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## Reaping Riches in a Wretched Region: Subsidized Industrial Farming and Its Link to Perpetual Poverty

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## ARTICLE

# REAPING RICHES IN A WRETCHED REGION: SUBSIDIZED INDUSTRIAL FARMING AND ITS LINK TO PERPETUAL POVERTY

LLOYD G. CARTER\*

## I. INTRODUCTION

In the last few decades, well over a billion dollars in taxpayer aid has been provided to a few hundred growers in the Westlands Water District (Westlands),<sup>1</sup> which is part of the San Luis Unit<sup>2</sup> of the U.S.

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<sup>1</sup> RENEE SHARP & SIMONA CARINI, ENVTL. WORKING GROUP, SOAKING UNCLE SAM: WHY WESTLANDS WATER DISTRICT'S NEW CONTRACT IS ALL WET (Sept. 2005), *available at* [www.ewg.org/book/export/html/8582](http://www.ewg.org/book/export/html/8582). The value of Westlands' federal water subsidy was calculated at \$110 million a year in 2002, and new contracts will likely increase the value of the subsidy by tens of millions of dollars per year. *Id.* "At the current value of the annual water subsidy, plus millions each year in federal crop subsidies, taxpayer-financed benefits to Westlands will total billions of dollars over the life of the contract." *Id.*

<sup>2</sup> Westlands Water District, Panoche Water District, Pacheco Water District, Broadview Water District (now annexed by Westlands), and San Luis Water District made up the original San Luis Unit. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-08-307R, CALIFORNIA'S CENTRAL VALLEY PROJECT, REIMBURSEMENT OF CAPITAL CONSTRUCTION COSTS FOR THE SAN LUIS UNIT 1-3 (2007), *available at* [www.gao.gov/new.items/d08307r.pdf](http://www.gao.gov/new.items/d08307r.pdf). The entire unit is approximately 700,000 acres,

## 6 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 3]

Bureau of Reclamation's Central Valley Project (CVP)<sup>3</sup> in Central California. The CVP is the largest publicly funded water-management system in the United States,<sup>4</sup> and the Westlands is the biggest agricultural irrigation district in America.<sup>5</sup> At nearly 1000 square miles, the Westlands is still dominated by a few pioneer dynastic families although congressional backers of the San Luis Unit half a century ago promised that 6100 small family farms would be created if Northern California river water was brought to the desert on the West Side of the San Joaquin Valley (Valley).<sup>6</sup> The promise was never kept, and the larger landowners are still in control.

While Westlands, considered one of the nation's most politically powerful irrigation districts, has produced an undisputable bounty of cotton and field crops over the decades in western Fresno and Kings counties, irrigation of this mineral-laden desert has also created huge environmental problems, and the wealth generated has not trickled down to farmworkers or the surrounding poverty-stricken communities.

The Twentieth Congressional District, encompassing Westlands and a portion of the western San Joaquin Valley down through Kings and Kern counties, has the dubious distinction of being the poorest of the 436 congressional districts in America.<sup>7</sup> The region is rife with social

*Id.* at 1, with Westlands at over 600,000 acres. Westlands Water Dist., Who We Are, [www.westlandswater.org/www/aboutwwd/aboutwwd.asp?title=Who%20We%20Are&cwid=1280](http://www.westlandswater.org/www/aboutwwd/aboutwwd.asp?title=Who%20We%20Are&cwid=1280) (last visited Mar. 22, 2009).

<sup>3</sup> The Central Valley Project, encompassing the Sacramento and San Joaquin Valleys, "[c]onsists of 20 dams and reservoirs, 11 powerplants, and 500 miles of major canals, as well as conduits, tunnels, and related facilities." Bureau of Reclamation, Central Valley Project General Overview, [www.usbr.gov/dataweb/html/cvp.html#general](http://www.usbr.gov/dataweb/html/cvp.html#general) (last visited Feb. 6, 2009). It delivers, on average, about seven million acre-feet of water per year, irrigating three million acres, about one third of California's farmland. *Id.*; see also *Westlands v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003) (offering an overview of the CVP and Westlands).

<sup>4</sup> *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002).

<sup>5</sup> Dean E. Murphy, *\$100 Million Deal Proposed for Central Valley Farmers*, N.Y. TIMES, Dec. 12, 2002, at A32, available at [www.nytimes.com/2002/12/12/us/100-million-deal-proposed-for-central-valley-farmers.html](http://www.nytimes.com/2002/12/12/us/100-million-deal-proposed-for-central-valley-farmers.html).

