

1 DANIEL J. O'HANLON, State Bar No. 122380
DANIELLE R. TEETERS, State Bar No. 210056
2 ANDREW P. TAURIANEN, State Bar No. 214837
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
3 A Professional Corporation
400 Capitol Mall, 27th Floor
4 Sacramento, CA 95814-4416
Telephone: (916) 321-4500
5 Facsimile: (916) 321-4555

6 Attorneys for Defendants WESTLANDS WATER
DISTRICT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FIREBAUGH CANAL WATER
DISTRICT and CENTRAL CALIFORNIA
IRRIGATION DISTRICT,

Plaintiffs,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
INTERIOR, BUREAU OF
RECLAMATION; GALE A. NORTON,
SECRETARY OF INTERIOR;
WESTLANDS WATER DISTRICT,
PANOCHÉ WATER DISTRICT,
PANOCHÉ DRAINAGE DISTRICT,
BROADVIEW WATER DISTRICT AND
SAN LUIS WATER DISTRICT,

Defendants.

SUMNER PECK RANCH, INC., et al.,

Plaintiffs,

v.

BUREAU OF RECLAMATION, et al.,

Defendants.

CASE NO. CIV-F-88-0634 OWW DLB

CONSOLIDATED WITH
CIV-F-91-048 OWW DLB

**WESTLANDS WATER DISTRICT'S
SCHEDULING CONFERENCE
STATEMENT AND APPLICATION FOR
ORDER TO SHOW CAUSE RE
CONTEMPT**

DATE: November 4, 2009
TIME: 8:15 a.m.
COURTROOM: 3
Hon. Oliver W. Wanger

I. INTRODUCTION

Westlands Water District submits the following Scheduling Conference Statement pursuant to this Court's July 22, 2009 Scheduling Conference Order (Doc. 740). The Court's July 2009 Order required that the Federal Defendants provide a report outlining the specific actions they will take to fulfill the Secretary of the Interior's mandatory duty to provide drainage for the San Luis Unit, as follows:

Within ninety (90) days, on or before October 23, 2009, the Federal Defendants shall provide a report to the Court identifying what specific actions will be taken to provide drainage to the San Luis Unit and a specific time table to implement drainage.

Scheduling Conference Order, dated July 22, 2009 ("July 2009 Order"), p. 2. The July 2009 Order further provided that "[t]he parties have been provided notice that no further delay shall be permitted in this case and that in the event the Federal Defendants continue to fail and refuse to provide the drainage long ago ordered by the Courts, this case shall proceed to an enforcement of judgment stage." *Id.* In addition to the report required from the Federal Defendants, the July 2009 Order required that all parties "present their provisions regarding bringing this case to a conclusion." *Id.*, at p. 3.

The Ninth Circuit Court of Appeals' decision of February 4, 2000, and this Court's order of December 18, 2000 confirmed the Secretary of the Interior's long established overall duty to provide drainage to the San Luis Unit. That duty had been ignored by the Secretary since 1986. *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 578 (9th Cir. 2000). The Court's July 2009 Order required that the Federal Defendants report to the Court regarding how the Secretary is meeting his drainage duty, including a time table. The Federal Defendants' Report to the Court ("Report") filed October 23, 2009 (Doc. 743) does not meet the requirements in the July 2009 Order. The Report merely describes continued federal funding in 2010 for additional studies and pre-existing projects that were initiated and are being implemented by local districts. There is no timetable in the Report to fully implement needed drainage to any area of the San Luis Unit, let alone the San Luis Unit as a whole. The Report indicates no effort to implement the drainage program selected by the Record of Decision ("ROD"), beyond sending a Feasibility Report to Congress more than

1 a year ago. The Report reveals no intention or effort to urge Congress to pass legislation to
2 implement the alternative selected in the ROD. It reveals nothing about when and how the
3 Department of the Interior will pursue alternatives to meet the Secretary's drainage duty if
4 Congress declines to pass the legislation necessary to fully implement the alternative selected in
5 the ROD.

6 The deficiencies of the Report indicate that the Secretary is failing to take the actions
7 necessary to meet his mandatory duty to provide drainage to the San Luis Unit. Accordingly, the
8 Court should now proceed to enforcement of the judgment, and begin by issuing an order to the
9 Federal Defendants, and specifically the Secretary of the Interior, to show cause why they should
10 not be held in contempt for failure to comply with the December 2000 mandatory injunction.

