

CA Save Our Streams Council



January 6, 2020

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Commissioner
U.S. Bureau of Reclamation
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Washington DC 20240-0001

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Via Email and Regular Mail

Re: Comments Westlands WD Conversion Contract for 1.15 MAF & Exhibits under the WIIN Act § 4011.

Dear Commissioner Burman, Mr. Conant and Ms Leal;

The largest federal irrigation district in the nation, Westlands Water District (Westlands), is seeking a permanent water contract for double the amount of water used by all the people of Los Angeles during 2018. By this contract, Westlands would escape limits on ownership acreage, pricing restrictions, and be allowed to irrigate with subsidized water on lands outside of the

federally authorized service area boundaries. The contract would allow irrigation of lands known to generate toxic drainage and runoff pollution. There is no current arable irrigation map to guide the Secretary's decisions about eligible contract deliveries.

For much of the last decade the undersigned have commented on Westlands' two-year interim contracts, seeking disclosure of the environmental, endangered species and water pollution impacts, and yet none of the undersigned or their representatives received notice of the "public negotiations" for this permanent contract. And, despite filing a Freedom of Information request, which Reclamation required for even the most rudimentary elements of the proposed draft contract and exhibits, public comment has been further thwarted by the absence of a complete draft contract and the essential exhibits necessary for public review by the January 8, 2020 deadline for public comment.

We urge you to deny the Westlands' contract conversion and that the process be restarted with proper public transparency and following established legal requirements. We request public contract negotiations be held with adequate notice provided, especially in the counties and areas from which the proposed irrigation water is taken. Furthermore, these negotiations should not be held until a full environmental impact statement is completed, endangered species consultation is provided, and an accurate irrigable land map is provided along with a complete draft of the proposed contract.

Our detailed comments follow, focusing on five main areas:

- I. Reclamation broke its own rules.**
- II. Full EIS analysis under NEPA is required.**
- III. NEPA and the ESA apply to Reclamation's decision to enter into and negotiate the terms of permanent contracts.**
- IV. The WIIN Act does not abrogate the requirements of other federal laws including NEPA, the ESA, and the CVPIA.**
- V. Conclusions**

I. Reclamation Broke its Own Rules

A. Public Participation was thwarted.¹

Reclamation law and policy seeks broad public participation in water contract negotiations.² Notice for the Westlands' public contract conversion negotiation sessions were printed in the

¹ <https://www.usbr.gov/mp/wiin-act/docs/wiin-act-negotiations-timeline-2019-06.pdf> See also https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1982/2/22/7761-7765.pdf#page=3

² See § 9(f) of the Reclamation Project Act of 1939, and the rules and regulations published in 52 FR 11954, April 13, 1987 (43 CFR 426.22) & "Final Revised Public Participation Procedures" for water resource-related contract negotiations, published in 47 FR 7763, February 22, 1982

county to which the water is exported in a three day legal notice that did not mention the Westlands' proposed permanent contract by name. The notice was issued on a Monday before the Labor Day holiday and "public negotiations" were held on that Thursday. In response to public protest, another public session was held after only a 32-hour workday notice during the Thanksgiving holiday, when many of the major highway arteries were closed by weather. Once again Westlands' contract conversion was not disclosed by name in the public notice. Water contractors were afforded a call-in number, but the general public was not. The rationale given for the rush to complete the contract was to preclude judicial review of Westlands' current water service contract. Evading judicial review is not a stated contracting purpose in Reclamation manuals. A key contractor essential to the negotiation needed to be reached by phone and another was simply contracted out without being present.³

B. A Complete Draft of the Contract has not been provided, thus public comment is precluded.

As required by Reclamation staff, representatives for the undersigned filed a Freedom of Information Request on October 2, 2019 for a copy of the draft water contract conversion and exhibits. These have yet to be provided. Subsequent draft exhibits provided online are incomplete and fully informed public comment has thus, been precluded. Problems with the exhibits⁴ include:

1. **Exhibit A – Map of Contractor’s Service Area**—This is not consistent with Congressional authorization and the map contained in the San Luis Unit Feasibility Study.⁵ The required updated irrigation suitability land classification maps and the systematic evaluation of lands with respect to suitability for agricultural production under irrigation are not provided.
2. **Exhibit B – Rates and Charges** [*-- This Exhibit template is unchanged from current Contract and is updated annually. Rate Schedules may be found at:* <https://www.usbr.gov/mp/cvpwaterrates/ratebooks/index.html>] Two DOI Inspector General Reports have indicated the amounts being charged are insufficient to repay the

³ For a video of the November 2019 contract negotiation session see <https://www.dropbox.com/home?preview=Bureau+of+Reclamation+Negotiations%2C+Fresno%2C+Nov.+19%2C+2019.mp4--CLIPS+15%2C+16.mp4>

⁴ See <https://www.usbr.gov/mp/wiin-act/docs/usbr-westlands-draft-wiin-act-contract-exhibits.pdf> Posted 11-10-19.

⁵ In 1956, the Bureau of Reclamation delivered to the United States Congress, “A Report on Feasibility of Water Supply Development” for the San Luis Unit (the 1956 Feasibility Report), which recommended constructing a group of water management facilities, called the San Luis Unit, as an addition to the Central Valley Project, in order to bring irrigation waters to an area of approximately 496,000 acres in the San Joaquin Valley. In 1960, Congress passed the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) authorizing water deliveries to 500,000 acres for the entire unit consistent with the Feasibility Report, see § 1(a). Also see LAND Exhibit 299 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/land.htm

capital costs.⁶ Reclamation law and policy require a contract to ensure that sufficient rates are charged to repay federal taxpayers. The undersigned have provided comment on how the proposed cost allocation will impact environmental protections and take additional money from the federal treasury without adequate repayment, as required.⁷ We adopt those comments by reference.

3. **Exhibit C – Central Valley Project Water Needs Assessments Purpose and Methodology** This is a methodology not a water needs assessment. The draft permanent contracts only include the methodology, not the actual water needs assessments.⁸
4. **Exhibit D – Repayment Obligation**—This is just a placeholder. The June 2018 term sheet letter to WWD (not provided to the public by Reclamation) indicated \$350 million was owed the US taxpayers. Now, this **template repayment obligation**, suggests the amount has dropped from ~\$350M to \$1.8M...” Moreover, this is apparently going to change further: *"This Exhibit template was developed during the WIIN Act Negotiations. Relevant data will be incorporated upon contract execution."* The public was effectively excluded from the negotiations so there is no ability to comment on this changing aspect of the contract. Further ratepayers and taxpayers are left in the dark regarding final payment obligations or the ability to pay off Westlands' debts.

C. The Secretary is allowed to contract for the delivery of project irrigation water only to lands with characteristics that allow delivery--this contract would violate that mandate.

As stated above water is being provided outside of the Congressionally designated service area and no updated irrigable lands map has been provided. Public Law 99–546, 100 Stat. 3050. (Coordinated Operations Act) Sec. 305. § 4(c) of the Act requires, among other things, that the Secretary must show that lands receiving project water are capable of *"successful irrigability of those lands and their susceptibility to sustained production of agricultural crops by means of irrigation has been demonstrated in practice. Such proposal shall also include an investigation of soil characteristics which might result in toxic or hazardous irrigation return flows."* No such documentation and evidence has been provided in support of the proposed permanent water contract to irrigate these lands referenced in Exhibit A of the proposed contract. In fact, government documents show that roughly 300,000 acres of the lands proposed for irrigation under this contract will generate "toxic or hazardous irrigation return flows" to ground or surface waters. Indeed, current practice results in some of these toxic flows being discharged to the

⁶ https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/land.html & 2004 DOIG *Central Valley Contract Renewal Process August 2004* [OIG Report No W-IN-BOR-0016-2004

⁷ <http://calsport.org/news/wp-content/uploads/Conservation-Fishing-and-Tribe-Cmts-RE-CVP-Cost-Allocation-Study-Burman-1-2-2020-.pdf>

⁸ See https://www.usbr.gov/mp/cvpia/3404c/process_info/cont_policies/3_cvp_policies/01_02-22-99.pdf and <https://pcffa.org/wp-content/uploads/2016/07/102-7-25-16-Amended-Memorandum.pdf> pg 7

California Aqueduct without proper Clean Water Act permits or consideration of hazardous conditions for fish and wildlife.⁹

D. Delivery of project water to toxic soils obligates the Secretary to provide drainage, but such drainage is not provided by the proposed contract.

Judge Hewitt ruled that under Westlands' current two year interim contracts the government was not obligated to provide drainage service, “*Because (Westlands) failed to show that drainage service was a bargained-for benefit of any of these contracts, (Westlands) has not shown that drainage service is a ‘fruit’ of any of the contracts.*”¹⁰ And yet, the proposed permanent contract proposal is to deliver water to these lands that are unsuitable for irrigation and to other lands that would receive project water that are, however, outside of Congressional authorization¹¹, but could obligate the federal government to furnish something that has been unattainable for decades—drainage.

