

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically Filed on October 9, 2012

MICHAEL ETCHEGOINBERRY, <i>et al.</i> , Plaintiffs,))	No. 11-564 L
v.))	Judge Marian Blank Horn
THE UNITED STATES OF AMERICA,))	
Defendant.))	

THE UNITED STATES’ PROPOSED ADDITIONAL FINDINGS OF FACT

Pursuant to the Court’s Orders of October 1, 2012 (ECF No. 47) and August 20, 2012 (ECF No. 42), the United States hereby submits its proposed additional findings of fact related to its pending motion to dismiss (ECF No. 9).

The substance of these proposed additional findings of fact were provided to Plaintiffs while the parties were drafting their Joint Stipulation of Facts (“Stipulation”), to be filed contemporaneously with this document, except for Proposed Fact No. D-11 (which was inadvertently omitted from drafts exchanged with Plaintiffs). Plaintiffs, however, would not agree to the inclusion of these facts in the Stipulation. The United States therefore submits these proposed additional findings of fact on the basis that they are indisputable and are relevant to the pending motion to dismiss.

For those proposed findings of fact which are raised here for the first time, they are numbered consecutively beginning with “D-1” and cite to Defendant’s Appendix. To the extent a proposed additional finding of fact relates to a fact in the Stipulation or cites to a document contained in the Stipulation’s Appendix, the corresponding stipulated Fact and/or Appendix citation is included below along with the United States’ proposed additional finding of fact.

Such proposed facts are numbered “D-##” with ## corresponding to the related Fact Number in the Stipulation.

As the parties have yet to conduct discovery, the United States reserves the right to supplement or amend this proposed additional findings of fact upon discovery of new information.

Proposed Fact No.	Date	Proposed Fact	Appendix No.
D-1	1962 December 20	<i>Cent. Valley Irrigation Dist. v. Udall</i> , Civ. No. 2356 ND (S.D. Cal.) Water districts sue to enjoin federal defendants from constructing the San Luis Unit until provision is made for the construction of the San Luis Drain. Order upon Motion for Preliminary Injunction, <i>Cent. Valley Irrigation Dist.</i> , Civ. No. 2356 ND (S.D. Cal. July 15, 1963) (unable to obtain copy of complaint)	D1
D-2	1963 July 15	<i>Cent. Valley Irrigation Dist. v. Udall</i> , Civ. No. 2356 ND (S.D. Cal.) District court denies without prejudice plaintiffs’ motion for preliminary injunction enjoining the federal defendants from constructing the San Luis Unit. Order upon Motion for Preliminary Injunction, <i>Cent. Valley Irrigation Dist.</i> , Civ. No. 2356 ND (S.D. Cal. July 15, 1963)	D1
D-3	1977	The United States and Westlands disagree over water and drainage services. This and other disputes lead to protracted negotiations between the parties. Class notice, <i>Barcellos v. Westlands</i> , No. 79-106 (E.D. Cal. Dec. 10, 1981) at 3	11
D-4	1978-1979	The United States and Westlands reach tentative agreements on a new repayment contract regarding construction of additional water distribution and drainage collector facilities within Westlands and	11

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		<p>completing construction and repayment of the San Luis Drain. Landowners and water users object.</p> <p style="text-align: center;">Class notice, <i>Barcellos</i>, No. 79-106 (E.D. Cal. Dec. 10, 1981) at 3-4</p>	
D-P	1979 July 25	<p><i>Barcellos & Wolfson Inc. v. Westlands Water Dist.</i>, No. CV-79-106 (E.D. Cal. July 25, 1979) Third Amended Complaint for Declaratory and Other Equitable Relief and Damages – Partial Defendant Class Action filed.</p> <p><u>Defendant’s Proposed Additional Finding of Fact:</u> Plaintiff landowners and water users within Westlands allege claims against Westlands, other Westlands landowners, and federal defendants relating to water service rates, contracts for water service, California water law, and federal reclamation law.</p> <p style="text-align: center;">Pls.’ Third Am. Compl., <i>Barcellos & Wolfson</i>, No. CV-79-106 (E.D. Cal. July 25, 1979) ¶¶ 1, 27-80</p>	15
D-5	1980-May 1981	<p>Negotiations between Westlands and the United States continue through May 1981. The United States demands Westlands reach agreement or be denied water service effective January 1, 1982.</p> <p style="text-align: center;">Class notice, <i>Barcellos</i>, No. 79-106 (E.D. Cal. Dec. 10, 1981) at 4</p>	11
D-6	1981	<p>The United States and Westlands enter into stipulated agreement providing for continuation of water service until the <i>Barcellos v. Westlands</i>, No. CV-79-106 lawsuit is resolved.</p> <p style="text-align: center;">Class notice, <i>Barcellos</i>, No. 79-106 (E.D. Cal. Dec. 10, 1981) at 4</p>	11
D-X	1985 April 3	<p>Westlands enters into agreement with [the Department of the] Interior pertaining to the closing of Kesterson Reservoir and providing water service to Westlands.</p>	19