<sup>6</sup> See S. 44, *A Bill to Authorize the Secretary of the Interior To Construct the San Luis Unit of the Central Valley Project, California, To Enter into an Agreement with the State of California with Respect to the Construction and Operation of Such Unit, and for Other Purposes: Hearing Before the Subcomm. on Irrigation and Reclamation of the S. Comm. on Interior and Insular Affairs*, 86th Cong. 39 (1959) [hereinafter *Hearing on S. 44*] (statement of Rep. Sisk). See also Mary Louise Frampton, *The Enforcement of Federal Reclamation Law in the Westlands Water District: A Broken Promise*, 13 U.C. DAVIS L. REV. 89, 90 (1979), available at [http://lawreview.law.ucdavis.edu/issues/Vol13/vol13\\_nol.html](http://lawreview.law.ucdavis.edu/issues/Vol13/vol13_nol.html) (recounting how the "guarantee of widespread benefits convinced Congress to appropriate funds for the San Luis Unit . . . [including promises that there would] be 27,000 farm residents, 30,700 rural nonfarm residents, and 29,800 city dwellers.") *Id.*

<sup>7</sup> See SARAH BURD-SHARPS, KRISTEN LEWIS & EDUARDO BORGES MARTINS, *THE MEASURE OF AMERICA: AMERICAN HUMAN DEVELOPMENT REPORT 2008-2009*, at 3 (2008)

problems ranging from high unemployment<sup>8</sup> to gang and drug problems, high teen-pregnancy rates,<sup>9</sup> an appalling high school dropout rate (25-35%),<sup>10</sup> and other side effects of poverty.<sup>11</sup>

It is the thesis of this brief history of the region that federal irrigation and farm-subsidy policy in the San Luis Unit since the 1960s has exacerbated grinding poverty while enriching a few dozen of the factory farming dynasties to the detriment of the environment, the human population of the region, small growers, and the public fisc. There are few farms under 500 acres. Rule is by the rich. Indeed, in Westlands, which is a public agency, the growers with the most land have the most votes in electing directors to the district's board. The late Justice William O. Douglas called this voting control by the big growers a "corporate political kingdom undreamed of by those who wrote our Constitution."<sup>12</sup>

This Article shows how a long American tradition of helping small farmers has, in the past few decades, morphed into a massive government aid program for large industrialized agribusiness operations—a program that not only drives small farmers off the land but also perpetuates rural poverty because agribusiness requires huge numbers of low-paid, seasonal harvest workers, many of whom are undocumented workers who choose to stay in the United States.

Part II reviews the history and evolution of publicly subsidized

(utilizing a "human development model" based on a broad array of socio-economic indicators).

<sup>8</sup> For instance, the unemployment rate in San Joaquin County was 16% in July 2009, compared to the California average of 12%. CAL. EMP. DEV. DEP'T, STOCKTON METROPOLITAN STATISTICAL AREA (Aug. 21, 2009), available at [www.calmis.ca.gov/file/lfmonth/stocSPDS.pdf](http://www.calmis.ca.gov/file/lfmonth/stocSPDS.pdf).

<sup>9</sup> The San Joaquin Valley has the highest teen pregnancy rate in California, with 68.5 out of every 1,000 young women ages fifteen to nineteen giving birth. Hans P. Johnson, Pub. Policy Inst. of Cal., *Maternity Before Maturity*, 4 CAL. COUNTS 11, 16 (2003), available at [www.ppic.org/content/pubs/cacounts/CC\\_203HJCC.pdf](http://www.ppic.org/content/pubs/cacounts/CC_203HJCC.pdf).

<sup>10</sup> KERN COUNTY NETWORK FOR CHILDREN, REPORT CARD 2009 16 (April 2006), available at <http://www.static.kern.org/gems/kcnc/KCNCRreportCard42209CN.pdf>. The provided dropout rate is for Kern County, but it is likely that other San Joaquin Valley Counties have similar dropout rates.

<sup>11</sup> For instance, the San Joaquin Valley has one of the largest child poverty rates in the United States, with between 52% and 62% of children in various Kern County locales living in poverty, and similar rates for other counties in the Valley. HANS P. JOHNSON & JOSEPH M. HAYES, *THE CENTRAL VALLEY AT A CROSSROADS: MIGRATION AND ITS IMPLICATIONS* 18 (2004), available at [www.ppic.org/main/publication.asp?i=461](http://www.ppic.org/main/publication.asp?i=461).

