

**Statement of John Bezdek
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U.S. Department of the Interior
Before the
U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Water, Power and Oceans
On HR 4366 (Valadao) and HR 5217 (Costa) – The San Luis Unit Drainage Resolution Acts
May 24, 2016**

Chairman Fleming, Ranking Member Huffman, I am John Bezdek, Counselor to the Deputy Secretary at the Department of the Interior. I am pleased to provide the views of the Department of the Interior (Department) on HR 4366, the San Luis Unit Drainage Resolution Act. The Department supports the goal of providing a long term drainage solution in the San Luis Unit. The Department notes that HR 4366 would authorize the implementation of a settlement of litigation with the Westlands Water District (Westlands) and provide a long term drainage solution and therefore supports the bill. The Department is also aware of the Subcommittee's interest in HR 5217, which authorizes the Westlands settlement, but additionally authorizes a related agreement (Northerly District Agreement) with three water districts in the northern reaches of the San Luis Unit service area. I will address HR 4366 first.

For over twenty-eight years, there has been litigation surrounding drainage for lands served by the San Luis Unit (SLU) of the Central Valley Project (CVP). Currently, the Bureau of Reclamation is under a court order to provide drainage services to these impaired lands and the only drainage alternative that has undergone environmental and feasibility review will cost approximately \$3.8 billion in 2015 dollars. If settlement is not authorized, significant amounts of funding will be directed towards providing drainage services. In order to meet this court-ordered mandate, the Department may have to significantly reduce or potentially eliminate other programs.

The San Luis Unit (SLU) is part of the Bureau of Reclamation's (Reclamation) Central Valley Project (CVP) in California. Congress authorized the SLU on June 3, 1960, under Public Law No. 86-488. As originally authorized, the Act contemplated facilities to remove drainage water from irrigated lands to achieve a long-term, salt and water balance necessary to maintain sustainable agriculture in the SLU. 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, which provided drainage to a portion of Westlands. Litigation over the United States' drainage obligation commenced shortly after the United States halted use of the San Luis interceptor drain and plugged all Federal drainage facilities in the SLU following the discovery of embryonic deformities of aquatic birds at Kesterson Reservoir. Kesterson Reservoir was emptied and, since that time, the United States has not resumed

drainage service to Westlands. These details are a matter of public record, and my statement will summarize only the facts relevant to the legislation before the subcommittee today.

Following the closure of Kesterson Reservoir and the plugging of the Drain, two lawsuits were filed regarding the provision of drainage. *Firebaugh Canal Water District v. United States* was filed in 1988 by two water districts located outside and “downslope” of the SLU. The action was partially consolidated with *Sumner Peck Ranch, Inc. v. United States*, a similar action brought in 1991 by approximately 100 landowners located within the SLU. In 1995, following a trial, the district court entered a partial judgment that the Secretary of the Interior’s (Secretary) obligation under the San Luis Act to provide drainage was not excused or rendered impossible. In 2000, the Ninth Circuit largely affirmed the partial judgment, and on remand the district court entered an injunction (2000 Order Modifying Partial Judgment) against the Secretary requiring Reclamation to provide drainage service “without delay” to the SLU. In 2002, the United States settled the *Sumner Peck* plaintiff’s claims.

In compliance with the 2000 Order Modifying Partial Judgment, the Department developed a Plan of Action outlining the steps it would follow to implement a drainage solution for the SLU. Following completion of an environmental impact statement, Reclamation issued a Record of Decision (ROD) in March 2007, in which Reclamation selected a drainage alternative that met the drainage service requirements of the district court’s injunction. The Department also prepared and submitted to Congress a feasibility report, concluding that the cost of implementing the selected alternative would be approximately \$2.7 billion (now \$3.8 billion in April 2015 dollars). That amount exceeds the remaining appropriations ceiling originally authorized for construction of the SLU. As a result, the alternative selected in the ROD cannot be fully implemented under existing law. As part of the on-going litigation, the Department advised the district court in November 2009 that, while it could not implement the entire ROD, sufficient appropriation ceiling remained to allow it to construct one subunit of drainage facilities within a portion of Westlands. Reclamation began implementing the selected drainage plan in a subunit of Westlands in 2010 and in the Northerly Area of the SLU with construction of the Demonstration Treatment Plant in 2012, pursuant to a court ordered control schedule. Beyond that subunit, however, the Department remains unable to continue implementation of the ROD without additional Congressional authorization. In 2012, the district court entered final judgment against the *Firebaugh* plaintiffs dismissing their remaining claims while maintaining jurisdiction to supervise compliance with the 2000 injunction requiring Reclamation to provide drainage service to drainage-impaired lands in the San Luis Unit.