The drainage obligation does not exist, however, if water service to these lands is cut off because of the impracticability of irrigation. This alternative—cessation of irrigation water from unsuitable lands—is mandated by law and regulation.¹² The toxic drainage, groundwater pollution, and surface water pollution is created in large part by the Bureau’s [of Reclamation] deliveries of CVP water to these non-irrigable lands. Reducing water service instead of expanding it is the obvious solution. Controlling or eliminating the supply of drainage water by eliminating deliveries to these identified toxic soils will control the demand for drainage and the

⁹ <http://calsport.org/news/wp-content/uploads/PCL-et.-al.-Cmts-Re-WWD-Interim-Contract-12-14-19.pdf>

<http://calsport.org/news/wp-content/uploads/Conant-Burman-Ltr-Re-Extension-of-Cmt-Re-SLD-Discharges-Use-Agreement-12-10-19.pdf>

<http://calsport.org/news/wp-content/uploads/CBD-PCL-et.-al-Cmt-Ltr-Cross-Valley-Interim-Contract-12-12-2019.pdf>

http://calsport.org/news/wp-content/uploads/PCL-et-al_Comments-on-DEA-for-GBP-Stormwater-Plan_12-23_-2019-.pdf

¹⁰ *Westlands Water District v. United States*, 12-12C (Fed. Cl. 2013) United States Court of Federal Claims Filed: January 15th, 2013 Docket Number: 12-12C

¹¹ See San Luis Act of 1960 Section 1(a) *for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California, hereinafter referred to as the Federal San Luis unit service area.* <https://www.govinfo.gov/content/pkg/STATUTE-74/pdf/STATUTE-74-Pg156.pdf>

¹² Continuing to provide project water to these toxic soils would require approval from Congress to increase the authorized appropriation cap under the San Luis Act. Also see Reclamation Directives and Standards PEC P12 for required continuing investigations into land classification and suitability for irrigation for the delivery of project water.

enormous costs estimated at \$2.6 billion. Westlands' land uses have changed significantly¹³ within the proposed contract acreage. These land use changes together with cessation of delivery to these lands impracticable of irrigation without generating pollution must be considered. The unauthorized financial obligation inferred by issuing the proposed permanent water contract must be addressed.¹⁴

II. A Full EIS analysis under NEPA is Required.

The CVPIA PEIS and Biological Opinion provided a framework whereby future CVP-related actions, including interim and long-term CVP water contract renewals, could be reviewed for site-specific impacts under NEPA and ESA. The environmental review completed for Westlands interim contracts is inadequate, as our organizations have documented in our December 14, 2019 comments on the Draft Environmental Assessment.¹⁵ We incorporate those comments by reference. These sequential two-year contracts have failed to address reduction in exports, irrigability of these lands, drainage impacts, and conversion to municipal and industrial uses as contemplated under the conversion of this 9(e) contract to a 9(d) repayment contract issued in perpetuity. These impacts would be exacerbated and magnified under the proposed permanent contract. Given the numerous potential environmental effects associated with Westlands' water deliveries, a full EIS and ESA analysis must be completed prior to converting the existing short-term contracts to permanent contracts.

Federal law requires a full EIS for Westlands' contract conversion. An EIS must comprehensively assess the far-ranging and complex direct and secondary effects of irrigation and illuminate the total environmental impact of contract renewal and conversion to a permanent contract. Responsible decision making requires guidance from this EIS and adherence to established legal requirements.

In 1989, Reclamation attempted to complete contract renewals for the Friant Division contracts without doing any environmental review, arguing that since the contract terms are essentially

¹³ Industrial uses including massive utility land conversion in thousands of acres has replaced irrigated agricultural uses and yet the contract is silent regarding the rates and interest owed on these land use changes along with water use changes. See the maps referenced in previous comments: <http://calsport.org/news/wp-content/uploads/PCL-et.-al.-Cmts-Re-WWD-Interim-Contract-12-14-19.pdf>

¹⁴ The 2008 Feasibility Report sent to Congress explained that “Federal interest is established either by legislation or through an evaluation of a proposed action relative to the agency's mission” and that, to be federally implementable, an action “must be feasible as defined by the Economic and Environmental Principles and Guidelines (Principles and Guidelines). The Principles and Guidelines require Federal actions contribute to the national economic development (NED).” The 2008 Feasibility Report continued: The San Luis Act of 1960 as amended establishes the Reclamation's Federal interest in the proposed action. However, the requirement for a net positive contribution to the Nation's economy cannot be met by either of the two action alternatives. The 2008 Feasibility Report concluded the action alternative selected by the Bureau was not appropriate for implementation according to the government's own accepted standards.

¹⁵ https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41303

unchanged from those of four decades ago, there is no legal basis for triggering the National Environmental Policy Act (NEPA) requirements. The USEPA believed NEPA review was required and that an EIS was the appropriate level of review. In 1989, EPA made a rare formal referral of these contracts to the Council on Environmental Quality when the Department of the Interior proposed signing long term renewals without any environmental review.¹⁶ In support of EPA's recommendation, the CEQ concluded that an EIS should be prepared for Friant contract renewals.¹⁷

In comments submitted in 1999 by the USEPA to the Bureau of Reclamation on Long Term Contract Renewals for the CVP, EPA recommended that an EIS should be the level of review for contract renewals: "*an EIS should be assumed the appropriate level of analysis for contract renewals, especially considering the many regional and localized concerns which were not covered in the CVPIA PEIS; e.g. water quantity, water quality, or specific terms and conditions for contract renewals.*"¹⁸ Further, in comments on CVP Long Term Contracts in 2000 the USEPA argued that, "*long term water service contracts are not and should not be permanent entitlements, but rather that they should be subject to review at the end of each contract period to reevaluate water supply and environmental conditions in a rapidly changing state.*"¹⁹ Locking in these paper water supplies in perpetuity artificially inflates Westlands' allocation during times of shortage and results in shortfalls to other contractors and the environment.

The following impacts from Westlands contract conversion are significant and should be addressed in a full EIS:

A. Effects to the San Francisco Bay-Sacramento and San Joaquin River Delta Estuary.

There have been repeated violations of the Clean Water Act standards²⁰ and Endangered Species Act requirements under the Reasonable and Prudent Alternatives. CVP operations and the exports of water pursuant to this interim contract have consistently violated the Coordinated Operation Act of 1986, which requires adherence to Delta Water Quality Standards contained in D-1485 and subsequent water quality standards.

¹⁶ <https://www.latimes.com/archives/la-xpm-1989-04-12-me-1552-story.html>

¹⁷ <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=50626>

¹⁸ <https://archive.epa.gov/region9/nepa/web/pdf/cvprenew.pdf>

¹⁹ <https://archive.epa.gov/region9/nepa/web/pdf/cvpkrenewals.pdf>

²⁰ Of particular note, the SWRCB, referencing WR Order 90-05, stated in WR 92-02 at page 9: *The State Water Board also has advised the USBR that decisions on water deliveries are subject to the availability of water, and that water should not be considered available for delivery if it is needed as carryover to maintain an adequate cold water pool for the fishery.* SWRCB warned against USBR decisions to maximize water deliveries in the initial years of a drought and failing to maintain sufficient carryover storage to protect fisheries and public trust resources.

The operations of the Federal Central Valley Project and State Water Project (Water Projects) have caused devastating environmental impacts and have contributed to severe declines in California's native fish species, several of which are now listed as endangered or threatened species under the Endangered Species Act. Specifically, Water Projects operations have been major factors in the decline of the endangered Sacramento River winter-run Chinook salmon ("winter-run Chinook salmon"), threatened Central Valley spring-run Chinook salmon ("spring-run Chinook salmon"), threatened Central Valley steelhead, threatened Green Sturgeon and threatened Delta Smelt, and in the listing of these and other species under the Endangered Species Act. Further, species not currently listed, such as longfin smelt and Sacramento splittail, are also being adversely affected by Water Project operations.

B. Effects to Indian Trust Assets in the Trinity River must be assessed and disclosed.

The Yurok and Hoopa Tribe's fishing and associated water rights in the Trinity River are Indian Trust Assets. Protection of the Indian Trust Assets for the Hoopa, Yurok and Winnemem Wintu people require sufficient water to remain within the Tribe's watershed so that their fishery resources will thrive, not merely survive.²¹ As the Hoopa Tribe commented as far back as 2010, the CVP water diversions to Westlands and other west side San Luis Unit contractors, significantly impact their Indian Trust Assets:

*"...It is irrelevant to the environmental review that the Tribe's reservation is not in the vicinity of the Proposed Action Area. The water to which the Tribe has a right and whose use is essential to its fishery resources is being delivered and will continue to be delivered pursuant to the proposed federal action from the vicinity of the reservation to the contractors' area by CVP facilities that divert water from the Tribe's watershed."*²²

C. The required Endangered Species Consultation has not been provided for public review.

For any federal action that may affect a threatened or endangered species or its habitat, the agency contemplating the action, otherwise known as "the action agency" (here, the Bureau of Reclamation), must consult with the appropriate "consulting agency" (here, the FWS and NMFS), for the purpose of ensuring that the federal action is not likely to: (1) jeopardize "the continued existence of" an endangered or threatened species; and (2) that the federal action will not result in the "destruction or adverse modification" of the designated critical habitat of the listed species. 16 U.S.C. § 1536(a)(2).²³ For the Westlands' contract conversion, Reclamation is

²¹ *Federal court: Tribal water rights outrank farmers' rights* Associated Press 11/25/2019 See <https://www.cherokeephoenix.org/Article/Index/113786>

²² See January 29, 2010 Letter to Rain Healer, USBR from Joseph Membrino Re: Draft Environmental Assessment and Finding of No Significant Impact for the San Luis Unit Water Service Interim Renewal Contracts. pg 3.

²³ <https://www.fws.gov/endangered/laws-policies/section-7.html>

required to request both FWS and NMFS to complete a formal Section 7 consultation under the ESA.

Terrestrial federally-listed species that could be affected by Westlands water deliveries and contract conversion include:

Mammals: San Joaquin kit fox, Fresno kangaroo rat, Giant kangaroo rat, Tipton kangaroo rat,
Reptiles: Blunt-nosed leopard lizard;
Plants: San Joaquin woolly-threads, and California jewel flower.

Threats to these species include loss of habitat to cultivation, conversion of land to other uses, use of rodenticides, herbicides and pesticides, any of which could decimate small, isolated populations.