11 Regarding bringing this case to a conclusion, only two claims remain pending in the Fifth
12 Amended Complaint filed by Firebaugh Canal Water District and Central California Irrigation
13 District (collectively, "Firebaugh Plaintiffs"). The Fifth Claim, brought against the Federal
14 Defendants under the Administrative Procedure Act, remains pending to the extent it alleges that
15 the Secretary has unlawfully withheld drainage service from the San Luis Unit. The Sixth Claim
16 seeks declaratory relief against the District Defendants on the basis that they are "indispensable
17 parties" to the Fifth Claim against the Federal Defendants. Westlands believes that both claims
18 are amenable to disposition by summary judgment, and that hence the most expeditious way to
19 resolve this action is to set a date and briefing schedule for cross motions for summary judgment.

20 **II. THE SECRETARY OF THE INTERIOR HAS FAILED TO FULFILL HIS**
21 **DUTY TO PROVIDE DRAINAGE**

22 In affirming this Court's ruling that the Secretary of the Interior has a duty to provide
23 drainage to the San Luis Unit, the Ninth Circuit Court of Appeals held that:

24 The Bureau of Reclamation has studied the problem for over two
25 decades. In the interim, lands with in Westlands are subject to
irreparable injury caused by agency action unlawfully withheld.
26 Now the time has come for the Department of Interior and the
Bureau of Reclamation to bring the past two decades of studies, and
27 the 50 million dollars expended . . . to bear in meeting its duty to
provide drainage under the San Luis Act.

28 *Firebaugh*, 203 F. 3d at 578 (emphasis added).

1 This Court's December 2000 Order reiterated the Ninth Circuit's holdings and ordered
2 that:

3 The Secretary of the Interior, the United States Department of the
4 Interior, the United States Bureau of Reclamation, and each of
5 them, and their officials, and employees, shall, without delay,
provide drainage to the San Luis Unit pursuant to the statutory duty
6 imposed by section 1(a) of the San Luis Act.

7 Order Modifying Partial Judgment on Findings of Fact and Conclusions of Law Re: Statutory
8 Duty to Conform to Ninth Circuit Opinion, Doc. 654, ¶ 2, p. 4 (emphasis added).

9 The language of the injunctions and orders issued by the Courts is clear; provide, without
10 delay, drainage to the San Luis Unit. While the Secretary of the Interior has implemented a few
11 very small "drainage service actions," he has failed to provide the overall drainage ordered nine
12 years ago. In fact, notwithstanding the more than \$50 million the Department of the Interior has
13 spent to study the issue, the Secretary of the Interior has yet to implement drainage. Instead, the
14 Secretary delays the process further by submitting the scant and wholly inadequate Report stating
15 that they have done essentially nothing over the last nine months to meet the drainage obligation
16 to the San Luis Unit. The Report offers no promise of ever meeting the drainage duty.

17 **III. THE FEDERAL DEFENDANTS' REPORT DOES NOT COMPLY WITH
18 THE COURT'S JULY 2009 ORDER**

19 The requirements of the July 2009 Order that the Federal Defendants explain the specific
20 steps they will take to provide drainage to the San Luis Unit and a timetable for doing those steps
21 are not new, and hence Federal Defendants should have been able to readily provide the required
22 information. The Court's December 2000 Order required that the Federal Defendants:

23 [S]hall no later than January 29, 2001, submit to this court a
24 detailed plan describing the action or actions, whether short term or
long term, they will take to promptly provide drainage to the San
Luis Unit, which plan shall contain a schedule of dates by which the
action or actions described in the plan will be accomplished.

25 Order Modifying Partial Judgment on Findings of Fact and Conclusions of Law Re: Statutory
26 Duty to Conform to Ninth Circuit Opinion, ¶ 2, p. 4 (emphasis added). The December 2000
27 Order specifies exactly what the Court expected of the Federal Defendants. The July 2009 Order
28 only required the Federal Defendants to update the Court on their plans and their timetable by a

1 date certain.