On September 2, 2011, individual landowners within Westlands Water District filed suit 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. Plaintiffs brought their suit as a class action on behalf of all landowners located within Westlands “whose farmlands have not received the necessary drainage service the

United States is required to provide under the San Luis Act....” A plaintiff class has not yet been certified. A motion by the United States seeking dismissal of the takings claim was denied on September 20, 2013¹. The Opinion contains language sharply critical of the United States’ delay in providing drainage to Westlands. The Court of Federal Claims has stayed this litigation to allow settlement negotiations to proceed, but is requiring the submission of regular status reports on the progress of the discussions. 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.

On January 6, 2012, Westlands filed its own suit against the United States also 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 interim renewal of those contracts) with the United States. The United States moved to dismiss Westlands’ claims. On January 15, 2013, the Court of Federal Claims granted the United States’ motion to dismiss, ruling that none of the contracts contained an enforceable promise to provide drainage to Westlands.² Westlands has appealed to the Federal Circuit, and briefing on the appeal is complete. On December 2, 2015, the Federal Circuit granted a stay through January 20, 2017.

The Westlands Settlement resolves *Westlands Water District v. United States*, the remaining breach of contract case relating to the United States’ drainage obligation. The Settlement also provides for the vacatur of the 2000 Order Modifying Partial Judgment in *Firebaugh Canal Water District v. United States*, allowing the U.S. to avoid the costs of meeting its statutory and court-ordered drainage obligation, currently estimated to be \$3.8 billion. The Settlement further provides a framework for resolving *Michael Etchegoinberry, et. al. v. United States*, the Fifth Amendment takings case brought by individual landowners within Westlands.

Interested parties have commented on the 2010 letter from the then-Commissioner of the Bureau of Reclamation to Senator Feinstein focusing on how the key legislative elements outlined in that letter differ from the Settlement ultimately negotiated by the parties. While the letter outlined key elements of a long-term drainage strategy that the Administration would support if Congress were to consider authorizing a resolution of the drainage issues in the SLU, the letter was not an Administration proposal for legislation. The Department’s belief was that a legislative response was needed and the letter was an effort to facilitate Congress moving forward with a resolution. However, Congress took no action on the legislative elements the Department indicated it could support. Therefore, the Administration explored a negotiated resolution of the drainage problem with Westlands as a response to the projected costs of construction of drainage service facilities in Westlands under control schedules which had been submitted to the district court under the

¹ *Etchegoinberry, et. al. v. United States*, 114 Fed. Cl. 437 (2013).

² *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177 (2013).

partial judgment and injunction. Moreover, Reclamation has grown increasingly concerned about the potential financial impact of compliance with the judgment on its ability to meet other priority programs. Lack of legislation by Congress, new legal challenges and financial concerns all played a significant role in the Department's decision to enter into settlement negotiations with Westlands and ultimately into the terms of the Settlement itself.

Benefits of the Westlands Settlement to the United States:

- If enacted into law, the proposed legislation would amend the San Luis Act to relieve the Department from all drainage obligations imposed by that statute, including implementation of the 2007 ROD, the present cost of which is estimated to be \$3.8 billion.
- Westlands agrees to dismiss *Westlands v. U.S.*, the breach of contract litigation, and would join the U.S. in petitioning for vacatur of the 2000 Order Modifying Partial Judgment in the *Firebaugh* case, which presently requires Reclamation to implement drainage service.
- The Settlement establishes a framework for resolving all individual landowner claims in the *Etchegoinberry* takings case. Specifically, Westlands would participate in this case for settlement purposes and would provide compensation to affected landowners. Otherwise, potential exposure to Federal taxpayers from an adverse judgment could be as high as \$2 billion.
- Westlands agrees to release, waive and abandon all past, present and future claims related to drainage, and agrees to indemnify the United States for any and all claims from individual landowners relating to the provision of drainage service or lack thereof within its service area.
- Westlands agrees to permanently retire at least a minimum of 100,000 acres of lands within its boundaries utilizing those lands only for the following purposes:
 - a. management of drain water, including irrigation of reuse areas;
 - b. renewable energy projects;
 - c. upland habitat restoration projects; or
 - d. other uses subject to the consent of the United States.
- The Settlement transfers the legal obligation to manage drainage for lands within Westlands service area from the United States to Westlands. The United States will retain the ability to enforce this obligation through a contract term conditioning the U.S. obligation to make water available to Westlands upon its compliance with State and Federal law.
- Westlands agrees to cap its CVP water deliveries at 75 percent of its contract quantity. Any CVP water which Westlands would otherwise receive above this 75 percent cap would become available to the United States for other CVP authorized purposes.

