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Testimony
Before the Subcommittee on Water, Power, and Oceans
Committee on Natural Resources
United States House of Representatives

Legislation to Authorize Implementation of the
Settlement Agreement Between the United States and Westlands Water District
For the Purpose of Resolving Litigation Related To Drainage

May 24, 2016

Mr. Chairman and members of the Subcommittee, my name is Thomas Birmingham, and I am General Manager/General Counsel of the Westlands Water District. I appreciate the opportunity to testify today in support of H.R. 4366, the "*San Luis Unit Drainage Resolution Act*," which authorizes the implementation of the settlement agreement between the United States and Westlands Water District for the purpose of resolving litigation related to the Secretary of the Interior's obligation to provide drainage service to the San Luis Unit of the Central Valley Project.

1. Westlands Water District

Westlands Water District (Westlands) is a public agency of the State of California, which was formed by an act of the State Legislature for the purpose of supplying irrigation water to land on the westside of the San Joaquin Valley. The District's principal office is in Fresno, California, and it consists of more than 600,000 acres of land in Fresno and Kings counties. The lands within Westlands are among the most productive agricultural lands in the world. Fruits and vegetables produced in Westlands grace dining tables across the United States. That tremendous productivity occurs though a combination of the area's climate and soil, the skill and diligence of area farmers, and water. Westlands provides most of the water used to irrigate these lands, water it receives under a contract with the federal Bureau of Reclamation (Reclamation). Because of its role in providing essential irrigation water, Reclamation rightly deserves credit for helping to create what is now a highly valuable agricultural resource. In this respect, federal reclamation policy has been a notable success.

For some lands within Westlands, as with lands elsewhere in the San Joaquin Valley, and across the United States, something more is required to keep the lands productive over the long term. Some lands require drainage. In the United States alone, 11 million of 44 million irrigated acres require drainage to remain productive. But disposing of drainage water can create its own set of concerns and issues, such as impacts to water quality. As a result of such concerns today there is no drainage of lands in Westlands, with the result that some lands in Westlands can no longer support irrigated crops. Without a solution, still more lands will be rendered infertile. With respect to drainage for these lands, federal reclamation policy has been a notable failure.

2. History of Litigation Concerning Drainage Service for the San Luis Unit

An understanding of the importance of H.R. 4366 requires an understanding of the events that have brought us to this point. I am confident that the members of Congress who approved the construction of the San Luis Unit of the Central Valley Project in 1960 would have been very surprised to learn that this Subcommittee is considering legislation, fifty-six years later, to resolve litigation concerning the Secretary's duty to provide drainage to the San Luis Unit, as the 1960 legislation was intended to have resolved that issue.

In 1960, it was understood that the delivery of irrigation water to areas within the San Luis Unit would also require drainage. Studies of the proposed San Luis Unit confirmed

the need for drainage. Lands in areas adjacent to the proposed San Luis Unit were experiencing drainage problems, and landowners in those adjacent areas expressed concerns that providing irrigation water to the San Luis Unit lands without drainage could exacerbate their drainage problem. Indeed, California's earliest water plans recognized that if water were exported from the Sacramento – San Joaquin Rivers Delta and used in the Central Valley a master drain would be needed. Accordingly, in section 1(a) on the San Luis Act, Congress required the Secretary to provide for a drain to the Delta in the event that the State of California did not provide a drainage system. (Act of June 3, 1960, Public Law 86-488, 74 Stat. 156.) In 1961, California informed the Secretary that it would not provide a master drain, and on January 9, 1962, the Secretary advised the Congress that he would make provision for the drain called for by the San Luis Act. Later, Reclamation entered contracts with Westlands (and other San Luis Unit Contractors) under which drainage service for lands within Westlands was contemplated.

There is a long trail of litigation over the Secretary's performance of these statutory and contractual duties.

That trail begins in 1963, when a group of districts now known as the San Joaquin River Exchange Contractors, which serve irrigation water to lands adjacent to the San Luis Unit, filed suit to compel the Secretary to provide for the drain before commencing construction of the San Luis Unit. The District Court denied an injunction, and dismissed the action, based on assurances by the United States that it would provide drainage to the San Luis Unit.

Construction of the San Luis Drain began in 1968, but in 1975 the Secretary halted construction with only 40% of the Drain completed, based on concerns expressed by various groups about effects of the discharge of drain water into the Delta. Without a terminus in the Delta, drainage water generated from the limited area then being drained was stored on an interim basis at Kesterson Reservoir. The drainage water contained selenium, a naturally occurring mineral that was leached from soils in Westlands served by the Drain. Selenium is an essential part of the human and animal diet, but at sufficiently high concentrations can cause adverse effects to human health, animal life and crops. Selenium was identified as the cause of deformities and mortality in waterfowl embryos at Kesterson Reservoir, and in 1985 the Secretary announced that Kesterson and the Drain would be closed. The Secretary failed to provide any alternative plan for providing drainage.