<sup>12</sup> See *Salyer Land Co. v. Tulare Lake Water Basin Storage Dist.*, 410 U.S. 719, 742 (1973) (Douglas, J., dissenting) (dissenting from the Court's approval of "one acre, one vote" in public water districts, thereby allowing the biggest landholders to retain their stronghold on voting power). Although the case centered on a district south of Westlands in the Tulare Basin—a district then controlled by cotton king J.G. Boswell—Westlands has similar voting rules under California law. See CAL. WATER CODE § 41001 (Westlaw 2009) ("Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars (\$100), or fraction thereof, worth of his land . . .").

farming in the Valley. Part III discusses the creation of the Westlands irrigation district as representing the archetype of large “factories in the fields” agribusiness. Part IV addresses the environmental drainage problem created because of the Westlands’ irrigation project and its implications for the surrounding communities. Part IV identifies the region’s social problems and illustrates how federal subsidies have contributed to these deficiencies.

## II. GOVERNMENT ASSISTANCE TO FARMERS: A LONG HISTORY

*And as time went on, the business men had the farms, and the farms grew larger, but there were fewer of them.*

*Now farming became industry, and the owners followed Rome, although they did not know it. They imported slaves, although they did not call them slaves: Chinese, Japanese, Mexicans, Filipinos. They live on rice and beans, the business men said. They don’t need much. They wouldn’t know what to do with good wages. Why, look how they live. Why, look what they eat. And if they get funny—deport them.*

*And all the time the farms grew larger and the owners fewer. . . .*

. . . .

*And it came about that the owners no longer worked on their farms. They farmed on paper; and they forgot the land, the smell, the feel of it, and remembered only that they owned it, remembered only what they gained and lost by it.*

*The Grapes of Wrath*, John Steinbeck, 1939<sup>13</sup>

The federal government has always helped American farmers, even before there was a United States. While fighting the British on the East Coast, George Washington, commander of the Revolutionary Army, sent troops west in the late 1770s to conquer and exterminate the Iroquois Confederacy and to seize native lands west and north of the Allegheny-Ohio River systems in western New York, Pennsylvania, and Ohio.<sup>14</sup> Those rich lands, which had been farmed by Native Americans for countless generations,<sup>15</sup> were then promised to landless young soldiers as an inducement to stay in uniform.<sup>16</sup> After the war, gentleman farmer

<sup>13</sup> JOHN STEINBECK, *THE GRAPES OF WRATH* 298-99 (Penguin 1987) (1939).

<sup>14</sup> See BARBARA ALICE MANN, *GEORGE WASHINGTON’S WAR ON NATIVE AMERICA* 37-39, 109-10, 147-48 (2005) (internal citations omitted).

<sup>15</sup> See *id.* at 3, 38.

<sup>16</sup> See *id.* at 38, 147-48.

Washington, a longtime land speculator,<sup>17</sup> and some of his top aides helped themselves to some of this conquered land.<sup>18</sup>

In California's San Joaquin Valley, which would become the nation's leader in fruit and vegetable production, the sad story of the Iroquois was repeated seventy-five years later, following the Gold Rush. The Tachi Yokut tribe lived in Central California since time immemorial before being forcibly removed in 1934 to a forty-acre reservation on barren land near Lemoore in Kings County.<sup>19</sup> According to the tribe's website, the Tachi Yokut's

forefathers made their living peacefully through farming, hunting, fishing, and gathering grains, nuts and fruits. Our lands consisted of fertile valleys, marshlands and rolling foothills. With the arrival of the American settlers, we gradually lost the land where we once lived. Our land was given away by the government or sold to farmers and ranchers, sometimes as bounty for killing our people. By the end of the 19th century, the Tachi Yokut Tribe was split across the central and southern parts of California.

Here in the San Joaquin Valley, our people were marched on foot from the valley to the [Coast Range] foothills to make way for farmers and ranchers. When oil was discovered near Coalinga, we then were marched back to a desolate spot in the Central Valley near the present location of our reservation.<sup>20</sup>

After California was granted statehood in 1850, Spanish and Mexican land grants totaling 8.5 million acres (land that had also been stolen from the Indians) were acquired by American land speculators.<sup>21</sup> The East Side of the Valley was America's wheat-growing capital after

<sup>17</sup> See *id.* at 38.

