

**AGREEMENT BETWEEN THE UNITED STATES AND WESTLANDS WATER
DISTRICT**

August 2015

For the purpose of disposing of all further judicial, administrative, and contractual claims without there being any trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of any party, and for no other purpose, Westlands Water District ("Westlands") and the United States (collectively, "the Parties") stipulate and agree as follows:

1. On June 3, 1960, Congress approved the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156, authorizing the construction of and operation of the San Luis Unit of the Central Valley Project.

2. On June 5, 1963, Westlands entered into a water service contract, Contract No. 14-06-200-495-A (Contract Between The United States And Westlands Water District Providing For Water Service) ("1963 Water Service Contract"), with the Department of the Interior Bureau of Reclamation (Reclamation) pursuant to section 9(e) of the Reclamation Project Act of 1939, and the parties have subsequently entered into interim renewal contracts (collectively, "water service contract and any interim renewals thereof").

3. On April 1, 1965, Westlands entered into a construction repayment contract, Contract No. 14-06-200-2020A (Contract Between The United States And Westlands Water District Providing For The Construction Of A Water Distribution And Drainage Collector System), with Reclamation pursuant to section 9(d) of the Reclamation Project Act of 1939 ("1965 Repayment Contract").

4. On February 4, 2000, the United States Court of Appeals for the Ninth Circuit held that section 1(a) of the San Luis Act requires the Secretary of the Interior ("the Secretary") to provide drainage to the San Luis Unit, while subsequent Congressional enactments left the Secretary with discretion as to the means of satisfying this requirement. *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000).

5. On December 18, 2000, the United States District Court for the Eastern District of California entered an Order Modifying Partial Judgment on Findings of Fact and Conclusions of Law Re: Statutory Duty to Conform to Ninth Circuit Opinion in *Firebaugh Canal Water Dist. v. United States*, Case No. F-88-cv-634-OWW (E.D. Cal.), directing that the Secretary "shall, without delay, provide drainage to the San Luis Unit pursuant to the statutory duty imposed by section 1(a) of the San Luis Act."

6. On March 9, 2007, Reclamation's Mid-Pacific Region issued a Record of Decision selecting a drainage service plan for the San Luis Unit. Reclamation has begun implementing that Record of Decision in a portion of the central sub-unit of Westlands under control schedules provided to the district court and the parties and pursuant to further orders of the district court in the *Firebaugh* litigation.

7. On September 2, 2011, certain landowners within the Westlands service area filed a putative class action in the United States Court of Federal Claims (*Etchegoinberry, et al. v. United States*, No.11-564L (Fed. Cl.)) ("*Etchegoinberry*"),

alleging that the United States' failure to provide drainage service to their lands effected a physical taking of their property without just compensation in violation of the Fifth Amendment.

8. On January 12, 2012, Westlands filed a breach of contract action in the United States Court of Federal Claims (*Westlands Water District v. United States*, No. 12-12C (Fed. Cl.)), alleging that the United States' failure to provide drainage service to Westlands' service area constituted a breach of Westlands' water service contracts and 1965 Repayment Contract. On January 15, 2013, the Court of Federal Claims granted the United States' motion to dismiss. Westlands appealed to the United States Court of Appeals for the Federal Circuit (Fed. Cir. 13-5069).

9. The United States and Westlands subsequently entered into negotiations designed to amicably resolve the parties' claims related to drainage service and have now agreed to settle the above disputes as follows, with each party to bear its own costs, attorney fees, and expenses:

(a) Upon execution of this Settlement Agreement ("Agreement"), Westlands shall cooperate in good faith with the United States in seeking a settlement of *Etchegoinberry*. Unless otherwise agreed to in writing, Westlands and the United States agree that the terms of a proposed settlement of *Etchegoinberry* shall include provisions for the following:

(i) a mutually agreed-upon procedure, whether through class action, joinder, or other means, for settling *Etchegoinberry*;

(ii) if warranted, the conditional intervention by Westlands in *Etchegoinberry* for the limited purpose of settlement;