In 1988 and 1991, various landowners and water districts, including the Exchange Contractors, brought multiple actions against the Secretary to compel the Secretary to provide the drainage service required by the San Luis Act. (*See Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715 (E.D. Cal. 1993).) After the District Court ruled that the San Luis Act imposed a mandatory duty to provide drainage, the government argued that changes in law since the adoption of the San Luis Act made compliance impossible. After a three-week trial, the District Court rejected the government's contentions. The government then appealed to the Ninth Circuit of

Appeals. In the meantime, nothing was being done to provide federal drainage service to Westlands.

In 2000, forty years after passage of the San Luis Act, and fifteen years after the Secretary essentially quit on drainage, the Ninth Circuit weighed in on the drainage issue. (*Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000).) The Ninth Circuit held that the Secretary has a mandatory duty to provide drainage service to the lands of the San Luis Unit, although the Secretary has discretion whether to provide drainage service by a drain to the Delta or by some other means. The Ninth Circuit said:

We agree with the district court that the Department of Interior must act to provide drainage service. The Bureau of Reclamation has studied the problem for over two decades. In the interim, lands within Westlands are subject to irreparable injury caused by agency action unlawfully withheld. Now the time has come for the Department of Interior and the Bureau of Reclamation to bring the past two decades of studies, and the 50 million dollars expended pursuing an “in valley” drainage solution, to bear in meeting its duty to provide drainage under the San Luis Act.

203 F.3d at 578.

In response to the mandatory injunction issued after the Court of Appeals decision, Reclamation began evaluating alternative means of providing drainage service to the San Luis Unit, culminating in the San Luis Unit Drainage Feature Re-evaluation Environmental Impact Statement. Thereafter, 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 \$2.7 billion. Reclamation now estimates that those costs are approximately \$3.8 billion using 2015 cost indices. Reclamation began implementing the selected drainage plan in a portion of Westlands in 2010 on a court-ordered schedule.

In addition, the United States settled litigation brought by individual landowners regarding some 37,000 acres within Westlands damaged by a lack of drainage. Under that settlement, the United States paid approximately \$110 million in damages. However, the claims of other landowners and Westlands with respect to other lands damaged by the lack of drainage remain unresolved. In 2011, those other landowners in Westlands 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. The Court of Federal Claims denied the United States’ motion to dismiss the complaint, and while the complaint does not specify a dollar amount for damages, the government estimates that federal liability for just compensation could be over \$2 billion.

In January 2012, Westlands filed a breach of contract claim against the United States, alleging that the Secretary's failure to provide drainage service to Westlands constituted a breach of Westlands' 1963 Water Service and 1965 Repayment contracts (including the interim renewal of those contracts). That case is currently pending.

In the context of this history, it should be evident to any objective person as to why the settlement authorized by H.R. 4366 is in the best interests of the United States, Westlands, and federal tax payers. Under the settlement: (1) the Secretary will be relieved of an obligation, the cost of which, is in excess of \$3.5 billion; (2) the United States will be indemnified against liability that the government has estimated could be in excess of \$2 billion; and, (3) Westlands will manage drain water within its boundaries, addressing a vexing environmental problem.

3. Terms of the Settlement

Under the settlement authorized by H.R. 4366, the Secretary would be relieved from all drainage obligations imposed by the San Luis Act, including implementation of the 2007 Record of Decision, which Reclamation estimates will cost approximately \$3.8 billion. Westlands will dismiss, with prejudice, the pending breach of contract litigation and will join the United States in a petition to vacate the District Court judgment imposing a mandatory injunction ordering implementation of drainage service. Westlands will 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 indemnify the United States for any and all claims relating to the provision of drainage service or lack thereof within the Westlands service area. Westlands will also seek to intervene in the pending landowner litigation for purposes of settling the case and will pay compensation to individual landowners.

The settlement also provides that Westlands will become legally responsible for the management of drainage water within its boundaries, in accordance with federal and California law. How Westlands will manage drainage water depends on the varying needs within the drainage-impaired areas, and will evolve as conditions change. It will also depend upon ongoing monitoring and regulation of groundwater under the Long Term Irrigated Lands Regulatory Program being administered by the California Central Valley Regional Water Quality Control Board under the Porter-Cologne Water Quality Control Act. California Water Code sections 13000, et seq. Measures that will be used by Westlands 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.