<sup>18</sup> See *id.* at 148. The British formally granted the United States the Indian lands seized by Washington's troop in the 1783 Treaty of Paris. *Id.* Needless to say, the Indians were not in agreement or consulted. *Id.* For a disturbing look at how the United States Supreme Court legitimized the forcible dispossession of Indian lands, under the doctrine of the sovereignty rights of European kings, see LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005); University of Oklahoma law professor Lindsay G. Robertson is the faculty director of the school's American Indian Law and Policy Center. The Supreme Court decision was *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823) ("Conquest gives a title which the courts of the conqueror cannot deny . . ."). The decision was written by Chief Justice John Marshall. *Id.* at 571.

<sup>19</sup> Tachi Yokut Tribe, The Santa Rosa Rancheria, [www.tachi-yokut.com/rancheria.html](http://www.tachi-yokut.com/rancheria.html) (last visited Mar. 24, 2009).

<sup>20</sup> Tachi Yokut Tribe, Our History, [www.tachi-yokut.com/history.html](http://www.tachi-yokut.com/history.html) (last visited Mar. 24, 2009).

<sup>21</sup> See WALTER GOLDSCHMIDT, *AS YOU SOW* 6-13 (1947). The railroads were given 11.5 million acres of land in California following statehood. *Id.* at 6.

the Civil War.<sup>22</sup> During the boom, Sierra Nevada snowmelt flowing to the Valley in several big rivers was diverted to the wheat fields by gravity-flow canals dug by horse-drawn “Fresno scraper” plows and Chinese laborers.<sup>23</sup> The railroad arrived in the Valley in the early 1870s to carry the wheat harvest to other parts of the nation.<sup>24</sup> When the wheat market collapsed in the late 1800s, the wheat barons’ estates were carved up to establish East Side irrigation colonies with individual farms ranging from as little as twenty acres to several hundred acres.<sup>25</sup>

In 1900, the West Side of the Valley remained an inhospitable desert with no surface water and only intermittent flow from small seasonal creeks emerging from the Coast Range foothills.<sup>26</sup> The first wells in western Fresno County were sunk a few years after the start of the twentieth century by a few hardy pioneers.<sup>27</sup> Deep wells were drilled during World War I by large landholders in order to plant cotton, a salt-tolerant crop in demand by the military.<sup>28</sup> By 1922, about 33,000 acres of Westlands land were “under deep well irrigation,”<sup>29</sup> allowing for extensive crop production, including cotton.<sup>30</sup> A second cotton boom followed during World War II,<sup>31</sup> but by the mid-1940s the groundwater

<sup>22</sup> See Robert Autobee, Bureau of Reclamation, The Friant Division (1994), [www.usbr.gov/projects/Project.jsp?proj\\_Name=Friant%20Division%20Project&pageType=ProjectHistoryPage#Group83530](http://www.usbr.gov/projects/Project.jsp?proj_Name=Friant%20Division%20Project&pageType=ProjectHistoryPage#Group83530).

<sup>23</sup> THIRTEENTH ANNUAL REPORT OF THE UNITED STATES GEOLOGICAL SURVEY TO THE SECRETARY OF THE INTERIOR 1891-'92, PART III-IRRIGATION 162-71, 333, 342-44 (1893), available at [www.archive.org/details/annualreportuni15sgoog](http://www.archive.org/details/annualreportuni15sgoog) (follow “PDF (Google.com)” link under “View the book”; then select “Download: PDF”).

<sup>24</sup> See Edward J. Johnson, *The Effect of Historic Parcels on Agriculture – Harvesting Houses*, 12 SANJAR 49, 65-66 (2002) (discussing how railroad development enabled the San Joaquin Valley’s rapid agricultural development). Frank Norris’s *The Octopus* recounts the Southern Pacific Railroad’s dominance of life in the San Joaquin Valley, including a famed 1880 incident at Mussel Slough when several ranchers were killed in a battle with railroad security officers. Southern Pacific acquired 106,000 acres in the Westlands. See FRANK NORRIS, *THE OCTOPUS* (1901).

<sup>25</sup> John Panter, *Marvel of the Desert*, 36 J. OF THE FRESNO CITY AND COUNTY HIST. SOC’Y 2, 4 (Summer 1994); GILBERT C. FITE, *THE FARMER’S FRONTIER 1865-1890*, at 166-68, 174 (1966).

<sup>26</sup> Westlands Water Dist., History, [www.westlandswater.org/wwd/aboutwwd/history.asp?title=History&cwide=1280](http://www.westlandswater.org/wwd/aboutwwd/history.asp?title=History&cwide=1280) (last visited Mar. 25, 2009) [hereinafter Westlands History].