2 After the Court's December 2000 Order, the Federal Defendants undertook a time-
3 consuming environmental review of drainage alternatives under NEPA. After seven years, they
4 issued the ROD, and in July 2008 completed a Feasibility Report based on the alternative they
5 had selected.¹ Over the course of the last three years, the Federal Defendants and other parties
6 pursued and completed negotiations regarding an alternative to the drainage program selected by
7 the ROD. But Federal Defendants are apparently unsatisfied with the negotiated alternative.

8 Although the Federal Defendants are aware that lands within Westlands continue to be
9 irreparably harmed, since January 2009, all progress toward accomplishing drainage service has
10 stopped, with no effort by the Federal Defendants to implement either the ROD or to pursue the
11 negotiated alternative. Accordingly, at the July 17, 2009 scheduling conference, Westlands asked
12 that Federal Defendants be directed to immediately describe to the Court how they would comply
13 with the Court's December 2000 Order. The July 2009 Order directed the Federal Defendants to
14 file a report by October 23rd delineating specifically what they will do to fulfill their duty to
15 provide drainage to the San Luis Unit, and to include a time table setting forth when they are
16 going to accomplish drainage of the San Luis Unit.

17 The Federal Defendants filed the Report on October 23rd. The Report includes, by
18 reference, a Declaration by Donald R. Glaser ("Glaser Decl."), the Director of the Bureau of
19 Reclamation's Mid-Pacific Region. The Report does not comply with the July 2009 Order. It
20 does describe the very limited actions that Federal Defendants are undertaking in 2010 that in
21 some sense relate to drainage. But it does not provide the Court what it asked for. It does not tell
22 the Court how Federal Defendants will fulfill their drainage obligation under Section 1(a) of the
23 San Luis Act, or when they will do so.

24 First, the Report and Glaser Decl. describe various site specific "drainage service actions"
25 that the Federal Defendants aspire to implement during fiscal year 2010. These limited funding
26 actions in 2010, while helpful in 2010 within the limited areas where they are being implemented,

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28 ¹ The ROD was lodged with the Court on March 9, 2007 (Doc. 711). The Feasibility Report was
lodged on July 8, 2008 (Doc. 727).

1 fall well short of fulfilling the Secretary's drainage duty to the San Luis Unit. The approximately
2 \$23 million in funding for the enumerated actions in 2010 is minimal compared to the nearly
3 \$430 million available under in the current appropriations ceiling in the San Luis Act. The
4 actions that the Federal Defendants commit to take in 2010 are far short of meeting the
5 Secretary's drainage obligation, which requires much broader action.

6 Second, despite the explicit terms of the July 2009 Order, the Report does not include a
7 timetable by which the Secretary will fulfill his drainage obligation to the San Luis Unit. The
8 Report states only that actions taken after fiscal year 2010 will require additional appropriations
9 from Congress, and an apportionment of appropriations by the Office of Management and
10 Budget. Report at pp. 2-3. While the Federal Defendants claim that they "will seek such
11 appropriations in future years through the annual federal budget process," and promise to keep the
12 Court and the parties informed via "periodic reports," the Report fails to describe the specific
13 drainage service actions that Federal Defendants will seek continued funding for, or what level of
14 funding will be sought. *Id.* The bottom line is that the Report provides nothing more than a
15 vague statement of intention to seek unspecified funding for unspecified projects in fiscal year
16 2011 and beyond.

17 Finally, what Federal Defendants grandly label a "long-term legislative strategy" instead
18 amounts to studied passivity for the indefinite future. The Federal Defendants note that they
19 submitted the Feasibility Report to Congress in July 2008 that recommended legislative action
20 necessary to fully implement the alternative they selected in the 2007 ROD. Report at p. 3:16-18.
21 They further note that Congress has not acted on these recommendations. *Id.* at 3:19. However,
22 the Report is devoid of any reference to actions taken by the Federal Defendants to promote or
23 support in Congress implementation of the ROD, or any intention or plan to do so. For example,
24 the Federal Defendants make no mention of any efforts or plans, past or present, to provide
25 Congress with draft legislation, request committee hearings, or seek appropriations to fund the
26 ROD. Nor have the Federal Defendants forwarded the draft legislation necessary to implement
27 the negotiated drainage alternative. There is no timetable for any legislative effort; Federal
28 Defendants instead observe that "it is unclear when congressional action on the Feasibility Report

1 is likely.” Report at 3:19-20. There is no definition of the set of conditions under which Federal
2 Defendants will pursue alternatives if Congress does not adopt the legislative changes proposed in
3 the Feasibility Study to implement the ROD, or enumeration of what alternatives Federal
4 Defendants are considering.