(iii) the payment of compensation by Westlands to owners of land within Westlands' service area affected by the alleged failure of the United States to provide drainage service;

(iv) subject to final approval, the execution of a settlement agreement contingent upon the enactment of Enabling Legislation;

(v) upon satisfaction of the foregoing terms in this sub-paragraph 9(a), and any other term or terms which may be mutually agreed-upon, the entry of judgment and dismissal with prejudice of all claims asserted, or that could have been asserted, in *Etchegoinberry*; and

(vi) Upon execution of this Agreement, Westlands shall use its best efforts to obtain a release, waiver and abandonment of all past, present and future claims of each landowner within its service area against the United States arising from the alleged failure by the United States to provide drainage service, including, but not limited to, the claims alleged in *Etchegoinberry*. Each release, waiver, and abandonment becomes effective only upon the execution of the 9(d) repayment contract

referenced in paragraph 9(c) ("the 9(d) Repayment Contract"). Upon execution of the 9(d) Repayment Contract, Westlands further agrees to save, hold harmless, and indemnify the United States for all claims described in this paragraph 9(a). Westlands' payment of all such indemnifiable costs, including expenses, attorneys fees, and damages of any kind, shall be due within 180 days of the United States invoicing Westlands.

(b) Within 28 days of the enactment of the Enabling Legislation referenced in paragraph 10 and provided that no party to this Agreement has determined that the Enabling Legislation was enacted with a material change in accordance with paragraph 10,

(i) Westlands agrees to join with the United States in petitioning for the vacatur of the Order Modifying Partial Judgment issued by the *Firebaugh* court referenced in paragraph 5 above, and all subsequent orders directing the United States to implement drainage or control schedules, pursuant to Fed. R. Civ. P. 60(b)(5); and

(ii) Westlands agrees to join with the United States in stipulating to the dismissal of *Westlands Water District v. United States* (Fed. Cl. 12-12C; Fed. Cir. 13-5069) with prejudice.

(c) Upon enactment of Enabling Legislation directing the conversion of Westlands' contract, the Secretary shall initiate and complete all actions necessary to convert Westlands' existing water service contract, or any renewal thereof, entered into under section 9(e) of the Reclamation Project Act of August 4, 1939, 43 U.S.C. § 485h(e), to a repayment contract under section 9(d) of said Act, 43 U.S.C. § 485h(d), upon mutually agreeable terms and conditions. Reclamation's costs in implementing this Agreement shall be recovered in a manner consistent with its policy existing at the time Reclamation undertakes the action. The 9(d) Repayment Contract shall include the following terms:

(i) Westlands shall agree to be responsible for management of drainage water within Westlands' boundaries, in accordance with federal and state law, and at its own expense and sole liability, and the United States' obligation to make water available to Westlands under the 9(d) Repayment Contract shall be conditioned on Westlands' fulfillment of its obligations to manage drainage water within its boundaries.

(ii) The contract total under the 9(d) Repayment Contract shall be 1,193,000 acre- feet per contract year; provided that, during each contract year, subject to the terms and conditions specified in the 9(d) Repayment Contract, the United States shall have the exclusive right to the use of all Central Valley Project ("CVP") water made available to Westlands in excess of 895,000 acre feet for other Project purposes as determined by the Secretary. For purposes of this Agreement, a "contract year" means the twelve months beginning each March 1.

(iii) Westlands shall agree to wheel CVP water made available to Lemoore Naval Air Station under a water service contract, authorized by the Enabling Legislation referenced in paragraph 10, between the Secretary and the Secretary of the Navy for sufficient CVP water to meet the needs of the Naval Air Station, including irrigation, associated with air operations, and under the same terms and conditions as Westlands delivers water to Westlands' contractors.