Supporting documentation for this USEPA Docket for Selenium in California includes 2 reports by USFWS: Species at Risk from Selenium Exposure in California Inland Surface Waters, Enclosed Bays and Estuaries (includes a list of species considered most at risk for selenium exposure in CA²⁴) and Species at Risk from Selenium Exposure in the San Francisco Estuary.²⁵ The species identified as most at risk from selenium exposure from agricultural drainage contamination in the San Joaquin Valley and San Francisco Estuary include:

Mammals: Buena Vista Lake Ornate Shrew;
Birds: Bald Eagle, California Black Rail, California Clapper Rail, California Least Tern, Greater Scaup, Lesser Scaup, White-winged Scoter, Surf Scoter, Black Scoter;
Reptiles: Giant Garter Snake;
Fish: Chinook Salmon, Steelhead, Green Sturgeon, White Sturgeon, Delta Smelt, and Sacramento Splittail.

D. Effects of Drainage from Westlands Caused by Imported Irrigation Water from the CVP are Significant and Complex and Must be Addressed in a Comprehensive EIS.

Federal and State law prohibit degradation of the waters of the State and Nation. The proposed contract conversions would allow the continued delivery of CVP water to lands known to create pollution when applied to irrigate these soils without data or substantive environmental analysis of the effects of drainage contamination from Westlands or Reclamation. This drainage pollution can deform fish and wildlife, impair reproduction, and reduce survival. These adverse impacts affect trust resources including migratory birds, anadromous fish, and federally and state listed species. Continued delivery of water to these soils, as contemplated by this contract renewal, will degrade the waters of the State and Nation. The USEPA, in their comments on San Luis Unit Long Term Contract Renewals (@ pg 4 of Attachment A), concluded that, “*the Drainage solutions and features relied upon to implement these solutions should not be separated from the*

²⁴ <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2018-0056-0144&contentType=pdf>

²⁵ <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2018-0056-0265&contentType=pdf>

implementation of long-term water contracts.”²⁶ Yet that is exactly what Reclamation has done in with this contract conversion for Westlands.²⁷

A comprehensive assessment of drainage problems in Westlands has not been conducted since 1980’s. A major planning effort to devise a drainage plan for the San Luis Unit was completed in 2006, with the San Luis Drainage Feature Re-evaluation (SLDFR) Final EIS. Yet the much of the data in the SLDFR FEIS for Westlands, which was used to define the drainage problem and help with modeling analyses, was derived from 1980’s data of groundwater conditions in Westlands (CH2MHill 1985).²⁸

Previous narrative description of groundwater movement in Westlands is based on modeling done by Williamson et al 1989 describing a groundwater flow system that has a much larger vertical gradient than horizontal gradient. However, lateral and vertical movement of subsurface drainage are not the only effects of subsurface agricultural drainage from Westlands to downslope lands. Steve Deverel, a groundwater hydrologist with Hydrofocus Inc., provided written testimony to the State Water Resource Control Board for the 1998 Bay-Delta Water Rights Hearing describing the effect of the hydraulic pressure of shallow drainage problem upslope of the Firebaugh Canal WD and Central California Irrigation District (primarily in Westlands), causing increases in pressure down gradient and contributing to drainage flows within those districts (Deverel 1998). Relevant excerpts are provided below:

“I have also been asked if I could quantify the load of salinity and selenium that enters along this boundary by downslope migration compared to the drainage load leaving Firebaugh Canal Water District as an example. Downslope migration does not explain all of the load but a part of it is from this shallow downslope flow, in the range of 20 to 40%...”

“...Elevations of groundwater in saturated areas in upslope areas are higher than elevation [sic] in lower areas. Although a particular particle of Water will take many years to migrate, in saturated soils pressure is very quickly transmitted to areas of lesser pressure. That is what is happening here. Pressure transmitted from high areas to low areas as an example will cause poor quality Water to show up in surface drain and be counted as load. A particle of poor quality Water may have originated from farming the downslope areas or migrated in the shallow geological features from farming the

²⁶ Ibid.

²⁷ <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=68443> USBR October 25, 2019 Reclamation releases draft repayment contract for Central Valley Project contractor. And Reclamation extends the public comment period for the released draft repayment contract for Central Valley Project contractors <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=68567>

²⁸ Westlands North, South and Central drainwater quality was estimated in the SLDFR FEIS by geostatistical analysis using TDS concentrations and 1980’s groundwater data (SLDFR FEIS Appendix C, page C-39) https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2234

downslope areas or migrated in the shallow geological features from upslope, but the pressure causes it to rise into the tile drainage and surface drain and flow out.”

“Pumping decreased substantially during the 1950’s and 1960’s as surface water was delivered and groundwater water levels rose. This rise in the groundwater levels continues to occur and has caused increases in pressures in downslope areas which have contributed to drainage flows.”

Numerous Reclamation documents have noted downgradient groundwater flows that could impact areas downslope of Westlands. For example, the SLDFR FEIS developed (by Hydrofocus Inc.) a regional groundwater flow model for the SLDFR project area (which included agricultural lands in the San Luis Unit, Delta Mendota Canal Unit, and San Joaquin Exchange Contractors service areas). The SLDFR FEIS noted on page 6-26 that, *“Using the groundwater-flow model results, horizontal groundwater velocities were estimated at about 500 feet/year in the upper 50 feet of the saturated zone for the 1foot/year seepage rate. Therefore, in 44 years groundwater with high salinity and constituent concentrations could travel about 20,000 feet downgradient from the evaporation basins. Results suggested significant water level increases could affect crop root zone salinity within 3,500 feet of the evaporation basins...”*²⁹

The San Luis Unit Long Term Contract Draft Supplemental EIS dated 2006 (Appendix B, @ pg 11) found that, *“The Westlands Subarea has no drainage discharge to the receiving waters of the State, therefore it is not directly affected by the current salinity and boron TMDL which limits discharge into the San Joaquin River. However, these actions have an indirect impact on the hydrology of the Basin owing to regional groundwater flow from Westlands into the Grasslands subarea...”*³⁰

Further, the Draft EA for a CVP Water Assignment from Broadview Water District (USBR 2004) noted on page 4-2 that, *“...the Proposed Action would reduce the quantity of drainage water currently being discharged from the BWD [Broadview WD] to the San Joaquin River by approximately 2,600 acre-feet or 70 percent of water per year (Summers Engineering, 2003). More specifically, by following the BWD lands and not applying CVP water for irrigation, the estimated reduction in drain water discharge from existing conditions (approximately 3,700 acre feet per year [afy]), will be reduced by approximately 1,100 afy. Most of these resulting flows are likely attributable to sub-surface flows originating from up-gradient locations to the south and west...”* and on page 4-12 that, *“Although irrigated agriculture would be discontinued within the BWD, under-land flow of groundwater from up-gradient locations would still contribute to drain water within BWD drainage canals.”* In other words, the Broadview DEA estimated that about a third of the subsurface drainage below Broadview WD originated outside and upslope of district boundaries via lateral flow from agricultural lands to the south and west (i.e., Westlands).

²⁹ Available at this link https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2234

³⁰ Available at this link: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2143

The SWRCB in their revised Water Rights Decision 1641, dated March 15, 2000 (@ pg 83) identified lands within the San Luis Unit that contribute to drainage-water contamination to the San Joaquin River, "...the SWRCB finds that the actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernalis. The salinity problem at Vernalis is the result of saline discharges to the river, principally from irrigated agriculture, combined with low flows in the river due to upstream development. The source of much of the saline discharge to the San Joaquin River is from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP, primarily through the Delta-Mendota Canal and the San Luis Unit."³¹

Oppenheimer and Grober (2004), in a draft staff report for the Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Salt and Boron Discharges into the Lower San Joaquin River, noted the following with respect to Westlands' effects on San Joaquin River water quality: "*The Grassland Subarea contains some of most [sic] salt-affected lands in the LSJR watershed. This subarea is also the largest contributor of salt to the LSJR (approximately 37% of the LSJR 's mean annual salt load). Previous studies indicate that shallow groundwater in the LSJR watershed is of the poorest quality (highest salinity) in the Grassland Subarea (SJVDP, 1990). The Grassland Subarea drains approximately 1,370 square miles on the west side of the LSJR in portions of Merced, Stanislaus, and Fresno Counties. This subarea includes the Mud Slough, Salt Slough, and Los Banos Creek watersheds. The eastern boundary of this subarea is generally formed by the LSJR between the Merced River confluence and the Mendota Dam. The Grassland Subarea extends across the LSJR, into the east side of the San Joaquin Valley, to include the lands within the Columbia Canal Company [and including the Northern Portion of Westlands Water District].*"

The USEPA in their comment letter on the Draft EIS and Supplemental Information for Renewal of Long Term Contracts for San Luis Unit (SLU) Contractors (CEQ# 050411 and 060056, dated April 17, 2006, @ pg 5 and 6 of Attachment A) found that, "*Subsurface drainage flow comes in part from the Westlands Water District and other water districts upgradient of the northerly [San Luis Unit] districts with high selenium/Total Dissolved Solids (TDS) concentrations ([USBR SLDFR] Plan Formulation Report Addendum, July 2004).*" EPA recommended that the FEIS for San Luis Unit Long Term Contracts should include information on the relationships between irrigation in the San Luis Unit (including Westlands) and groundwater movement downslope, in terms of flow and water quality. EPA further noted that Reclamation should provide information on the San Luis Unit's role in groundwater accretions and discharges of pollutants into wetland channels and the San Joaquin River and identify impacts to wetlands and wildlife. Based on this additional information, the FEIS should consider mitigation measures, such as "*changes in amounts and location of water applied, which will reduce drainage production and selenium mobilization.*"³²

