclamation of its obligation under the San Luis Act to provide drainage by amending the act itself. However, if Congress were to do so, additional questions would remain regarding Reclamation's obligations under existing contracts, as well as its liability to landowners for possible takings.

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