In exchange for agreeing to undertake responsibility to manage drain water within its boundaries, agreeing to dismiss its pending breach of contract claim against the United States, agreeing to compensate landowners in the pending Federal Claims Court litigation, and agreeing to indemnify the United States against future claims arising out of the Secretary's failure to provide drainage service, Westlands will be relieved of the obligation to pay its current, unpaid capitalized construction costs for the Central Valley

Project. Reclamation currently estimates that the present value of these unpaid costs is approximately \$300 million. However, under the settlement, Westlands will still be responsible for the payment of operations and maintenance costs of the Project and the payment of restoration fund charges pursuant to the Central Valley Project Improvement Act. Moreover, Westlands will still be responsible for future Project construction charges. The Secretary will convert Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing terms and conditions. As a "paid out" contractor, the benefit of this conversion is permanent right to a stated share of Central Valley Project water. However, the terms and conditions of the contract, including the "shortage provision" that immunizes the United States from liability if shortages are caused by restrictions on operations of the Project imposed by federal and applicable state law, will otherwise be the same as in the current 9(e) contract. Moreover, a new condition will be imposed in the 9(d) repayment contract: under the settlement, the United States' obligation to provide water to Westlands will be conditioned on Westlands' fulfillment of its obligations to manage drainage water within its service area. In other words, if Westlands does not fulfill its obligation to manage drainage water in a manner consistent with state and federal law, its Central Valley Project water supply will be cut off.

Another significant term of the settlement related to the 9(d) repayment contract is that it will cap deliveries to Westlands at 75% of its existing contract quantity, 1.193 million acre-feet. Any water allocated in excess of this 75% cap, that otherwise would have been delivered to Westlands, will instead be available to the United States for other authorized Project purposes. In a year like 2011, when the allocation to south-of-Delta agricultural contractors was 80%, 59,650 acre-feet of water would have been available for other purposes, such as level 4 refuge supplies. Assuming a modest cost of \$200 per acre-foot, if the Secretary were to purchase this quantity of water in the transfer market, the water would have a value of \$11.9 million.

The settlement also obligates Westlands to permanently retire from irrigated agricultural production not less than 100,000 acres of lands within its boundaries. This total includes lands previously retired by Westlands, approximately 36,500 acres, and lands previously acquired by Westlands and fallowed temporarily, approximately 53,500 acres. After retirement, these lands may be utilized only for: (1) management of drain water, including irrigation of reuse areas; (2) renewable energy projects; (3) upland habitat restoration projects; or (4) other uses subject to the consent of the United States.

4. Similarities to San Joaquin River Settlement

There exists recent precedent for the settlement between the United States and Westlands authorized by H.R. 4366. In 2009, Congress enacted the San Joaquin River Restoration Settlement Act, Title X of Public Law 111-11, which authorized the implementation of a settlement to resolve decades-long litigation concerning the Secretary's obligation to make releases from the Millerton Reservoir, a facility of the Central Valley Project, to comply with the requirements of California law.

Like the settlement between the United States and Westlands intended to resolve decades-long litigation involving the Secretary's failure to comply with the law mandating drainage service to the San Luis Unit, the litigation related to the San Joaquin River involved environmental impacts resulting from the Secretary's failure to comply with the law. Both settlements provide for the conversion of Central Valley Project 9(e) water service contracts to 9(d) repayment contracts. Both settlements provide for the use of the contractors' capital repayment obligations as a source of funds to implement the settlements. The only meaningful difference between the terms of the two settlements is that under the San Joaquin River settlement, the federal government remains responsible for compliance with the law and funding those measures required to implement the settlement. Under the drainage settlement, the federal government is relieved from responsibility for compliance with the law, and Westlands, at its own cost, will undertake that responsibility.

I am aware that the mere mention of Westlands Water District raises the blood pressure of many environmentalists and some Members of Congress. Therefore, the reaction by some people that the settlement is a "sweetheart deal" for Westlands is not surprising, but is far from the truth. When the settlement is analyzed objectively, the benefits to the federal government and federal taxpayers become readily apparent. The Secretary will not be faced with a mandatory injunction, compliance with which will cost an estimated \$3.8 billion. Westlands will become responsible for drainage, and if Westlands does not perform, its Central Valley Project water supply will be terminated. Westlands will retire permanently 100,000 acres, and its maximum Central Valley Project water supply will be reduced by 25%. Westlands will compensate individual landowners who have sued the federal government, a federal liability that the government estimates could exceed \$2 billion if the litigation were not settled.

Without question, Westlands will also benefit from the settlement. Westlands will be relieved of its existing capital repayment obligation, which the government estimates to have a present value of approximately \$300 million. But money that Westlands otherwise would have paid the United States absent the settlement, will be used to manage drainage water pursuant to the settlement. This cost will greatly exceed \$300 million. Westlands will receive a permanent water supply contract, but this is not an anomaly under federal Reclamation law. Across the west, when a contractor is "paid out," the contractor receives a permanent right to a stated share of a project's water. Moreover, the conversion of Westlands contract to a 9(d) repayment contract will provide certainty that is critical to Westlands' ability to expend the hundreds-of-millions of dollars required to implement the settlement. But among the most significant benefits farmers in Westlands will receive is that, after more than five decades, there will finally be a meaningful solution to the drainage problem.

I would be happy to answer any questions the Members have.