³¹ Available at this link:

https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf

³² <https://archive.epa.gov/region9/nepa/web/pdf/san-luis-deis-supplemental.pdf>

E. Environmental Impacts from Groundwater pump-ins in the California Aqueduct need to be disclosed and mitigated.

Polluted groundwater from Westlands is being pumped into the California Aqueduct as part of a Warren Act Contract approved by USBR in 2015 despite records showing elevated levels of selenium, arsenic, and boron in this groundwater.³³ The California Department of Water Resources conducts monthly monitoring of the California Aqueduct and has documented occurrences of elevated levels of concern for selenium at Check 21 near Kettleman City (station number KA017226), especially during times when surface water flows have been restricted in the Aqueduct and groundwater from Westlands is being pumped into the Aqueduct. Some of these monthly water quality samples have exceeded the US EPA's November 2018 proposed selenium objectives for protection of aquatic fish and wildlife. These proposed objectives include a lentic water quality objective of 1.5 µg/L (lentic meaning of, relating to, or living in still waters, such as lakes, ponds, or swamps), which would be the applicable selenium objective for Kern National Wildlife Refuge and other wetlands that are fed by water from the Aqueduct.³⁴ The 50 µg /L drinking water selenium objective that is currently applicable to water in the California Aqueduct is not protective of fish and wildlife resources that use water from the Aqueduct. Kern National Wildlife Refuge receives their refuge water supplies from the California Aqueduct. Endangered species, such as the federally listed as endangered Buena Vista Lake Shrew, are likely to be impacted from cumulative levels of selenium in this source water contaminated by Westlands' groundwater discharges. The once-a-month water quality sampling is insufficient to capture selenium spikes that accumulate downstream, or to assess the bioaccumulation in the food chain.³⁵

F. Drainage Contamination in Grasslands Wetland Channels must be disclosed.

The Grasslands Wetland Channels are listed as impaired for selenium on the State's 303(d) list³⁶ and elevated selenium in those channels could be harming aquatic-dependent fish and wildlife resources including federally listed species such as the threatened giant garter snake. Although the Draft EA for Westlands' interim contracts concluded that extensive land retirement along the northern boundary and drainage management under the Grassland Bypass Project (GBP) have "*prevented contamination of Grasslands wetlands water supply*

³³ https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=21021

³⁴ Federal Selenium Criteria for Aquatic Life and Aquatic Dependent Wildlife Applicable to California Docket RIN, 2040-AF79 EPA-HQ-OW-2018-0056 FRL-9989-46-OW. These selenium criteria established lentic and lotic water values, and bird egg and fish tissue values. See: <https://www.regulations.gov/document?D=EPA-HQ-OW-20180056-0001>.

³⁵ Selenium & Arsenic concentrations in the California Aqueduct, downstream of where groundwater has been pumped into the canal, have increased markedly in 2015 and in the case of Arsenic are approaching the Maximum Contaminant Level for drinking water of 0.010 mg/L. See http://www.water.ca.gov/waterdatalibrary/waterquality/station_group/index.cfm

³⁶ https://www.waterboards.ca.gov/water_issues/programs/tmdl/2014_16state_ir_reports/01657.shtml#34338

channels,” aside from the narrative in the Draft EA, there are no maps documenting retired lands in Westlands, no data confirming that contaminated groundwater is not migrating downslope and out of Westlands, and no data on flow or water quality in the Grassland wetland channels.

The undersigned organizations have long-standing interests in the GBP because contaminants in agricultural drainage discharges have profound effects to the environment, including effects to downstream waterways, aquatic life, and migratory birds. Further, Westlands' Broadview District lands and upgradient irrigated lands contribute to this drainage discharge. We hereby include our previous comments on the GBP EIR/EIS and Basin Plan Amendment by reference.^{37,38} We also include our comments submitted to Reclamation December 23, 2019 on the Draft Environmental Assessment on a 10-Year Use Agreement for the San Luis & Delta-Mendota Water Authority Long-term Storm Water Management Plan for the Grasslands Drainage Area (Draft EA-19- 029³⁹) by reference.

G. The San Francisco Bay/Delta continues to be impacted by selenium from agricultural drainage.

The San Francisco Bay and Delta ecosystem is at risk due to environmental degradation, including impacts from elevated levels of selenium. Waterways in the North Bay and Delta, including Carquinez Straits, Suisun Marsh, and Sacramento San Joaquin Delta, are listed as impaired for selenium on the 303(d) list (being addressed by a USEPA approved TMDL).⁴⁰ Sources of selenium contamination include agricultural drainage from the Central Valley and effluent discharges from oil refineries (Linares et al 2015; Presser and Luoma 2010). At risk species include federally listed as threatened or endangered, green sturgeon, Chinook salmon, steelhead trout, delta smelt, Sacramento splittail and the California Ridgway's rail, as well as many migratory bird species that use the estuary as a wintering ground, including greater and lesser scaup, and white-winged, surf, and black scoters.

³⁷ These comments are as follows: Coalition comments of environmental, fishing, and environmental justice organizations opposed U.S. EPA's proposed federal water quality criteria for selenium applicable to California. March 28, 2019. Available at <http://calsport.org/news/wp-content/uploads/PCL-et.-al-Cmt-Letter-EPA-CaSeleniumCriteria-Doc-No.-EPA-HQOW-2018-00....pdf>; Comments of the Pacific Coast Federation of Fishermen's Associations Requesting Denial of Proposed Waste Discharge Requirements for Surface Water Discharges from the Grassland Bypass Project, Stephan C. Volker. June 22, 2015. Available at https://www.waterboards.ca.gov/centralvalley/water_issues/grassland_bypass/wdrs_development_archive/2015_may/

³⁸ [_05_gbp_com_pcffa.pdf](#); Re: Land Retirement Benefits to Grasslands Bypass Project and Draft Waste Discharge Requirements, Coalition Letter to CVRWQCB Follow-up on Grasslands WDR. September 8, 2014. Available at <http://calsport.org/news/wp-content/uploads/Coalition-response-letter-toLongley-re-gbp-landretirement.pdf>; Coalition Comments Re Draft Waste Discharge Requirements for the Grassland Bypass Project. June 30, 2014. Available at <http://calsport.org/news/wp-content/uploads/Finalcoalition-comments-on-Draft-GBP-WDR6.30.14.pdf>.

³⁹ https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41546

⁴⁰ https://www.waterboards.ca.gov/water_issues/programs/tmdl/2014_16state_ir_reports/category4a_report.shtml

The USEPA noted on page 46036 of the Federal Register Notice 81(136) that, “[t]he analyses to develop the fish tissue and the avian egg tissue benchmarks used in the modeling, and the modeling results used to derive the proposed water column criteria, indicate the health of these species would be negatively impacted from exposure to selenium water column concentrations above 0.2 µg /L, which would be allowed to occur under the existing NTR selenium criterion of 5.0 µg /L. Accordingly, EPA finds that it is necessary to propose revised and more protective criteria for selenium in order to help ensure the continued protection of these vulnerable species and associated designated uses.”

Our organizations submitted comments to USEPA on the proposed selenium water quality and tissue criteria for the Bay Delta supporting more protective water quality criteria and hereby incorporate those comments by reference.⁴¹ The selenium discharges being considered by the Regional Board from the GBP for the next 25 years will affect the Bay-Delta ecosystem and could affect compliance with EPA’s proposed water quality criteria for San Francisco Bay and Delta. The 5.0 µg /L Basin Plan selenium objective for Mud Slough and the San Joaquin River is not protective of downstream beneficial uses, will result in non-compliance with proposed water quality criteria and will cause deleterious effects to fish and wildlife in the Bay-Delta. Westlands' Broadview District and upgradient irrigated lands contribute to this discharge and therefore must be analyzed in a full EIS for the contract conversion.

Table 2. Proposed Selenium Water Quality Criteria for the San Francisco Bay and Delta

Media Type	Tissue		Water Column ¹		
			Dissolved		Particulate
Criteria	Fish Whole Body or Muscle	Clam	Chronic	Intermittent Exposure ²	Chronic
Magnitude	8.5 µg/g dw whole body or 11.3 µg/g dw muscle	15 µg/g dw	0.2 µg/L	$WQC_{int} = \frac{0.2 \mu\text{g/L} - C_{bkgrnd}(1 - f_{int})}{f_{int}}$	1 µg/g dw
Duration	Instantaneous measurement	Instantaneous measurement	30 days	Number of days/month with an elevated concentration	30 days
Frequency	Not to be exceeded	Not to be exceeded	Not more than once in three years	Not more than once in three years	Not more than once in three years

¹ Dissolved and particulate water column values are based on total selenium (includes all oxidation states, i.e., selenite, selenate, organic selenium and any other forms) in water.

² Where C_{bkgrnd} is the average background selenium concentration in µg/L, and f_{int} is the fraction of any 30-day period during which elevated selenium concentrations occur, with f_{int} assigned a value ≥ 0.033 (corresponding to one day).