5 Federal Defendants observe that last year the parties negotiated an alternative to the
6 ROD’s approach to drainage, an alternative that included draft legislation to implement it. Report
7 at 3:20-4:1. But to date, more than nine months since negotiations concluded, the current
8 Administration has not submitted that draft legislation to Congress. The Report nebulously
9 deflects responsibility by citing a lack of “consensus” as the reason for not submitting the
10 legislation. The decision whether to submit that legislation to Congress is entirely within the
11 control of the Federal Defendants, and specifically the Secretary of the Interior. The Report
12 provides no timetable for doing so, no commitment that Federal Defendants will ever do so
13 absent “consensus,” and no assurance that “consensus” is even likely to occur. Apparently,
14 Federal Defendants contemplate further “discussions,” more studies, and yet a different
15 alternative, with a “goal” of completing discussions by the end of this year. The time for doing
16 more studies and discussing yet more alternatives has long since passed.

17 The Federal Defendants cannot rely on their own choice not to take action to pursue the
18 alternative selected in the ROD, and their choice not to pursue the negotiated alternative to the
19 ROD, to excuse their ongoing delay in providing drainage to the San Luis Unit. The Court’s July
20 2009 Order was specific and definite, and reasonably calibrated to motivate Federal Defendants
21 to meet comply with the Court’s mandatory injunction. While a defendant can show it
22 substantially complied with a court’s specific and definite order if it shows it took “all reasonable
23 steps” necessary to comply (*see Go Video v. Motion Picture Association of America*, 10 F.3d 693,
24 695 (9th Cir. 1993); *see also General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir.
25 1986)), the description of the Federal Defendants’ actions in the Report does not even come close.
26 A finding of the failure to substantially comply supports a determination of contempt. *See*
27 *General Signal Corp.*, 787 F.2d at 1379.

28 Accordingly, Westlands submits that the Court should now proceed to enforcement of the

1 judgment. As a first step, the Court show issue an order to show cause (“OSC”) why the Federal
2 Defendants should not be held in contempt. Westlands submits that, as a means of accomplishing
3 the Court’s mandate that no further delays be permitted in the case, the hearing regarding
4 contempt should be scheduled no more than 30 days after the Court issues the OSC. Likewise, a
5 shortened briefing schedule should also be set as follows: any brief in opposition should be filed
6 by the Federal Defendants within 14 days after the OSC is issued; any brief in reply should be
7 filed no later than 7 days before the scheduled hearing date.

8 **IV. RESOLUTION OF THE REMAINING CLAIMS BY THE FIREBAUGH**
9 **PLAINTIFFS**

10 The Firebaugh Plaintiffs’ Fifth Amended Complaint, filed on June 1, 2004 (Doc. 930), is
11 the operative complaint in this action. There is a lengthy procedural history involving the
12 Firebaugh Plaintiffs’ claims, and most of the claims in the Fifth Amended Complaint have been
13 dismissed. All that remains is the Fifth Claim, against the Federal Defendants under the APA,
14 and the Sixth Claim, against the District Defendants as alleged “indispensable parties” to the Fifth
15 Claim.

16 The Firebaugh Plaintiffs’ “First Claim (Continuing Negligence)” and their original “Third
17 Claim (Continuing Trespass)” were dismissed with prejudice on September 22, 1989. (CV F-88-
18 634 Memorandum Decision Re: Defendants Motion to Dismiss, filed September 22, 1989.) The
19 Plaintiffs’ most recent “Second Claim (Continuing Nuisance as to Westlands, Panoche, San Luis
20 and Broadview as Indispensable Parties)” was dismissed with prejudice on May 12, 2004. Doc.
21 928. The Plaintiffs’ “Fourth Claim – Inverse Condemnation” was transferred to the United States
22 Court of Claims on May 7, 2003. Doc. 826. The Court of Federal Claims subsequently
23 dismissed Plaintiffs’ inverse condemnation claim, without prejudice, for lack of jurisdiction
24 pursuant to 28 U.S.C. § 1500. Federal Defendants’ Notice of Decision by Court of Federal
25 Claims in Firebaugh v. United States (Doc. 951).