<sup>27</sup> *Id.*

<sup>28</sup> See U.S. DEPT. AGRIC., SOIL SURVEY OF FRESNO COUNTY, CALIFORNIA, WESTERN PART 8-9 (2006), available at <http://soildatamart.nrcs.usda.gov/Manuscripts/CA653/0/fresno.pdf>.

<sup>29</sup> *Id.*

<sup>30</sup> See C. Wayne Smith, Roy G. Cantrell, Hal S. Maser & Stephen R. Oakley, *History of Cultivar Development in the United States*, in COTTON: ORIGIN, HISTORY, TECHNOLOGY, AND PRODUCTION 145 (C. Wayne Smith & Joe Tom Cothren ed., 1990).

<sup>31</sup> See Robert Autobee, Bureau of Reclamation, Central Valley Project, The San Luis Unit (1994) (recounting how the national demand for cotton and other crops expanded during World War II, and that “[p]rivately, many growers were frightened by peacetime, believing the demand for their

aquifer was quickly being depleted.<sup>32</sup>

### III. THE WESTLANDS IS BORN

In 1942, West Side growers, who were running out of groundwater, formed the Westside Landowners Association to gain support for federal assistance in delivering Northern California river water to their region.<sup>33</sup> In 1952, pursuant to the California Water Code,<sup>34</sup> the growers formed the Westlands Water District, which would grow to become the nation's largest federal irrigation district, with over 600,000 acres.<sup>35</sup> At 400,000 acres, the original Westlands was dominated by large growers Russell Giffen (at over 100,000 acres),<sup>36</sup> Jack O'Neill,<sup>37</sup> John "Jack" Harris,<sup>38</sup> Frank Diener,<sup>39</sup> Harry Baker,<sup>40</sup> the Wolfsen family,<sup>41</sup> Louis Robinson, and the legendary Boswell family of the Tulare Lake Basin region to the south.<sup>42</sup> The West Plains Storage District, at 214,000 acres and located adjacent to the planned San Luis Unit, was merged with Westlands in 1965.<sup>43</sup>

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products would diminish and the half-million acres in production during the war years would revert to desert"), available at [www.usbr.gov/projects/Project.jsp?proj\\_Name=San%20Luis%20Unit%20Project&pageType=ProjectHistoryPage#Group346075](http://www.usbr.gov/projects/Project.jsp?proj_Name=San%20Luis%20Unit%20Project&pageType=ProjectHistoryPage#Group346075).

<sup>32</sup> See MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 10, 341-42 (1986).

<sup>33</sup> See DANE J. DURHAM, *HOW THE TRINITY RIVER LOST ITS WATER* 75 (2005) (unpublished manuscript), available at [www.fotr.org/news\\_items/HTTLIW.pdf](http://www.fotr.org/news_items/HTTLIW.pdf).

<sup>34</sup> CAL. WATER CODE §§ 34000-38999 (Westlaw 2009). Districts like Westlands possess the power of eminent domain. *Id.* § 35600, and the power to collect acreage-based assessments for tax payments, *Id.* § 35410.1.

<sup>35</sup> See Westlands Water Dist., *supra* note 2. At the time Westlands was formed, district officials established a committee to look at obtaining a water supply from the Trinity River in Northern California, which ultimately became Westlands' water source. See DURHAM, *supra* note 33 (recounting how the Trinity River was drained almost dry by Westlands).

<sup>36</sup> See B.F. SISK, *A CONGRESSIONAL RECORD: THE MEMOIR OF BERNIE SISK* 69 (1980); see also Westlands History, *supra* note 26.

<sup>37</sup> Westlands History, *supra* note 26.

<sup>38</sup> JOHN FRASER HART, *THE CHANGING SCALE OF AMERICAN AGRICULTURE* 57-60 (2003).

<sup>39</sup> Westlands History, *supra* note 26.

<sup>40</sup> *Id.*

<sup>41</sup> Wolfsen Land & Cattle: California Farming Corporation, [www.ceive.com/work/wolfsen.php](http://www.ceive.com/work/wolfsen.php) (last visited Aug. 21, 2009).

<sup>42</sup> MARK ARAX & RICK WARTZMAN, *KING OF CALIFORNIA: J.G. BOSWELL AND THE MAKING OF A SECRET AMERICAN EMPIRE* (2003) (recounting the history of the Boswell cotton empire and efforts to establish Westlands).

<sup>43</sup> Westlands History, *supra* note 26. For a fascinating history of the often-divisive internal politics of the Westlands Water District in its early days, see Bryan J. Wilson, *Westlands Water District and Federal Water: A Case Study of Water District Politics*, 7 STAN. ENVTL. L.J. 187 (1988).