⁴¹ Coalition comments of environmental, fishing and environmental justice organizations on EPA’s Water Quality Standards for the Establishment of Revised Numeric Criteria for Selenium for the San Francisco Bay and Delta. October 28, 2016. Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-20150392-0246>

H. Drainage Treatment is not cost effective and has not been proven to be reliable and meet operational criteria.

The 2006 EIS for SLDFR and the 2009 EIR/EIS for the GBP included treatment as a significant component of the plan to manage drainage and reduce brine volumes to be discharged or disposed of. Reclamation has promoted and funded drainage treatment solutions for decades with repeated operational failures and unreliable results.⁴² Both the SLDFR EIS and the GBP EIS/R included a biotreatment plant to reduce the selenium load being discharged, and to ultimately achieve zero discharge of agricultural drainage to the San Luis Drain and San Joaquin River.⁴³

In 2012, construction began of the SLDFR Demonstration Treatment Plant (Demo-Plant) in Panoche Drainage District. The purpose of the Demo-Plant was to demonstrate and operate water treatment processes to collect cost and performance data for the design of a full-scale water treatment facility to be constructed in Westlands. The Demo-Plant was completed in 2014 but did not operate consistently due to operational failures and faulty design. The treatment plant has yet to become operational.⁴⁴

The Department of Interior's Inspector General issued a report in November 2019 that finalized their investigation on the Demo-Plant.⁴⁵ The Inspector General found that the Demo-Plant did not provide the agricultural drainage service that is required by statute and it did not consistently meet operational performance criteria. In addition, the USBR was found to not have provided effective oversight of the cooperative agreement for operation and maintenance of the Demo-Plant. As a result, USBR spent a reported \$67.8 million for a project that does not meet its legal obligation and that had not consistently met operation performance goals. Warned of fraud, the Inspector General found that "work at the "pilot" Demo-Plant included: "invalid single audits, conflicts of interest with key personnel, a general absence of project oversight, and questionable use of a cooperative agreement as the legal instrument." The Inspector General also raised federal fraudulent funding issues, stating: "*We also question how and why the project grew from a pilot-scale \$15 million demonstration and research and development plant to a full-size \$37 million plant. Further,*

⁴² See USBR SLDFR Feasibility Report 2008, Appendices D and E. See: http://calsport.org/news/wp-content/uploads/USBR_SLDFR-Feasibility-Rpt_AppE-Se-Biotreatment-Performance_2008.pdf
http://calsport.org/news/wp-content/uploads/USBR_SLDFR-Feasibility-Rpt_AppD-RO-Treatment-Performance_2008.pdf

⁴³ See SLDFR FEIS Appendix B page 18:
https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2234

⁴⁴ Federal Status Report of October 1, 2019 Case 1:88-cv-00634-LJO-SKO Document 1037 Filed 10/01/19.

⁴⁵ See <https://www.doioig.gov/reports/bureau-reclamation-did-not-effectively-manage-san-luis-demonstration-treatment-plant>

we have been told that the costs to operate and maintain the plant could outweigh the benefits of the treated water produced.”⁴⁶

All action alternatives in the SLDFR FEIS included bio-treatment and reverse osmosis treatment as a large part of the schematic to manage drainage for the San Luis Unit, primarily from Westlands. Since the Demo-Plant has yet to work reliably, the viability and costs of the drainage plan put forth in the SLDFR ROD is questionable, particularly at full-scale. Without treatment, how will drainage volumes and selenium loads be managed? These issues related to the contract conversion must be addressed and analyzed in a full EIS.

I. Long Term Viability of Drainage Management Actions.

The SLDFR FEIS included a suite of management actions, including drainage reuse (to reduce the volume of drainage that would need to be treated), treatment, and disposal. Pilot studies conducted for SLDFR failed to meet specified objectives, putting doubt into effective implementation of any of these approaches at full-scale.

Reuse of polluted drainage in reuse areas does not eliminate the loading of wastes. It simply stockpiles contaminants on land. The continued recycling of agricultural drainage will ultimately turn vast areas of the Central Valley into saline and toxic wastelands. The practice of drainage reuse is not sustainable and will inevitably lead to permanent fallowing of more and more land.

J. Cessation of deliveries to these toxic soils is the most cost effective and proven strategy to manage drainage.

Our organizations have previously submitted comments to the Regional Water Board about the success of land retirement in relation to the GBP's drainage volume load reductions.⁴⁷ The USBR's 2004 Broadview Water Contract Assignment Draft Environmental Assessment cites Summer's Engineering as predicting a load reduction of 17,000 tons of salt, 1,500 pounds of selenium, and 52,000 pounds of boron to the San Joaquin River each year from the cessation of irrigation on 9,200 acres of agricultural land in Broadview Water District as per Table 4-1 below (USBR 2004). This amounts to a per acre reduction of 0.28 AF of drainage, 1.85 tons of salt, 0.16 pounds of selenium and 5.65 pounds of boron.

⁴⁶ See https://www.doioig.gov/sites/doioig.gov/files/ManagementAdvisory_ProposedModification_112717.pdf

⁴⁷ See Coalition letter to CVRWQCB on Selenium Basin Plan Amendment, April 26, 2010, p 15-16; http://www.waterboards.ca.gov/centralvalley/water_issues/grassland_bypass/grasslands_bpa_coalition_ltr and Coalition letter to Karl Longley on Land Retirement Benefits to Grasslands Bypass Project and Draft Waste Discharge Requirements: <http://calsport.org/news/wp-content/uploads/Coalition-response-letter-to-Longley-re-gbpland-retirement.pdf>

**TABLE 4-1
DRAINAGE AND WATER QUALITY EFFECTS OF PROPOSED ACTION ON THE
SAN JOAQUIN RIVER**

	Existing Conditions	Under Proposed Action Conditions	Estimated Reduction Attributable to Proposed Action
BWD Drainage to San Joaquin River (afy)	3,700	1,100	2,600
BWD Estimated Salt Production (tons/yr)	24,300	7,300	17,000
BWD Estimated Selenium Production (lbs/yr)	2,140	640	1,500
BWD Estimated Boron Production (lbs/yr)	74,000	22,000	52,000

Source: Summers Engineering, 2003

Land retirement likely accounted for most of the reductions in selenium, and the majority of reductions in drainage volume, boron, and salt claimed by the Grasslands Bypass Project in the 2009 EIR/EIS.

The USEPA, in a letter regarding the Bay Delta Conservation Plan,⁴⁸ strongly recommended the USBR's Land Retirement Program be revived to save water and prevent further selenium contamination and impacts to endangered species (page 13):

***Recommendations:** To mitigate for the project's impacts to selenium levels in the estuary as a result of the BDCP operations, consider reviving and funding the Bureau of Reclamation's Land Retirement Program¹⁷ to remove from cultivation and irrigation large areas of selenium laden lands on the West side of the San Joaquin Valley. This would save irrigation water, reduce discharges of selenium into the San Joaquin River basin, and advance attainment of selenium reduction targets¹⁸ set by EPA and the Central Valley Regional Water Quality Control Board. Evaluate the extent to which restoration of these "retired" lands to the native plant community could also contribute to the recovery of threatened and endangered plants and animals listed by FWS. Consider analyzing the cost/benefit of implementing treatment technologies vs. land retirement. Although cost/benefit analyses are not required under NEPA, such an analysis may be useful to decision makers and the public in this case."*

Further, the USBR's San Luis Drainage Feature Re-Evaluation (SLDFRE) Final EIS in 2006 found that land retirement was the most cost-effective solution to managing drainage in the San Luis Unit. Three land alternatives were evaluated in the SLDFRE EIS, 306,000 acres, 194,000 acres and 100,000 acres respectively. The Final EIS found that the only environmentally and economically preferred alternative was to retire 306,000 acres (In-Valley/Drainage Impaired Area Land Retirement).⁴⁹ It's clear from the NED findings in Table N-10 below that additional land retirement would provide increased net economic benefits.

⁴⁸ <http://calsport.org/news/wp-content/uploads/bay-delta-conservation-plan-deis.pdf>

⁴⁹ SLDFRE Final EIS, Appendix N, Table N-10, page N-17, accessed at https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2240

Table N-10
Benefit/Cost Summary
Changes Relative to the No Action Alternative (\$/year in 2050)

Subarea	In-Valley Disposal	Out-of-Valley Disposal	In-Valley/ Groundwater Quality Land Retirement	In-Valley/ Water Needs Land Retirement	In-Valley/ Drainage-Impaired Area Land Retirement
Total NED Benefit	\$37,962,000	\$38,430,000	\$31,164,000	\$20,629,000	\$9,931,000
Total NED Cost	51,225,000	51,370,000	46,767,000	30,778,000	6,288,000
Net NED Benefit	-\$13,263,000	-\$12,940,000	-\$15,603,000	-\$10,149,000	\$3,643,000

Notes:

Values represent net NED benefits relative to No Action.

Values rounded to nearest \$1,000. Totals may not add due to rounding.

Moreover, the US Fish and Wildlife Service, in their Fish and Wildlife Coordination Act Report (FWCAR) for SLDFRE, recommended that all of the northerly area within the San Luis Unit (GBP Drainage Area) be retired as well,⁵⁰ but USBR did not consider that alternative. The Service concluded on page 67 of the FWCAR, *“To avoid and minimize risks and effects to fish and wildlife resources in the San Joaquin Valley and Pacific Flyway, the Service recommends land retirement on all drainage impaired lands in the SLU. This approach would maximize the elimination of drainage at its source, and therefore avoidance of adverse fish and wildlife effects.”*

The 2019 Draft EA for Westlands interim contracts arbitrarily reduced the acreage of permanent land retirement from what was recommended in the Final EIS for SLDFR. This ‘head in the sand’ approach continues the delivery of CVP water to drainage-impaired lands in Westlands and creates an ongoing risk of toxic selenium discharges to wetland water supply channels, Mud Slough, the San Joaquin River and the Bay-Delta estuary, especially in wetter years.

K. A Drainage Plan is required by law.

Federal courts and reclamation law require a drainage plan. There is no plan. There is an unauthorized settlement agreement, as mentioned in the Draft EA, whereby Reclamation suggests implementation would occur in 2051. Westlands would be required to contain all drainage within their district. As pointed out, this promise is one of a long line of promises broken by Westlands, designed to get a contract for water without an effective drainage plan.⁵¹

The drainage management laid out in the schematics of the preferred alternatives in the SLDFR FEIS and ROD have failed during pilot studies, and treatment has not proven viable

⁵⁰ SLDFRE Final EIS, Appendix M, USFWS FWCAR accessed at https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2236

⁵¹ Taxpayers in 2002, paid roughly \$140 million dollars in a previous settlements to “solve” the drainage problem where four families reportedly reaped most of the financial gains and Westlands got the land and the water. Also see http://www.lloydgcarter.com/content/120329554_how-westlands-was-won-a-two-part-series-part-one

or cost effective.⁵² Moving forward with contract conversions that authorize full contract quantities in perpetuity without acknowledging drainage problems and technological and economic limitations is negligent and in violation of the law.