(iv) Westlands shall be relieved of all unpaid capitalized construction costs for the CVP allocated to Westlands as of the date of this Agreement, as identified in the Central Valley Project Schedule of Irrigation Allocated Construction Costs per Acre-Foot by Contractor, dated January 23, 2014, and the Central Valley Project Schedule of M&I Allocated Construction Costs per Acre-Foot by Contractor, dated February 26, 2014, as adjusted to reflect payments by Westlands not reflected in such schedule, and properly assignable for ultimate return by the contractor. Upon completion of a subsequent or final allocation of capital construction costs expended by the United States and allocated among long-term water service and repayment contractors prior to the date of this Agreement, Westlands shall neither receive a credit nor incur any additional obligation as a result of the subsequent or final allocation of capital construction costs. Westlands shall likewise be relieved of the remaining balance due to the United States pursuant to the 1965 Repayment Contract. Westlands shall have no obligation to repay any costs incurred by the United States prior to the date of this Agreement for purposes of evaluating, planning, or providing drainage to the San Luis Unit, or future costs incurred to provide drainage service to lands outside of Westlands' boundaries.

(v) Notwithstanding the foregoing subsection (iv), the repayment relief afforded to Westlands in subsection (iv) shall not extend to Westlands' operation and maintenance obligations, whether payable to the United States or to an Operating Non-Federal Entity, or to construction costs or other capitalized costs not yet allocated to or incurred by Westlands as of the date of this Agreement, including, but not limited to, costs attributable to the Folsom Safety of Dams modifications or the B.F. Sisk corrective action study or Safety of Dams modifications, or the repayment of future capital costs incurred after the date of this Agreement. CVP construction costs or other capitalized costs allocated to Westlands after the date of this Agreement, and properly assignable to Westlands, shall be repaid in not more than 5 years after notification of the allocation of such amount of less than \$5,000,000. If such amount is \$5,000,000 or greater, such cost shall be repaid as provided by applicable Reclamation law. Power revenues will not be available to aid in the repayment of construction costs allocated to Westlands.

(vi) Notwithstanding the other subsections of this section 9(c), Westlands agrees that the Secretary shall retain all discretion to make water allocation decisions in the CVP consistent with the requirements of current or future-enacted Federal law, including but not limited to the Federal Endangered Species Act and Federal Reclamation law, including the Central Valley Project

Improvement Act and the Enabling Legislation; as well as all applicable California State Water Resources Control Board requirements, and nothing in this Agreement shall limit such discretion. If there is a condition of shortage in the amount of water available for delivery to Westlands because of the exercise of the Secretary's discretion in allocating water, errors in physical operations of the Project, drought, hydrologic variability, other physical causes beyond the control of the Secretary, or actions taken by the Secretary to meet legal obligations, no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom. Except as provided in the Enabling Legislation and this Agreement, conversion of Westlands' contract to a 9(d) Repayment Contract shall not afford Westlands any greater or lesser rights to an annual allocation of water than Westlands would have had if Westlands' 9(e) water service contract and any interim renewals thereof had remained in place.

(d) Upon enactment of the Enabling Legislation referenced in paragraph 10, and as a condition of the 9(d) Repayment Contract, Westlands shall be legally responsible for the management of drainage water within Westlands' boundaries.

(e) Within one year of the enactment of the Enabling Legislation referenced in paragraph 10 and provided that neither the United States nor Westlands has determined that the legislation was enacted with a material change in accordance with paragraph 10, Westlands shall permanently retire from irrigated agriculture not less than 100,000 acres of lands within its boundaries by recording on the title of all such retired lands a non-irrigation covenant in favor of the United States. Westlands agrees to identify for the United States all such retired lands and further agrees that the retired lands shall be used for: (1) the management of drainage water, including, with the consent of the United States, which shall not be unreasonably withheld, irrigation of reuse areas; (2) renewable energy projects; (3) upland habitat restoration projects, or (4) other uses to which the United States consents. The lands to be retired pursuant to this subsection 9(e) shall include the lands identified in Attachment A hereto and such additional lands, if any, needed to accomplish the permanent retirement of an aggregate of not less than 100,000 acres of lands within Westlands' boundaries. In the event any lands in Attachment A are not permanently retired from irrigated agriculture, Westlands shall permanently retire substitute lands within its boundaries, so that the aggregate of permanently retired lands is not less than 100,000 acres.