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		<p><u>Defendant's Proposed Additional Finding of Fact:</u></p> <p>The agreement was entered into for the following purposes: "1) to facilitate the expeditious stoppage of the flow of drain water from Westlands into the San Luis Drain north of Bass Avenue, Fresno County and into Kesterson Reservoir in an orderly and environmentally sound manner on the schedule set forth in paragraph 2 of this Agreement by no later than June 30, 1986; 2) to continue the delivery of irrigation water to Westlands during 1985 for use on the lands now draining into the San Luis Drain, while at the same time Westlands, in compliance with the mandate of the federal government, designs and installs alternative means for disposal of drain water in an efficient and environmentally sound manner; 3) to encourage the development of environmentally sound means of disposing of the drain water from lands in Westlands presently draining into the San Luis Drain; 4) to provide conditions under which irrigation water delivered to Westlands may be used throughout Westlands in future years; and 5) to encourage farmers in Westlands and in other areas served by the Bureau [of Reclamation] to employ sound water conservation practices which will help reduce their drainage problems." With respect to the long-term goals of continuing irrigation service while also addressing the drainage problem, Westlands and the Department of the Interior ("Interior") acknowledge that it will require "Federal, state, and local agencies, and interested private parties ... to work together" in order to achieve an environmentally responsible solution.</p> <p style="text-align: right;">Agreement between Interior and Westlands (Apr. 3, 1985) at 3-4</p>	
D-7	1985 May 9	<p><i>Claus v. United States</i>, No. 270-85L (Cl. Ct. filed May 9, 1985)</p> <p>Complaint filed. Plaintiff landowners bring takings claims against the United States premised on damage caused by drain water leaking from Kesterson Reservoir.</p>	D2

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		Compl., <i>Claus</i> , No. 270-85L (Cl. Ct. May 9, 1985) ¶¶ 2-19	
D-8	1985 May 16	<i>Schwab v. United States</i> , No. 292-85L (Cl. Ct. filed May 16, 1985) Complaint filed. Plaintiff landowners bring takings claims against the United States premised on damage caused by drain water seeping from Kesterson Reservoir and the San Luis Drain. Compl., <i>Schwab</i> , No. 292-85L (Cl. Ct. May 16, 1985) ¶¶ 2-13	D3
D-9	1987	Based on the recommendation of its citizens advisory committee consisting of water users, environmental advocates, and public interests, the San Joaquin Valley Drainage Program (“SJVDP”) makes the policy decision to limit the scope of its study to in-valley drainage management measures. Reclamation, San Luis Drainage Feature Re-evaluation, Feasibility Report (March 2008) at vii	07
D-10	1988 April 5	<i>Freitas v. United States</i> , No. 218-88L (Cl. Ct. filed Apr. 5, 1988) Complaint filed. Plaintiff landowners bring takings claims against the United States premised on invasive drainage water and actions at Kesterson Reservoir. Compl., <i>Freitas</i> , No. 218-88L (Cl. Ct. Apr. 5, 1988) ¶¶ IV-XII	D4
D-FF	1991 January 31	<i>Sumner Peck Ranch v. Bureau of Reclamation</i> , No. CV-F-91-048 (E.D. Cal.) Complaint for Equitable and Monetary Relief filed. Lawsuit by landowners against Interior seeking completion of master drain to the Delta. <u>Defendant’s Proposed Additional Finding of Fact:</u> Lawsuit is brought by 135 Westlands landowners against Westlands and federal defendants. Among other claims, the plaintiffs allege inverse condemnation claims against Westlands and the	25