L. Endangered Species Consultations completed on Westlands Interim Contracts and San Luis Drainage are outdated or contain invalid assumptions.

1. Consultations on Drainage

Consultations by the USFWS on San Luis Drainage (SLDFR) and Grasslands Bypass Project (GBP) included as part of the project a cessation of discharge to the San Joaquin River by 2010 in SLDFR⁵³ and 2019 in GBP⁵⁴. In December 2019 Reclamation proposed to extend the Use Agreement for the San Luis Drain (allowing GBP discharges to the San Joaquin River) for an additional 10 years.⁵⁵

The SLDFR 2006 biological opinion (BO) and Fish and Wildlife Coordination Act Report were predicated on a drainage treatment performance objective of <10 µg/L selenium in treatment effluents, primarily as selenate. SLDFR FEIS studies of the proposed drainage management scheme reported that treatment (RO and selenium biotreatment) had not been performing to performance objectives that the Service used for the basis of the FWCA Report and biological opinion. The SLDFR pilot evaporation pond data in the SLDFR FEIS demonstrated double the bioconcentration that was predicted by the bioconcentration model (see page 18, Appendix B). The highest reported invertebrate selenium concentration from the SLDFR pilot evaporation ponds was 225.7 µg/L dry weight from a sample of aquatic nektonic invertebrates (primarily water boatmen) collected from pond 1 (see Appendix B, Attachment B-2, Table 10, SLDFR FEIS). By comparison, concentrations of selenium in water boatman collected from Kesterson Reservoir in the mid-1980's were in the range of 5.9-130 µg/L (see Moore et al., 1990 page 4-43). Most selenium concentrations for invertebrates from the SLDFR pilot evaporation ponds were well above concentrations associated with adverse biological effects to wildlife (i.e., >7 µg/L dry weight in invertebrates based on dietary effects on reproduction in chickens, quail and ducks, see Table

⁵² These important scientific reports were removed from USBR's website but can be found here: http://calsport.org/news/wp-content/uploads/USBR_SLDFR-Feasibility-Rpt_AppE-Se-Biotreatment-Performance_2008.pdf Also see http://calsport.org/news/wp-content/uploads/USBR_SLDFR-Feasibility-Rpt_AppD-RO-Treatmt-Performance_2008.pdf

⁵³ See appendix M of SLDFR FEIS for Biological Opinion and Fish and Wildlife Coordination Act Report available at: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2236, https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2237, https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2238, https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=2239

⁵⁴ GBP BO available at https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=4826

⁵⁵ https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41546

6-4, Recommended Ecological Risk Guidelines Based Upon Selenium Concentrations, on page 6-27 of the FEIS/R Grassland Bypass Project, 2010–2019.⁵⁶

The critical issue with respect to environmental risk is associated with bioaccumulation potential of waterborne selenium through the food-web and into higher trophic level consumers. A two-fold increase in bioconcentration factors may have a pronounced impact on realized risks to wildlife populations because toxicity is not a linear phenomenon (i.e., the dose-response curve is sigmoidal). In the case of selenium, a trace element with a very narrow safety margin (the range between nutritionally beneficial and toxic concentrations), the dose-response curve is quite steep (see, for example, SLDFR FEIS Appendix M, USFWS Adult Avian Mortality Protocol).⁵⁷ Therefore, the ESA consultation and Coordination Act Report were based on invalid performance objectives and are invalid. Even Interior in their latest status report on the drainage litigation (@ pg 4) admits a need to re-scope [SLDFR] project needs: “*Reclamation, in collaboration with Westlands, San Luis WD, Panoche Water District, and Pacheco Water District, is collecting and analyzing data to verify that the original assumptions and conceptual plans presented in the 2008 Feasibility Study are still accurate.*”⁵⁸

2. ESA Consultations on Westlands Interim Contracts are Insufficient & Outdated.

a. Environmental Protection Measure is unverified.

The USFWS completed a Programmatic biological opinion on the Central Valley Project Improvement Act in 2000 (CVPIA BO). The CVPIA BO reviewed and provided ESA coverage for the CVPIA Programmatic EIS (PEIS). The purposes of the CVPIA include:

- Protection, restoration and enhancement of fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California;
- Addressing impacts of the CVP on fish, wildlife and associated habitat;
- Improving operational flexibility of the CVP;
- Increasing water-related benefits through expanded use of voluntary water transfers and water conservation;
- Contributing to efforts to protect the San Francisco Bay/Delta Estuary;
- To achieve a reasonable balance among competing demands for use of CVP water, including requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

The CVPIA PEIS and BO provided a framework whereby future CVP-related actions, including interim and long-term CVP water contract renewals, could be reviewed for site-specific impacts under NEPA and ESA. Included in the BO was a commitment to develop and implement a Comprehensive Mapping Program (aka CVPHMP) (as described on pages 2-62 and 2-63 of the Final CVPIA BO): “*Reclamation and the*

⁵⁶See https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=4412

⁵⁷ *Ibid.*

⁵⁸ Oct 1, 2019 Fed Defendants Status Report, Case 1:88-cv-00634-LJO-SKO

Service will use the best scientific and commercial information available, in conjunction with data from aerial photograph analysis to monitor trends in the environmental baseline for listed species. It is the ultimate goal of Interior to assure that listed species are being recovered. For any species affected by the CVP that are continuing to decline, the Service and Reclamation will immediately assess critical needs for the species and determine whether it is appropriate to expand the Conservation Program or implement other conservation measures. Any native habitat converted to agricultural or municipal/industrial use within the water service area without prior biological surveys, as required by Reclamation prior to the delivery of Reclamation water, will be evaluated to determine what mitigation measures will be required.” The purpose of the CVPHMP was to identify remaining natural habitats and cropping patterns within the State-permitted CVP Place of Use (POU) and identify any changes within those habitats that have occurred from 1993 to 1999, and then every 5 years thereafter. Identification of natural habitats remaining in CVP contract service areas and monitoring of those habitats every 5 years is essential to confirming that listed species baselines are stable.

As part of the ESA consultation on the 2014 CVP Interim Contract Renewals for Westlands, the USFWS requested confirmation that districts that receive this CVP water will not use the water to convert native lands to other uses. This information was identified as necessary for validating Reclamation’s conclusion that CVP interim contract deliveries do not result in land use changes that would adversely affect Federally-listed species or critical habitat.⁵⁹ Yet, the current Draft EA for Westlands interim contract renewals includes no mention of the CVPHMP commitments, or any data from it. Without actual data to verify the environmental commitment @ pg 11, “No CVP water would be applied to native lands or land untilled for three consecutive years or more” is of little value. Further, there is no mechanism identified in the Draft EA to address land conversions that may have occurred without additional “environmental analysis and approval.” The consequences of non-compliance need to be defined and implementable.

b. Status of Consolidated Place of Use Mitigation should be disclosed.

In November 1999, the SWRCB issued a final EIR that updated Reclamation’s 16 CVP water rights permits. Included in this EIR were changes to the state authorized place of use for these permits (CPOU). The EIR authorized the addition of “encroachment lands” to the CPOU (defined as lands within the boundaries of CVP water contractor service areas outside of the POU that received CVP water historically). The EIR did not authorize the addition of “expansion lands” to the CPOU (defined as lands within the boundaries of CVP water contractor service areas but outside of the POU that have never received CVP water) until adequate site-specific environmental documentation is completed (CPOU EIR @ pg ES-2).⁶⁰

⁵⁹ Available at this link: https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=15981

⁶⁰ Available at this link: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/eirs/eir1999_ccpou/docs/ccpoufeir.pdf

Westlands was identified in the EIR to have 30,718 acres of encroachment lands and 9,664 acres of expansion lands.

The CPOU EIR concluded that historic delivery of CVP water to encroachment lands has resulted in significant adverse effects to vegetation and wildlife. The EIR and D-1641 identified that of the 85,620 acres of encroachment lands that currently receive CVP water, the development and land use conversion of 45,390 acres was facilitated by delivery of CVP water supplies for agricultural purposes. As part of the SWRCB Decision 1641 Reclamation was required to provide compensation for lost habitat due to encroachment. Specifically, Reclamation was required to delineate existing habitats of the affected special status species and in consultation with DFG and USFWS to develop a mitigation plan satisfactory to the SWRCB. This decision requires that the mitigation plan be developed and completed within ten years of the date of D-1641 (D-1641 was signed in March 2000, @ pg 165). This decision also requires a mitigation monitoring and reporting program to ensure continued protection and enhancement of special status species.”⁶¹ The SWRCB identified the following habitat types that would need to be mitigated for from Westlands encroachment: 22,343 acres of alkali scrub/ 1,611 acres of Valley-foothill riparian/fresh emergent wetland, and 6,653 acres of annual grassland (CPOU EIR @ pg 2-70, Table 2-32). No information was provided in the Draft EA on the status of mitigation for CPOU.