(f) Upon execution of the 9(d) Repayment Contract with Westlands, or as soon thereafter as practicable, the Secretary shall transfer to Westlands all right, title and interest, without warranties, in and to the following described real property or interest in real property, set forth in Attachment B, held in the name of the United States for the benefit of Westlands.

(i) Upon the transfer of the facilities pursuant to this paragraph, Westlands shall be responsible, at its own expense, for the operation and maintenance of the facilities transferred to it; provided that project use power shall be provided for the operation of said facilities.

(ii) Upon the transfer of facilities pursuant to this paragraph and this Agreement, Westlands shall operate and maintain the facilities to provide for the pumping and conveyance of water to enable Reclamation to fulfill its contractual obligations to any Project Water service or settlement contractor that has historically taken delivery of water from said facilities, including but not limited to the City of Coalinga, the City of Huron, and the California Department of Fish & Wildlife (formerly the California Department of Fish & Game); provided, that Westlands shall be entitled to collect from any Project Water service or settlement contractor on whose behalf water is conveyed or pumped, a charge to recover costs of operation and maintenance.

(g) Within eighteen months of the execution of the 9(d) Repayment Contract between the United States and Westlands referenced in paragraph 9(c) above, Reclamation shall, unless enjoined by a court, take all necessary actions to complete the process necessary to implement the exemption from the ownership and full cost pricing limitations of the Reclamation Reform Act of 1982 (96 Stat. 1269) ("RRA") and the ownership limitations provided in any other provision of Federal Reclamation law for lands within Westlands, as directed by the Enabling Legislation. Upon commencement of this process Reclamation will send a conditional exemption letter to Westlands explaining Westlands' RRA responsibilities from the date of the execution of the 9(d) Repayment Contract until Westlands receives a formal exemption from the Commissioner of Reclamation.

(h) Upon enactment of the Enabling Legislation, Westlands' capital repayment obligation and payments under its existing water service contracts and the 1965 Repayment Contract shall be suspended until the execution of the 9(d) Repayment Contract, and upon execution of the 9(d) Repayment Contract between the United States and Westlands referenced in paragraph 9(c) above, Westlands shall receive a credit against future operation and maintenance costs payable to the United States in the amount of the capital costs and payments under the existing water service contracts and the 1965 Repayment Contract paid by Westlands between the date of this Agreement and the date of enactment of the Enabling Legislation.

10. This Agreement is contingent upon the enactment of legislation, a copy of which is set forth in Attachment C ("Enabling Legislation"). If the Enabling Legislation set forth in Attachment C is not enacted into law by January 15, 2017, unless such date is mutually agreed by Westlands and the United States in writing to be extended, this Agreement shall become voidable by any Party to this Agreement. In addition, enactment of the Enabling Legislation as set forth in Attachment C is material and essential to this Agreement. If either Party to this Agreement determines that such legislation was enacted with material changes, and that Party provides written notice of such determination to the other Party within 14 days of enactment, this Agreement shall become voidable upon the election by either Party to the Agreement. Provided, that before either Westlands or the United States may exercise its right to void this Agreement based on material changes in the legislation, it shall provide thirty days written notice to the other Party of its intent to exercise its right to void this Agreement, and the Parties shall thereafter meet and confer. If this Agreement becomes null and void pursuant to

this paragraph 10, the Parties agree not to move this Agreement into evidence or otherwise present it in any judicial or administrative proceeding. In the event this Agreement becomes null and void, nothing in this Agreement creates any right of action or may be used by or against any Party for any purpose.

11. This Agreement has been approved by the United States. This Agreement has been approved by Westlands Water District.

12. Upon the enactment of Enabling Legislation subject to the provisions of paragraph 10 and dismissal of *Westlands Water District v. United States* (Fed. Cl. 12-12; Fed. Cir. 13-5064) with prejudice, Westlands releases, waives, and abandons all claims, known and unknown, asserted or unasserted in *Westlands Water District v. United States* against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related to the United States' provision of drainage service or lack thereof within Westlands' boundaries, or otherwise involved in this case, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort.