## 12 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 3

In 1959, Representative Bernard F. Sisk (D-Fresno), who represented the Westlands area, pushed for congressional approval of a U.S. Bureau of Reclamation project to deliver Northern California water to the San Luis Unit.<sup>44</sup> In remarks to a Senate committee, Sisk, a former tire salesman who had been recruited by the Westlands growers to be their pitchman for a federal water project,<sup>45</sup> contended:

[I]f San Luis is built, according to careful studies, the present population of the area will almost quadruple. There will be 27,000 farm residents, 30,700 rural nonfarm residents, and 29,800 city dwellers; in all, 87,500 people sharing the productivity and the bounty of fertile lands blossoming with an ample supply of San Luis water.

Recent surveys show that the land proposed to be irrigated is now in 1,050 ownerships. These studies show that with San Luis built, there will be 6,100 farms, nearly a sixfold increase. And in the breaking up of farms to family-size units, antispeculation and other provisions of the reclamation laws will assure fair prices.<sup>46</sup>

In 1960, Congress approved the San Luis Unit, and seven years later there was a massive earthen dam containing the waters of the San Luis Reservoir in western Merced County, with a storage capacity of over two million acre-feet, and a giant canal built jointly with the state of California.<sup>47</sup> Water deliveries to Westlands began in 1968.<sup>48</sup> Controversy soon followed.

Rep. Sisk's promise of 6100 farms and 87,000 people living in a bucolic farming area proved a mirage. In order to get the federally subsidized water, large landholders in Westlands were required to sign recordable contracts to sell off all acreage in excess of 160 acres (320 acres for a husband and wife), which, at that time, was the acreage

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<sup>44</sup> See *supra* note 6, at 38-40.

<sup>45</sup> See SISK, *supra* note 36, at 46.

<sup>46</sup> *Hearing on S. 44, supra* note 6, at 39. In his memoir, Rep. Sisk recounts how he got down on one knee in the Senate cloakroom to cajole a seated Sen. Clinton Anderson (D-N.M.), then chair of the Senate Interior Committee, which had to approve the San Luis project. SISK, *supra* note 36, at 74. "In order to get his attention so he could hear what I was saying, I knelt down. I actually got down on one knee. It was symbolic, I guess," Sisk said. *Id.* Sen. Anderson finally said "okay," and minutes later, the Senate approved the project. *Id.* President Eisenhower signed the bill authorizing it in the closing days of the 86th Congress. *Id.*

<sup>47</sup> See Autabee, *supra* note 31. An acre-foot is 325,851 gallons, or about enough water to cover a football field a foot deep. It is a common unit of measurement for large volumes of water used in irrigation. See Water Educ. Found., Where Does My Water Come From?, [www.water-ed.org/watersources/subpage.asp?rid=&page=19](http://www.water-ed.org/watersources/subpage.asp?rid=&page=19) (last visited Mar. 24, 2009).

<sup>48</sup> Westlands History, *supra* note 26.

limitation for subsidized federal water.<sup>49</sup> In the mid-1970s, members of a group known as National Land for People tried to buy 160-acre parcels in Westlands from the large growers but were rebuffed.<sup>50</sup> The group, represented by Mary Louise Frampton, went to federal district court in 1976 and won an order requiring the Bureau of Reclamation (“Reclamation”) to formulate criteria and procedures requiring the large landholders to actually sell off their excess holdings.<sup>51</sup>

Among the findings of fact of the district court in *National Land for People, Inc.*, were the following:

1. The legislative history of the reclamation laws indicate[d that Congress intended] to create small tracts of privately held farm land available at nonspeculative prices in areas irrigated by Federal projects. *See, e.g.*, H.R.Rep.No.1468, 57th Cong., 1st Sess. 8 (1902).
2. Members of National Land [for People had] been unsuccessful in [purchasing] 160 acre tracts at a price which exclude[d] enhanced value resulting from water projects subsidized by the government.
3. Members of National Land ha[d] made offers to buy [small parcels of forty to 160 acres from large landholders] in Westlands and their offers ha[d] been rejected.<sup>52</sup>

The U.S. Supreme Court had ruled almost two decades earlier that the principal purpose of the reclamation laws was to encourage small family farms:

From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as

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<sup>49</sup> *See* *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 815-16 & n.1 (9th Cir. 1990).

<sup>50</sup> *See* *Nat'l Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449, 452 (D.D.C. 1976).