Proposed Fact No.	Date	Proposed Fact	Appendix No.
		<p>federal defendants for failing to provide drainage to the San Luis Unit.</p> <p>Compl., <i>Sumner Peck Ranch v. Bureau of Reclamation</i>, No. CV-F-91-048 (E.D. Cal. filed Jan. 31, 1991) (<i>Sumner Peck</i> Docket Number (“<i>SP Doc. #</i>”) 1) ¶¶ 27, 97, 99</p>	
D-11	1991 April 8	<p><i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal.) Amended Complaint for Equitable and Monetary Relief filed. The amended complaint brings the total number of plaintiff landowners to 147. The amended complaint further alleges that the SJVDP’s Rainbow Report is evidence of the United States’ decision not to provide drainage as required by the San Luis Act.</p> <p>Am. Compl., <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. Apr. 8, 1991) (<i>SP Doc. # 4</i>) ¶¶ 28, 98</p>	D11
D-12	1991 December	<p>Four Federal and four California State agencies, including the Bureau of Reclamation (“Reclamation”), sign Memorandum of Understanding for Implementation of the San Joaquin Valley Drainage Program’s Recommended Plan. The agencies agree to “use the management plan described in [Rainbow Report] as the principal guide for remedying subsurface agricultural drainage and related problems.”</p> <p>Mem. of Understanding for Implementation of the San Joaquin Valley Drainage Program’s Recommended Plan, December 1991 (transcribed copy obtained from Cal. Dept. of Water Resources’ website; unable to obtain original copy)</p>	D5
D-GG	1991 December 20	<p>Reclamation releases Draft Environmental Impact Statement, San Luis Unit Drainage Program, Central Valley Project, California (“1991 DEIS”) in order to “address drainage needs through year 2007, satisfy requirements of the <i>Barcellos</i> Judgment, and be compatible with potential long-term solutions.”</p>	23

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		<p><u>Defendant's Proposed Additional Finding of Fact:</u> The 1991 DEIS describes no action and four action alternatives for the San Luis Unit Drainage Program. None of the alternatives considers completing the San Luis Drain. The proposed action, alternative four, relies upon source control and the implementation of new technologies to reduce the volume of drainage water.</p> <p>Reclamation, San Luis Unit Drainage Program, Central Valley Project, California, Draft Environmental Impact Statement (Dec. 20, 1991), at Introductory Statement and Cover Letter</p>	
D-13	1993 July 28	<p><i>Sumner Peck</i>, No. CV-F-91-048 Pursuant to a stipulation between plaintiffs and the federal defendants, the court modifies its June 1, 1993 order to stay, rather than dismiss, plaintiffs' inverse condemnation claim pending transfer to the United States Court of Federal Claims.</p> <p>Stipulation and Modification Order, <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. July 28, 1993) (<i>SP Doc.</i> 144) at 2</p>	D6
D-14	1992 October 30	<p>Congress passes "Reclamation Wastewater and Groundwater Study and Facilities Act of 1992," Pub. L. No. 102-575, §§ 1601-1617, 106 Stat. 4600, 4663 (1992) (enacting 43 U.S.C. §§ 390h to 390h-15 (West Supp. 1997)). The law limits the Secretary of the Interior's ability to implement a program to reclaim impaired drainage water to those measures recommended in the San Joaquin Valley Drainage Program's report entitled "A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley (September 1990)," also known as the Rainbow Report.</p> <p>Reclamation Wastewater and Groundwater Study and Facilities Act of 1992, Pub. L. No. 102-575, § 1602(d) (1992)</p>	D7