- Westlands agrees that all drainage water will be disposed of within Westlands’ district boundaries and that no drainage water will be discharged outside of Westlands’ boundaries.
- As part of the Settlement, the United States would enter into a water service contract with Lemoore Naval Air Station to provide a quantity of CVP water to meet the irrigation needs of the Naval Air Station associated with air operations, and Westlands agrees to wheel CVP water made available to Lemoore.

Benefits of the Westlands Settlement to Westlands

- Westlands will be relieved of current, unpaid capitalized construction costs for the CVP, the present value of which is currently estimated to be \$295 million. Westlands will still be responsible for operation and maintenance costs, will pay restoration fund charges pursuant to the Central Valley Project Improvement Act and will be responsible for future CVP construction charges associated with new construction of the project (e.g. Folsom Reservoir Safety of Dams modifications).
- The Secretary will convert Westlands’ current 9(e) water service contract to a 9(d) repayment contract consistent with existing terms and conditions and all terms of the Settlement. As a “paid out” project, the benefit of this conversion gives the district a contract with no expiration term, consistent with other paid out Reclamation projects. However, the contract will contain terms and conditions that are nearly identical to those in the current 9(e) contract, including the shortage provision.
- Westlands will be relieved of Reclamation Reform Act (RRA) (96 Stat. 1269) provisions relating to acreage limitations and full cost pricing. The RRA grants this relief on its face to projects that are considered “paid-out.” Additionally, the tiered pricing provisions are triggered when a district receives 80 percent of its contract quantity, and as part of this settlement, Westlands water deliveries will be capped at 75 percent of its contract quantity.
- Westlands will also take title to certain facilities within its service area that it currently operates.

Several aspects regarding the obligation to provide drainage service were evaluated in determining the overall net benefit to the United States. Included in this consideration were avoided drainage construction costs, repayment to the United States of reimbursable costs, relief from Reclamation Reform Act fees, and unpaid CVP capital obligations. The United States would also benefit from avoided financial liability in the *Etchegoinberry* takings litigation, which could be as high as \$2 billion.

The Department recognizes that Westlands can realize efficiencies, such as local or in-house labor, reduced travel, and different purchasing requirements than Reclamation, that reduce its cost to implement drainage as compared to the costs that Reclamation would incur if

Reclamation implemented the 2007 ROD. Nevertheless, while the scope of the drainage problem may have lessened in recent years due to drought and irrigation efficiencies, the Department is of the view that there will continue to be a need for substantial financial investment to alleviate drainage concerns in the San Joaquin Valley in the long term. While California has experienced a series of dry years recently, the historic hydrologic record indicates that wet cycles will return and the drainage challenge in the San Luis Unit will increase. With Westlands responsible for drainage within its boundaries, there is more incentive to increase irrigation efficiencies should new technology be developed in the future, which is a component of managing drainage that is largely outside of Reclamation's control. It should also be noted that Westlands will be responsible for implementing drainage in perpetuity. Costs will rise as drainage actions are implemented many years and potentially, decades into the future.

It is the Department's belief that the Settlement results in a savings to the American taxpayers when compared to the costs that would occur without the terms agreed to in the Settlement. Moreover, we are also of the view that failure to settle on-going litigation will place the Department's ability to address the effects of the ongoing drought in both the short term and long term at risk due to the potential of significant amounts of appropriations being expended on providing drainage service. As a practical matter, should our efforts to settle litigation with Westlands fail, funding for programs throughout Reclamation are likely to be reduced in order for Reclamation to adequately fund the Control Schedule.

Were the Settlement not to be approved by Congress, Reclamation would still be obligated to implement drainage service to all drainage-impaired lands in the SLU as required under that Act and the injunction. To fully carry out that obligation, Congress would need to increase the appropriations ceiling imposed by the San Luis Act and appropriate adequate funds to complete the work. Some members of the public and this subcommittee have expressed concerns with many aspects of the Settlement, and the Department appreciates those concerns and would note that this settlement is a unique situation stemming, in part, from a specific set of judicially-imposed, legal requirements and should not be seen as precedential for future settlements. But it is the Department's view that in this specific case, the years of negotiation that have led to the Settlement and the introduction of HR 4366 have produced the best possible outcome for the people of California, the environment, and the American taxpayer. With the enactment of HR 4366, nearly three decades of litigation, enormous potential liabilities for the United States, and a longstanding environmental problem will be comprehensively resolved.

As stated above, the Department is also aware of the provisions of HR 5217 which would authorize the Northerly District Agreement. The Department believes that agreement is consistent with, and complementary to, the Westlands settlement. However, the Office of Inspector General at the Department of the Interior is currently involved in an investigation, pending which, the Department is withholding a decision on the Northerly District Agreement and has no position on HR 5217 at this time. This concludes my written statement. I would be pleased to answer questions at the appropriate time.