26 The Fifth Amended Complaint acknowledges on its face that all but an “Amended Second
27 Claim,” the Fifth Claim, and the Sixth Claim have been dismissed or transferred. On
28 November 18, 2004, the Court decided the Federal Defendant’s motion to dismiss the Fifth

1 Amended Complaint, in its Memorandum Decision and Order on Federal Defendants' Motion to
2 Dismiss Plaintiffs' Fifth Amended Complaint. Doc. 948. That order examined the lengthy
3 procedural history in this matter, including the Firebaugh Plaintiffs' numerous attempts to re-
4 plead their various tort claims despite the Court's previous dismissals with prejudice. It explained
5 that the First, Second and Third Claims had already been dismissed, and the Fourth Claims had
6 been transferred to the Court of Claims. As to the Fifth Amended Complaint's attempt at an
7 "Amended Second Claim," the Court's November 18, 2004 order noted that "[t]he Second Claim
8 of continuing nuisance was dismissed with prejudice on May 12, 2004. Doc. 928. (As explained
9 above, this dismissal of the Second Claim was against all defendants.)" Doc. 948, at 48:7-10.

10 In its November 18, 2004 order the Court denied the Federal Defendant's motion to
11 dismiss the Fifth Claim. But after the Court's various rulings, the remaining scope of the Fifth
12 Claim is much narrower than what is alleged in the Fifth Amended Complaint. In particular, the
13 Court has rejected the Firebaugh Plaintiffs' contention that provision of drainage is a precondition
14 to delivery of water to the San Luis Unit. *See* Memorandum Opinion dated May 17, 2003,
15 CV-91-048 Doc. 131, at 21:4-6; *see also* Memorandum Opinion and Order dated February 13,
16 1996, CV-88-634 Doc. 504, at 7:6-9, and Memorandum Decision and Order dated May 7, 2003,
17 CV-91-048 Doc. 826, at 22:11-13.

18 After the November 18, 2004 order, the Fifth Claim, against the Federal Defendants under
19 the Administrative Procedure Act for failure to provide drainage to the San Luis Unit remained
20 pending as limited. *Id.* at 48:3-4. The Court did not reach the Sixth Claim, for declaratory relief
21 as to the district defendants, based on representations that had "been mooted by a settlement
22 between Plaintiffs and District Defendants." *Id.* at 48:17-21. However, upon the Plaintiffs'
23 motion for reconsideration, the Court amended the November 18, 2004, Order to state that the
24 Sixth Claim "may be mooted by a settlement between Plaintiffs and District Defendants." Order
25 on Plaintiffs' Motion for Reconsideration [Doc. 949] and Setting Deadline for Settlement, dated
26 April 19, 2005 (Doc. 952), at 3 (emphasis added). Hence, the Firebaugh Plaintiffs' Fifth and
27 Sixth Claims remain pending in this matter.

28 Accordingly, Westlands proposes that the Court set a schedule for cross motions for

1 summary judgment on the Fifth and Sixth Claims in the Fifth Amended Complaint, limited to
2 issues raised by those claims that have not already been decided by the Court.

3 **V. CONCLUSION**

4 For the reasons set forth herein, the Secretary of the Interior has failed to comply with the
5 mandatory injunction of the Ninth Circuit and this Court to halt the irreparable injury to land
6 within Westlands by fulfilling their unavoidable duty to provide drainage to the San Luis Unit.
7 The Report filed by the Federal Defendants on October 23, 2009 unequivocally fails to comply
8 with the requirements of this Court’s Orders to explicitly identify and delineate: specific actions
9 that the Federal Defendants will take to provide drainage to the San Luis Unit, and a time table
10 with in which to implement those actions. The Court should therefore commence enforcement of
11 judgment proceedings by issuing an order to show cause why the Federal Defendants, and
12 specifically the Secretary of the Interior, should not be held in contempt.

13 Dated: October 30, 2009

Respectfully submitted,

14
15 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

16
17 By /s/ Daniel J. O’Hanlon
DANIEL J. O’HANLON
18 Attorneys for Defendant Westlands Water District
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