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D-KK	1993 August 09	<p><i>Sumner Peck</i>, No. CV-F-91-048 Answer of Defendant Bureau of Reclamation to Third Amended Complaint filed.</p> <p><u>Defendant's Proposed Additional Finding of Fact:</u> Among others, the United States asserts the affirmative defenses of statute of limitations and laches.</p> <p>Reclamation's Answer, <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. July 20, 1993) (<i>SP Doc.</i> 148) at 2</p>	29
D-NN	1994 December 16	<p><i>Firebaugh Canal</i>, No. CV-F-88-634 / <i>Sumner Peck</i>, No. CV-F-91-048 Judge Wanger's Findings of Fact and Conclusions of Law based on first phase of trial filed. Court enters 134 Findings of Fact and 26 Conclusion of Law related to issues of concern in first phase of trial.</p> <p><u>Defendant's Proposed Additional Finding of Fact:</u> The court found that the activities funded and undertaken by Reclamation "since the mid-1980s have been directed at managing the drainage problem 'in-valley' by reducing the volume of drainage water" and that Reclamation "has not undertaken any efforts to complete the San Luis Drain in order to physically remove saline subsurface agricultural drainage water from the drainage service area." The court also found that Reclamation's existing policy is to not further consider, much less construct, facilities to dispose of drainage water in the Delta as contemplated by the San Luis Act. This result was in spite of the court's May 1993 order declaring that Section 1(a) of the San Luis Act required completion of a drain. As a result, the court found that the federal defendants "have failed to take necessary steps to provide drainage service for a number of years" and are "unlikely to undertake efforts to provide drainage service unless ordered to do so by the Court." The court also found that the federal defendants' breach of their duty to provide drainage service was not excused. The court</p>	32

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		<p>concluded that the federal defendants responsible for providing drainage service “have not effectively addressed the serious problems of water-logging and salt accumulation that are destroying the plaintiffs’ ability to farm their lands in the San Luis Unit.” Accordingly, the court held that Reclamation’s “policy decision not to complete the San Luis Drain, in violation of Section 1 of the San Luis Act” constituted unlawfully withheld agency action and that in “view of the actual, extensive, and continuing harm suffered by plaintiffs in the loss of productivity and value of their farmlands,” the court ordered the federal defendants to “take all reasonable and necessary actions to apply for a discharge permit [from the SWRCB] for the San Luis Drain” in order to comply with the United States’ obligation to provide drainage to the San Luis Unit.</p> <p style="text-align: center;">Court’s Findings of Fact and Conclusions of Law, <i>Firebaugh Canal</i>, No. CV-F-88-634 (E.D. Cal. Dec. 16, 1994) (<i>Firebaugh Canal</i> Docket Number (“FC Doc. #”) 426) at 15, 16, 41, 47</p>	
D-OO	1995 March 12	<p><i>Firebaugh Canal</i>, No. CV-F-88-634 / <i>Sumner Peck</i>, No. CV-F-91-048 Judge Wanger’s Partial Judgment on Findings of Fact and Conclusions of Law Re Statutory Duty filed. Partial Judgment states that the San Luis Act established a mandatory duty to provide drainage. <u>Defendant’s Proposed Additional Finding of Fact:</u> The court reiterated its findings of fact and conclusions of law, again holding that Reclamation “has made the policy decision not to complete the San Luis Drain, in violation of section 1 of the San Luis Act.” “The evidence establishes [Reclamation] will not undertake statutorily required efforts to provide drainage service without order of the Court.” Because of the failure to provide drainage in violation of law, the <i>Sumner Peck</i> plaintiffs, Westlands, and neighboring water districts “are suffering irreparable injury” caused “by the rising groundwater table beneath their</p>	33