<sup>51</sup> *See id.* (granting an injunction that forced Reclamation to abandon its former case-by-case treatment of land sales).

<sup>52</sup> *Id.*

privately owned lands, which might receive project water.<sup>53</sup>

While National Land for People battled in court to break up the large land holdings in Westlands, newly elected President Jimmy Carter, who criticized many western water projects as pork barrel, ordered the creation of an Interior Department Task Force to look into the Westlands controversy.<sup>54</sup>

The 1978 *Special Task Force Report on [the] San Luis Unit*,<sup>55</sup> authorized by Public Law 95-46, concluded the following:

- Nine years after water deliveries began, there was not a single 160-acre farm in the San Luis Unit.<sup>56</sup> The average farm size was about 2200 acres.<sup>57</sup> In contrast, the average farm size in the rest of Fresno County was 343 acres, and the average irrigated farm in California was only 157 acres.<sup>58</sup>
- The irrigation subsidy for construction of the San Luis Unit water delivery facilities (dams, canals, pumps, hydroelectric facilities) amounted, in 1978 dollars, to \$770 million, or \$1540 per acre.<sup>59</sup> This figure was based on the following: San Luis Unit water districts were not required to repay interest on funds borrowed from the U.S. Treasury to construct the irrigation project that accrued “during the period the funds [themselves were not being] repaid”; and part of their repayment amount was

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<sup>53</sup> *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 292 (1958) (citing Paul S. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955)).

<sup>54</sup> See W. Water Digital Library, Carter Administration – Reclamation Legislation, [www.westernwaters.org/index.php/instruction/carter/](http://www.westernwaters.org/index.php/instruction/carter/) (last visited Mar. 28, 2009); President’s Statement on Signing Pub. L. No. 95-46, An Act To Authorize Appropriations for Continuation of Construction of Distribution Systems and Drains on the San Luis Unit, Central Valley Project, California, To Mandate the Extension and Review of the Project by the Secretary, and for Other Purposes (1977) (June 16, 1977), available at [www.presidency.ucsb.edu/ws/?pid=7687](http://www.presidency.ucsb.edu/ws/?pid=7687) (“Recent investigations have shown that undue public subsidies to large landowners are occurring in the Westlands area. . . . [The Interior] Department will enforce acreage limitations to assure broad distribution of benefits . . .”).

<sup>55</sup> BUREAU OF RECLAMATION, SPECIAL TASK FORCE ON THE SAN LUIS UNIT (1978) [hereinafter SAN LUIS TASK FORCE REPORT]. The Task Force was headed by Guy Martin, Assistant Secretary of Interior for Land and Water Resources; it included county, state, and federal officials, Westlands lawyer Adolph Moskovitz, and National Land for People chairman Berge Bulbulian, a small grower. See *id.* at v.

<sup>56</sup> *Id.* at 196.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 197.

<sup>59</sup> *Id.* at 38-39.

excused as being “beyond the ability of the irrigation users to repay.”<sup>60</sup>

- Major design changes had been made in the San Luis Unit since Congress’ review of the 1956 Feasibility Report, including increasing the size of the service area by merging with the West Plains Storage District in 1965, addition of the Kesterson Reservoir evaporation ponds, and lining the proposed San Luis Drain Canal, all “in the absence of adequate congressional authorization.”<sup>61</sup>
- Because funds intended for completion of the drainage system were instead spent on an expanded water distribution system to service an additional 150,000 acres (the West Plains Storage District), there was insufficient funding to complete the drainage system.<sup>62</sup> The report added:

In this regard, the Task Force believes that the Bureau [of Reclamation] knew for many years that the amount designated for these purposes would be insufficient to build both the expanded distribution system and the contemplated drainage system but never informed Congress of this fact and never required that the originally contemplated facilities, such as the drains, receive priority over the expanded works.<sup>63</sup>

- The total estimated cost of the San Luis Drain to carry away salty waste waters had increased from \$7.2 million in 1955 to as much as \$185 million in 1978, due mainly to inflation, the cost of building the Kesterson Reservoir, and the cost of a cement lining for the drainage canal, which originally was to be earthen.<sup>64</sup> There was no congressional authorization for these expanded costs.<sup>65</sup> Thirty-one years after the Task Force report, the estimated completion costs of the still unfinished drainage system were as much as \$2.7 billion, a figure the Bureau candidly conceded was beyond the ability of Westlands’ 700 growers to pay.<sup>66</sup>

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<sup>60</sup> *See id.* at 38.

<sup>61</sup> *Id.* at 89.