M. An Alternative including Secretarial cessation of water deliveries to Westlands' must be considered in a full EIS.

There is nothing presented in the record that precludes the Secretary of Interior from considering an alternative that decommissions this specific contract. There is no legal obligation to operate a project once it was built if experience reveals to the Secretary that the project is not “practicable” under reclamation law without drainage (which of course both Reclamation and Congress knew to be the case beforehand) and is harmful to public and environmental health. At the time the San Luis Unit was authorized in 1960, vast portions of the unit were understood by Congress, the Bureau of Reclamation and the State of California not to be “practicable” for irrigation without drainage. *See* Reclamation Act of 1902 § 4 (43 USC 419) “*Upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same...*” The statutory premise and requirement of practicable irrigability remains under Reclamation law.

Drainage was known to be an issue and it was required to be provided under the San Luis Act of 1960 (PL 86-488). The project proceeded without it. So the catastrophe of Westlands' irrigation causing pollution and degradation of water supplies was both predictable and predicted. The contract conversion does not require Reclamation to merely roll over the existing interim contract without considering the irrigability requirements under Reclamation law and by definition the cessation of exported water to these non-irrigable lands.

⁶¹ D-1641 @ pg 140, available at this link:

https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf

Further, any consideration of a "no-action" alternative should not set up the false choice of drainage vs. no drainage. This is a false choice. The alternative which needs to be considered is the cessation of water exports under the contract to these lands that are causing the pollution. Such a false choice--drainage vs. no drainage-- is a deliberate obfuscation by the Secretary to avoid considering the alternative of discontinuing water deliveries to these unsuitable lands. The "No-Action" in the SLFRE alternative created by Reclamation set up a false choice between no drainage and drainage. The no action alternative is feasible and legal under the 9th Circuit court decision if the Secretary changed operations and discontinued deliveries to drainage impaired lands.

Finally, under Reclamation law, feasibility is required of project operations. Typically, project feasibility is determined by an economic analysis, the goal of which is a 1:1 benefit-cost ratio. If one includes the obligation for drainage management, for which no solution except land retirement has been effective, it seems that irrigation of Westlands is not *economically* feasible from a national perspective, even if it is *financially* beneficial to Westlands' irrigators. The ongoing environmental damage caused by its operation is a cost that needs to be fully integrated into any justification for continued deliveries.

There is a need for a full and fair review in the NEPA analysis that would determine what lands within Westlands' service area are not practicably irrigable and then that portion of the project should be *decommissioned*. Review should be made of the authority of the Secretary to make the non-practicability determination and thus, stop water deliveries. How can there be an obligation to provide—and liability for not providing—drainage when the government has decided, using another cornerstone of reclamation law, that irrigation of Westlands is not a “beneficial” use of water. *See* section 8 of the 1902 Act “beneficial use shall be the basis, measure, and limit of the right.”

Under the current San Luis Unit situation, solving the vexing drainage pollution problem turns on whether the CVP is delivering water to Westlands. If yes, then drainage is required of the Reclamation to be repaid by the contractors. If not, that is, if the Secretary declares it is not beneficial or practicable to apply water to San Luis Unit lands, then the drainage obligation as a federal responsibility disappears. This environmental pollution and the potential costs for clean up and treatment must be weighed against the alternative of not delivering the water for irrigation.

In addition, the cumulative impacts of other water export projects, such as a tunnel project providing even greater exports, needs to be evaluated against (1) the full cost, including drainage and environmental remediation costs of irrigating the San Luis Unit; and (2) who is responsible for those costs.

The benefit/cost ratio of the SLU is no longer favorable, if ever it could have been. The SLU irrigation development has fundamental flaws in its soils contaminants, and drainage that are not economical to remediate. The SLU is not feasible. The SLU is not a practicable irrigation project.

Section 4 of the 1902 act states: “Upon the determination by the Secretary of the Interior that any irrigation project is *practicable*, he may cause to be let contracts for the construction of the same . . .” (emphasis added). We know that subsequent to 1902, by the time of the SLU authorization in 1960, reclamation law had changed to require congressional authorization of projects. But the basic criterion of practicability remained intact.

When one looks PL 86-488, one can see how problematic the project development was, with drainage being the biggest problem. Tapping distant water supplies (e.g. Trinity River) along with expensive pumping plants and the Delta-Mendota Canal/California Aqueduct Intertie added to the problem. Too many subsidies are needed to address problems that it turns out cannot be solved. Moreover, there has been an enormous environmental price to pay because the SLU has not worked and was not feasible in the first instance to construct. Thus, one is drawn to the unavoidable conclusion that using CVP water on these SLU lands under these conditions is not practicable under federal law or “beneficial” under state law.

Finally, any conversion from the existing 9(e) contract to a 9(d) contract must include a contract to resolve the vexing contamination problem caused by excessive water exports from the Delta. Clearly, because such conversion contracts are proposed, these new contracts must document the practicability of the irrigation of Westlands' lands. We conclude, based on Reclamation's studies: (1) Over 200,000 acres under the proposed Westlands contract is no longer practicable of irrigation due to drainage problems; and (2) it is not a beneficial use to apply water to these lands that are not practicable of irrigation.

We conclude that the State Water Board must re-open the water right and Reclamation must cease deliveries of water to these toxic lands. It remains unclear whether the State Board has conformed its *place of use* designation for CVP water exports to facts on the ground. A contract requirement should include: (1) A prohibition of any water deliveries to drainage impaired lands, (2) the restoration fund payment obligation must remain intact, and (3) any proprietary interest in the water as a result of a change in the contract whereby Westlands can use or sell the water as the market warrants, must be subject to CVPIA limitations for other project purposes such as fishery restoration, preservation and propagation. Similarly fish and wildlife refuge needs also must be considered prior to such change in use or sale.

N. NEPA Analysis of Westlands' contract conversion should include alternatives that reduce contract quantities.

The Westlands contract conversion would renew full contract quantities in perpetuity. These contract quantities are justified by outdated, inaccurate data, and bias that renders the Water Needs Assessment (WNA) insufficient in addressing shortcomings identified by the 9th Circuit Court⁶². Further, the 9th Circuit Court ruled in their July 25, 2016 Amended Memorandum that “*Reclamation’s decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of*

⁶² See Appendix B and C of the Draft EA, Central Valley Project (CVP) Water Needs Assessments (WNA) Purpose and Methodology, and Westlands WD WNA.

*discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study... On remand, the district court shall direct Reclamation consider such an alternative in any future EA for an interim contract renewal.”*⁶³

The USEPA in their comments on the Draft EIS and Supplemental Information for Renewal of Long Term Contracts for San Luis Unit (SLU) Contractors (CEQ# 050411 and 060056, dated April 17, 2006, @ pg 2 of Attachment A) recommended that the SLU FEIS should consider mitigation measures, such as “...*contract provisions, or changes in amounts and location of water applied, which will reduce drainage production and selenium mobilization.*” EPA further cited 40 CFR 1502.14 (b) and CEQ’s NEPA 40 Most Asked Questions, which emphasize the need to evaluate all reasonable alternatives, even if they conflict with local or federal law (2b).⁶⁴

Curtailling deliveries of CVP water to drainage impaired lands could have significant benefits to the environment, including: reducing diversions from the Trinity River and pumping in the Delta, reduction of drainage production and selenium contamination of the environment, freeing up water to meet CVPIA fish and wildlife obligations including water for fisheries restoration and improvement as established in CVPIA Sections 3406 b(2) and b(3) and for refuge water management needs as established in 3406(d).⁶⁵

O. Cumulative Effects Analysis is Required in an EIS

The Westlands contract conversion should include the effects of other past, present, and reasonably foreseeable future actions that could result in cumulative impacts on the biological resources of the study area. Reclamation concluded, for Westlands’ interim contract renewals that there would only be minimal cumulative impacts to biological resources over a 2-year period. However, these conclusions of finding minimal cumulative impacts to biological resources are dependent on the timely implementation of future agricultural drainage service, habitat restoration, land acquisition and retirement, water conservation, and CVPIA programs including implementation of Fish and Wildlife Habitat Restoration Programs under Sections 3406 b(2), b(3) and 3406 d(1) and d(2).

The Draft EA for Westlands interim contracts references the Programmatic EIS for CVPIA which identified these restoration programs necessary to remediate adverse impacts of these contract renewals⁶⁶. Yet, some important ecosystem restoration provisions of CVPIA, such as acquisition of full Level 4 refuge water supplies, have lacked funding for adequate implementation. Purchase of environmental water under the CVPIA b(3) program has also fallen substantially short of targeted needs due to inadequate funding mechanisms. This unmet need

⁶³ See: <https://cdn.ca9.uscourts.gov/datastore/memoranda/2016/07/25/14-15514.pdf>

⁶⁴ <https://archive.epa.gov/region9/nepa/web/pdf/san-luis-deis-supplemental.pdf>

⁶⁵ <https://www.usbr.gov/mp/cvpia/docs/public-law-102-575.pdf>

⁶⁶ https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41303

may increase in the future as market prices for water continue to rise with demand. Further, past and present efforts to meet water quality standards in the San Joaquin Basin have been significantly hampered by the lack of adequate fresh water supplies. The USEPA recommended, in their comments on the DEIS and Supplemental Information for San Luis Unit Long Term Contracts (@ pg 6 of Attachment A) that, “The cumulative impacts analysis in the FEIS should be based on the past and present trends of supplies available for redirection to meet restoration and refuge needs in the area, including Trinity Restoration needs. Where information is available, the analysis should reflect the actual implementation status of CVPIA restoration actions.”⁶⁷

In October 2019, Reclamation released a draft EA on new water assignments from Mercy Springs and Fresno Slough WDs (both Delta-Mendota Unit CVP contractors) to Angiola Water District.⁶⁸ Angiola WD is a non-CVP contractor in the Tulare Basin that is outside of the CVP Place of Use as established by the SWRCB⁶⁹. Allocating federal water outside of the State permitted Place of Use, and without consideration of CVPIA fish and wildlife restoration programs is a violation of the law.