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		<p>lands,” which results from the lack of drainage.</p> <p>Court’s Partial Judgment on Findings of Fact and Conclusions of Law re Statutory Duty, <i>Firebaugh Canal</i>, No. CV-F-88-634 (E.D. Cal. Mar. 12, 1995) (FC Doc.# 442) at 10, 11</p>	
D-QQ	2000 February 4	<p><i>Firebaugh Canal Co. v. United States</i>, No. 95-15300 & No. 95-16641 (9th Cir.) Ninth Circuit issues Opinion.</p> <p><u>Defendant’s Proposed Additional Finding of Fact:</u></p> <p>The court affirms in part, reverses in part, and remands for further proceedings. The court agrees with the district court “that the San Luis Act clearly expresses the intent of Congress to provide for the interceptor drain prior to the construction of the San Luis Unit.” The court also agrees with the district court that subsequently enacted appropriation riders “did not implicitly repeal the drainage provisions of the San Luis Act.” The court finds that for 13 years, Interior has failed to provide drainage in violation of law, which is causing irreparable injury to Westlands’ farmlands.</p> <p><i>Firebaugh Canal Co. v. United States</i>, 203 F.3d 568, 574-78 (9th Cir. 2000)</p>	06
D-RR	2000 December 18	<p><i>Firebaugh Canal</i>, No. CV-F-88-634 / <i>Sumner Peck</i>, No. CV-F-91-048 Judge Wanger’s Order Modifying Partial Judgment on Findings of Fact and Conclusions of Law Re: Statutory Duty to Conform to Ninth Circuit Opinion filed. Court modifies Partial Judgment on Findings of Fact and Conclusions of Law, filed March 12, 1995.</p> <p><u>Defendant’s Proposed Additional Finding of Fact:</u></p> <p>The court finds that Reclamation will not provide drainage unless ordered by the court. The court therefore orders Reclamation to provide drainage pursuant to its statutory duty and to that end, orders Reclamation to file a detailed plan describing the actions it will undertake to fulfill that duty.</p>	35

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		Court's Order Modifying Partial Judgment on Findings of Fact and Conclusions of Law re Statutory Duty to Conform to Ninth Circuit Opinion, <i>Firebaugh Canal</i> , No. CV-F-88-634 (E.D. Cal. Dec. 18, 2000) (<i>FC Doc. # 654</i>) at 3-4	
D-15	2002 March 29	<p><i>Sumner Peck</i>, No. CV-F-91-048/ <i>Firebaugh Canal</i>, No. CV-F-88-634 Judge Wanger's Memorandum Decision and Order Re: Cross-Motions for Summary Judgment; Motion to Strike Jury Demand; Motion to File Supplemental Complaint; Motion to Strike Expert Report and Testimony; and for Sanctions filed. The court resolves numerous motions including granting the landowner plaintiffs leave to file a supplemental complaint.</p> <p>In granting that motion, the court reasons that "[i]t serves judicial economy to adjudicate all the alleged damage stemming from the government's failure, if any, to provide drainage service, rather than allow continued piecemeal litigations, which already has taken over a decade." In their supplemental complaint, the landowner plaintiffs allege that Reclamation has "at no time since 1993" provided drainage. <i>See also id.</i> ¶ 118E (alleging that since the court's 1993 order, the federal defendants have done nothing to provide drainage to their farmlands), ¶ 118H (alleging that the United States refused to obey its legislative and judicial mandates to provide drainage), ¶ 118I (alleging that meetings and letters in 1999 and 2000 confirmed plaintiffs' view that Reclamation was ignoring its duty to provide drainage), ¶ 118J (alleging that a 1999 congressional visit to destroyed farmlands was highly critical of Reclamation's "policy of withholding drainage"). Those plaintiffs further allege that "[a]t all times since 1993 and until January 30, 2001, the Federal Defendants continued their unlawful policy not to provide drainage service or drainage to the [San Luis] Unit in violation of Section 1(a) of the [San Luis] Act."</p>	D8 D9