13. Upon the enactment of Enabling Legislation subject to the provisions of paragraph 10 and vacatur of the Order Modifying Partial Judgment issued by the *Firebaugh* court in 2000, and all subsequent orders directing the United States to implement drainage or control schedules, Westlands releases, waives, and abandons all claims and cross-claims, known and unknown, asserted or unasserted in *Firebaugh Canal Water Dist. v. United States*, Case No. 88-cv-0634-LJO (E.D. Cal.) ("*Firebaugh*"), and *Sumner Peck Ranch v. United States*, Case No. 91-cv-048-LJO (E.D. Cal.) ("*Sumner Peck*"), against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related to the United States' provision of drainage service or lack thereof within Westlands' boundaries, or otherwise involved in *Firebaugh* or *Sumner Peck*, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort.

14. Upon execution of the 9(d) Repayment Contract:

(a) Westlands releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related to the provision of drainage service or lack thereof within Westlands' boundaries, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort;

(b) Westlands agrees to cooperate in good faith with the United States in the defense of any claim then pending or subsequently brought by a past, present or future landowner within Westlands' boundaries against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related to the provision of drainage service or lack thereof within Westlands' boundaries, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and

(c) Westlands agrees to save, hold harmless, and indemnify the United States for all claims described in this paragraph 14. Westlands' payment for

indemnifiable costs, expenses, attorney fees, and damages of any sort shall be due within 180 days of the United States invoicing Westlands.

15. This Agreement is in no way related to or concerned with income or other taxes for which Westlands is now liable or may become liable in the future as a result of this Agreement.

16. Westlands warrants and represents that to its knowledge no action or suit, other than those identified in this Agreement, with respect to the provision of drainage service, is pending and that it will not file in or submit to any other court, administrative agency, or legislative body any claim related to the provision of drainage service within its boundaries. Westlands further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit.

17. Implementation of the provisions of this Agreement shall not alter the repayment obligation of any other long-term water service or repayment contractor receiving water from the Central Valley Project, or shift any costs to other such contractors that would otherwise have been properly assignable to Westlands absent this action, including operations and maintenance costs, construction costs, or other capitalized costs allocated to Westlands after the date of this Agreement.

18. This Agreement is for the purpose of settling the above-described disputes, and for no other. Accordingly, this Agreement shall not bind the Parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the Parties or counsel for the Parties have or may acquire an interest, except as is necessary to effect the terms of this Agreement.

19. This Agreement binds any and all future successors and/or assigns of Westlands.

20. The expenditure or advance of any money or the performance of any obligation by the United States, in any of its capacities, under this Agreement shall be contingent upon appropriation of funds therefor. No liability shall accrue to the United States, in any of its capacities, in the event funds are not appropriated.

21. The Parties reserve the right to amend this Agreement upon mutually agreeable terms.

22. The signatory for Westlands represents that he has been and is authorized to enter into this Agreement on behalf of Westlands Water District.

23. Counsel for the United States represent that he or she has been and is authorized to enter into this Agreement on behalf of the United States.

24. This document constitutes a complete integration of the Agreement between the Parties and supersedes any and all prior oral or written representations, understandings or agreements among or between them.

25. This Agreement is binding upon and shall inure to the benefit of Westlands and the United States. This Agreement is not intended to and shall not be interpreted in a manner so as to confer rights on persons or entities who are not Parties hereto, or to create intended or expected third party status on any such non-party.

26. No Member of or Delegate to Congress, Resident Commissioner, or official of Westlands shall benefit from this Agreement other than as a water user or landowner in the same manner as other water users or landowners.

27. Nothing in this Agreement shall be construed to deprive any federal official of the authority to revise, amend, or promulgate regulations. Nothing in this Agreement shall be deemed to limit the authority of the executive branch to make recommendations to Congress on any particular piece of legislation.

28. The Parties shall cooperate with one another in the implementation of this Agreement.

UNITED STATES OF AMERICA

By: 

JOHN G. CRUDE

Assistant Attorney General

United States Department of Justice

Environment and Natural Resources Division

Dated: 9/15/15

WESTLANDS WATER DISTRICT

By: 

THOMAS W. BIRMINGHAM

General Manager

Dated: 9/15/2015