III. NEPA and the ESA apply to Reclamation’s decision to enter into and negotiate the terms of permanent contracts.

Reclamation contended in a status report filed in district court in a case challenging some of Westlands interim contracts that NEPA does not apply to Westlands’ contracts that are converted from existing water service contracts to repayment contracts pursuant to section 4011 of the Water Infrastructure Improvements for the Nation Act (“WIIN Act”) because the conversion is a non-discretionary act. *See* 1:16-cv-00307-LJO-SKO (E.D. Cal), ECF No. 100.⁷⁰ However, pursuant to NEPA, ESA, and Reclamation laws there is no basis for that conclusion.

Reclamation’s decision to enter into the permanent contracts is not merely ministerial in nature and thus the non-discretionary exceptions to NEPA and the ESA do not apply. Therefore, Reclamation is required to complete an EIS and engage in Section 7 consultation prior to converting the water service contracts to repayment contracts. Under the plain language of the WIIN Act, the Secretary of the Interior has discretion over the terms of any permanent contract. Section 4011(a)(1) of the WIIN Act states:

⁶⁷ <https://archive.epa.gov/region9/nepa/web/pdf/san-luis-deis-supplemental.pdf>

⁶⁸ See: https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=33881

⁶⁹ https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/eirs/eir1999_ccpou/docs/ccpoufeir.pdf

⁷⁰ “Section 4011 of the WIIN Act directs the Secretary of the Interior, upon the request of a contractor with a long-term water service contract, to convert that contract to a repayment contract under specified terms. Westlands Water District has requested conversion of the water-service contracts corresponding to the Interim Contracts to repayment contracts under the WIIN Act. Reclamation thus construes the conversion of the contracts under the direction of the WIIN Act as a non-discretionary action that is not subject to the requirements of NEPA.” United States Status Report, Mar. 12, 2019, ECF No. 100, at ¶4.

Upon request of the contractor, the Secretary of the Interior *shall* convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' association to allow for prepayment of the repayment contract pursuant to paragraph (2) *under mutually agreeable terms and conditions.*

WIIN Act (Pub. L. 114-322, 130 Stat. 1628), Section 4011(a)(1)(emphasis added).

Subsection 2 requiring “mutually agreeable terms and conditions” makes clear that the terms and conditions of the contract are not pre-determined and must instead be agreed to by the Secretary of Interior (Secretary) and a water users' association or contractor. The Secretary's discretion in negotiating such “mutually agreeable terms” means that the Secretary's actions in converting the contracts are not merely ministerial and that environmental considerations could alter the terms and conditions to which the Secretary is willing to agree. Accordingly, NEPA applies, and Reclamation must analyze the potential environmental impacts of the repayment contract before the Secretary can legally enter into these contracts. Further, Reclamation has discretion to negotiate the terms of the contracts, and it could do so for the benefit of a protected species. Thus, Section 7 of the ESA applies to Reclamation's decision on the permanent contracts, and it therefore must consult on effects of its action on listed species.

IV. The WIIN Act does not abrogate the requirements of other federal laws including NEPA, the ESA, and the CVPIA.

The WIIN Act did not repeal any parts of NEPA, the ESA, the CVPIA, or any other federal law and thus, Reclamation must still follow its obligations pursuant to these laws in its actions taken under the authority of the WIIN Act. There is nothing in the WIIN Act that creates “a clear and unavoidable conflict” and thus, NEPA, the ESA, and the CVPIA apply to Reclamation's decision. The fact that the WIIN Act says that the Secretary “shall” convert water service contracts to repayment contracts does not create a conflict with completing an EIS or ESA section 7 consultation first.

Furthermore, the WIIN act *expressly states* that the other requirements of federal reclamation law apply. Section 4011(d) of the WIIN Act provides that, “Implementation of the provisions of this subtitle shall not alter ... except as expressly provided in this section, any obligations under the reclamation law.” As acknowledged at the start of the draft contract, the CVPIA is part of “reclamation law,” and thus, according to the express language of the WIIN Act, the requirements of the CVPIA apply to the conversion of contracts under Section 4011 of the WIIN Act.

The CVPIA makes clear that Reclamation must comply with the ESA and suggests that Reclamation must complete an EIS. Regarding the ESA, Section 3406(b) of the CVPIA provides: “The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq....” 106 Stat. at 4714. Thus, compliance with the ESA is an express requirement of the CVPIA.

Section 3404(c) of the CVPIA requires that an EIS be completed before Reclamation can renew any long-term repayment or water service contract for a period of 25 years.⁷¹ Reclamation defines "long term contract" as a "*contract with a term of more than 10 years.*"⁷² By these definitions anything contract term longer than 10 years is by Reclamation's own definition 'a long-term contract.' A conversion to a permanent contract fits the definition of a long-term contract. Thus, Reclamation must prepare an EIS before entering into permanent repayment contracts, which will last even longer than either 25-year renewal contracts or the long-term contracts defined by Reclamation. Congress determined that long-term contracts would have a significant effect on the environment such that an EIS is required. Permanent contracts will have even a more significant effect on the environment and thus an EIS clearly is required for permanent contracts. We could also argue that it would frustrate the intent of Congress if Reclamation could get around the requirement of an EIS in CVPIA section 3404(c) by simply converting contracts under the WIIN Act rather than renewing contracts under the CVPIA. Congress did not expressly repeal these provisions of law that govern CVP water supply contracts.

V. Conclusions

Reclamation has engaged in a process to convert Westlands' two-year interim water service contract that functionally ignores much of Reclamation contract law and violates NEPA, ESA, the Administrative Procedures Act, Central Valley Project Improvement Act, the Reclamation Reform Act, and other federal statutes. The ultimate effects of the process Reclamation is following are:

- A raid on the US Treasury and taxpayers because of permanently eliminating beneficiary payment obligations;
- A clever water grab whereby contract conversion impacts are segmented by USBR, in collusion with Westlands, and have effectively excluded or contracted out impacts to areas of origin and communities who depend on these water resources for their livelihood and economic well-being;
- A process that effectively repeals, without Congressional authorization, the fundamental policy goals of providing these subsidized water benefits to the greatest number of people for the greatest good, while ensuring the environment is protected and the treasury is repaid at least the costs of construction and mitigation.⁷³

Under this contract conversion process the public has been given a puzzle of dizzying complexity without the puzzle picture. Relying on language adopted without hearings or testimony, USBR and Westlands, based on mutual agreement, claim that Congress intended the

⁷¹ Reclamation has not completed this analysis which is why it has been entering into interim contracts with water users, including Westlands.

⁷² <https://www.usbr.gov/recman/pec/pec-p05.pdf>

⁷³ See *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958).

WIIN Act as the functional repeal of these federal laws. There is simply no justification for this contention and no authority for Reclamation to issue the proposed permanent water contract under the present process. Westlands' proposed draft contract conversion must be withdrawn and restarted.

The water contract conversion process must start with outreach to the more than 17-20 parties of interest that have thus far been excluded or contracted out under the proposal. Further, all of this now invisible draft contract must be publicly disclosed and the critical exhibits must be provided to the public and those areas of origin that are most impacted by the water that is being taken and exported to Westlands. The impacts of privatizing this amount of subsidized water for a few corporate irrigators must be analyzed and the impacts on other users disclosed, including for example impacts to Los Angeles ratepayers. Such ratepayers will ultimately pay to meet mutual state and federal project environmental protections and will undoubtedly be charged a markup of millions of dollars during times of shortage to obtain some of these federally subsidized supplies that will be dedicated to Westlands under such a permanent contract.

Additionally, any NEPA process that considers allocating excessive contract water amounts to Westlands in perpetuity must also include the management of toxic drainage from irrigating these soils within Westlands. Only after proper NEPA and ESA analyses are completed, should Reclamation issue a revised converted contract that modifies the terms to comply with the requirements of federal and state law. Using a 'stale water needs assessment', failing to conduct the required irrigability and arable land investigations, while delivering water outside of the Congressionally authorized area under the San Luis Act of 1960, inflates Westlands' water allocation. The proposed Westlands conversion contract permanently inflates their water allocation, and thus the export of water from the Delta and its tributary rivers. These excessive exports have significant impacts upon the environment and communities from where this water originates. We recommend strategic land retirement and cessation of water deliveries to the 300,000 acres identified by federal scientists. Water deliveries to irrigate these lands causes drainage problems and mobilizes water contaminants on the west side of the southern San Joaquin Valley. Only a full EIS that comprehensively assesses the far-ranging and complex direct and secondary effects of irrigating these toxic soils can illuminate the total environmental impact of the proposed permanent water allocation to this geographic area. Without a comprehensive, EIS Reclamation decision makers and the public are flying blind. Reclamation law does not require delivery of water claimed nor the operation of the CVP to deliver water to lands that are not practicably irrigated and where such federal action causes pollution. Alternatives that exclude water deliveries to these soils and incorporate contract provisions that require adherence to CVPIA mitigation measures are needed and required.

Thank you for considering our comments. Please make sure the undersigned are included in any future Reclamation actions with regard to CVP water exports from the San Francisco Bay-Delta Estuary and/or the CVP San Luis Unit contractors and/or conversion of CVP contracts pursuant to Section 4011 of the WIIN Act. Despite repeated comments the undersigned did not receive notice of the proposed permanent Westlands' conversion contract public negotiations.

Thank you for the opportunity to comment.



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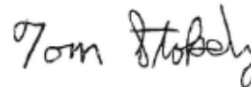
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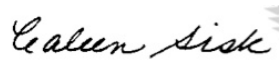


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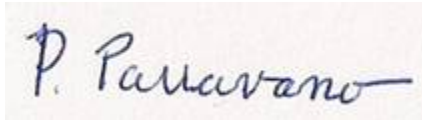
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