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		<p>Mem. Decision and Order, <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. Mar. 29, 2002) (<i>SP Doc. #554</i>) at 27</p> <p>Third Am. Compl. Supplemented Pursuant to Order Granting Motion filed Feb. 7, 2001, <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. Feb. 7, 2001) (<i>SP Doc. #393-1</i>) ¶¶ 118A, 118E, 118H, 118I, 118J, 118P</p>	
D-YY	2003 February 6	<p><i>Sumner Peck</i>, No. CV-F-91-048</p> <p>Judge Wanger’s Memorandum Decision and Order Re: Motion to Approve and Enter Consent Decree and Consent Judgment, Including Findings of Fact and Conclusions of Law, attaching Settlement Agreement.</p> <p><u>Defendant’s Proposed Additional Finding of Fact:</u></p> <p>The court grants the motion.</p> <p>Court’s Mem. Decision and Order Re: Motion to Approve and Enter Consent Decree and Consent Judgment, <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. Feb. 06, 2003) (<i>SP Doc. # 798</i>)</p>	40
D-16	2003 March 12	<p><i>Sumner Peck</i>, No. CV-F-91-048</p> <p>Judge Wanger’s Stipulation and Order of Voluntary Dismissal Upon Settlement filed. The parties stipulate that it is not necessary to transfer the landowner plaintiffs’ inverse condemnation claim against the United States to the Court of Federal Claims. The parties further stipulate to dismiss that claim with prejudice pursuant to their settlement agreements.</p> <p>Stipulation and Order of Voluntary Dismissal Upon Settlement, <i>Sumner Peck</i>, No. CV-F-91-048 (E.D. Cal. Mar. 12, 2003) (<i>SP Doc. 810</i>)</p>	D10
D-RRR	2009 November 18	<p><i>Firebaugh Canal</i>, No. CV-F-88-634 / <i>Sumner Peck</i>, No. CV-F-91-048</p> <p>All parties submit Supplemental Status Report to discuss further proceedings in case. Supplemental Status Report attaches Control Schedule for San Luis Unit Central Valley Project Drainage System Reformulation, Westlands Water District – North</p>	57

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		<p>Area.</p> <p><u>Defendant's Proposed Additional Finding of Fact:</u> Reclamation states that it "intends to take the actions described in the 2007 ROD set forth in the schedule and cost estimates contained in the Control Schedule chart attached hereto ... to provide drainage service in the northern sub-unit of Westlands."</p> <p>Supplemental Status Report, <i>Firebaugh Canal</i>, No. CV-F-88-634 (E.D. Cal. Nov. 18, 2009) (<i>FC Doc. # 752</i>) at 3</p>	
D-ZZZ	2011 July 5	<p><i>Firebaugh Canal</i>, No. CV-F-88-634 Judge Wanger issues Order Following Hearing Regarding Amendment to Control Schedule. Court grants Westlands' motion to amend Scheduling Order.</p> <p><u>Defendant's Proposed Additional Finding of Fact:</u> The granting of this motion provides the federal defendants "120 days to analyze and evaluate the feasibility, design, cost and source of funding for commencing construction in the central subunit of Westlands instead of the north subunit of Westlands." The court further orders the federal defendants to provide notice if the control schedule is modified.</p> <p>Order Following Hearing Regarding Amendment to Control Schedule, <i>Firebaugh Canal</i>, No. CV-F-88-634 (E.D. Cal. July 5, 2011) (<i>FC Doc. # 908</i>) at 2</p>	66
D-AAA	2011 September 30	<p><i>Firebaugh Canal</i>, No. CV-F-88-634 Judge Wanger's Memorandum Decision Re: Cross-Motions for Summary Judgment filed. Court grants Federal and District Defendants' motions for summary judgment on Plaintiffs' claim under APA section 706(2). Court denies without prejudice Plaintiffs' motion for summary judgment on their APA section 706(1) claim. Court grants without prejudice to a renewed claim based on future circumstances Federal and District Defendants'</p>	67

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		cross-motions. <u>Defendant's Proposed Additional Finding of Fact:</u> In so holding, the court finds that the Federal Defendants are complying with their statutory duty to provide drainage to the San Luis Unit. Mem. Decision Re: Cross-Motions for Summary Judgment, <i>Firebaugh Canal</i> , No. CV-F-88-634 (Sept. 30, 2011) (FC Doc. # 916) at 36	

Dated: October 9, 2012

Respectfully submitted,

IGNACIA S. MORENO
 Assistant Attorney General

/s E. Barrett Atwood
 E. BARRETT ATWOOD
 Trial Attorney
 United States Department of Justice
 Environment and Natural Resources Division
 Natural Resources Section
 301 Howard St., Suite 1050
 San Francisco, CA 94105
 Email: Barrett.Atwood@usdoj.gov
 Telephone: (415) 744-6480
 Fax: (415) 744-6476

Counsel for the United States

Of Counsel:

Shelly Randel
 Attorney/Advisor
 U.S. Department of the Interior
 Office of the Solicitor
 1849 C Street, N.W. - MS 5524
 Washington, D.C. 20240