<sup>62</sup> *Id.* at 88-89.

<sup>63</sup> *Id.* at 89.

<sup>64</sup> *See id.* at 173.

<sup>65</sup> *Id.* at 173.

<sup>66</sup> *See* BUREAU OF RECLAMATION, SAN LUIS DRAIN FEASIBILITY REPORT, at xii tbl S-4, xxii

- In the early 1960s, the Bureau kept expanding the size of the service area to include what were characterized as Class 4 soils, which “are marginal in their suitability for irrigated agriculture . . . because of highly saline, slowly permeable soils with anticipated or present drainage problems.”<sup>67</sup> The original proposed San Luis Unit excluded such marginally useful land, but “by 1962, 12 percent of the [service area] was comprised of Class 4 soils.”<sup>68</sup> The Task Force further noted that “the very areas which require the most extensive capital requirements for removing drainage water have the least ability to pay for irrigation and drainage in the service area.”<sup>69</sup>
- San Luis Unit growers were paying a surcharge of only fifty cents per acre-foot of water to repay the cost of constructing drainage facilities, and “[b]ased on the estimated cost to complete the drain and the rate of payment provided for in the contract,” it would take the growers 270 years to pay back the cost of the drain.<sup>70</sup>

Attorney Frampton, counsel for National Land for People, later wrote a law-review article criticizing Reclamation for taking the side of big growers and abandoning the Reclamation Law goals of small family farms.<sup>71</sup> She noted that instead of Congressman Sisk’s prediction of 6100 farms and 87,500 people living in the Westlands, there were only 216 large farming operations and the district’s biggest town, Huron, was “a decidedly unprosperous center with a population of 2348 and a concentration of illegal aliens, bars and houses of prostitution.”<sup>72</sup> Nearly two thirds of the Westlands “farmers” did not live within fifty miles of their “farms,” although the residency requirement was still in effect.<sup>73</sup> Among the “family farmers” was Southern Pacific Railroad at 106,000 acres, Standard Oil at 10,474 acres, Boston Ranch (owned by cotton billionaire J.G. Boswell) at 26,485 acres, and Harris Ranch, operator of the world’s largest cattle feedlot, at 18,393 acres.<sup>74</sup>

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(2008), available at [www.usbr.gov/mp/sccao/sld/docs/sldfr\\_report/index.html](http://www.usbr.gov/mp/sccao/sld/docs/sldfr_report/index.html).

<sup>67</sup> SAN LUIS TASK FORCE REPORT, *supra* note 55, at 163 (citing BUREAU OF RECLAMATION, DEFINITE PLAN REPORT 32 (1962)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 163.

<sup>70</sup> *Id.* at 26.

<sup>71</sup> See Frampton, *supra* note 6, at 89.

<sup>72</sup> *Id.* at 90-91; *Hearing on S. 44, supra* note 6, at 39.

<sup>73</sup> See Frampton, *supra* note 6, at 90-91.

<sup>74</sup> See *id.* at 91. To subsidize these farms, federal taxpayers paid between \$1540 and \$2200 per acre. *Id.*

In 1982, the Reclamation Reform Act was passed, eliminating the residency requirement for farms, increasing the acreage limitation to 960 acres, and supposedly eliminating the “leasing loophole,” which had provided cheap water to big growers dating back to the 1920s.<sup>75</sup> The Bureau took five years to formulate new rules for limiting the amount of subsidized water to the mega-farms, issuing the final rules on April 10, 1987.<sup>76</sup> United States Congressman George Miller (D-Martinez), the California Democrat from the Bay Area who has long been a critic of Westlands and who had helped write the 1982 Reform Act, called the new rules “‘a double-cross,’ an ‘outrage’ and ‘a horrible insult to Congress.’”<sup>77</sup> Congressional critics said that large loopholes rendered the rules virtually meaningless.<sup>78</sup>

The big Westlands land holders had dodged another bullet with elimination of the residency requirement and an increase in the acreage limitation to 960 acres, plus new leasing rules that would still allow them to operate on vast tracts of land. The critics, however, did not let up. In 1985, the Natural Resources Defense Council and the California Rural Legal Assistance Foundation released a study called *Turning Off the Tap on Federal Water Subsidies*, by E. Phillip LeVeen and Laura B. King.<sup>79</sup> It concluded the average subsidy per acre in the Westlands, which was paying less than \$10 an acre-foot for water at the time, was \$217 per acre while the average net revenue per acre was only \$290,<sup>80</sup> meaning the most expensive irrigation project in American history was built so growers could make \$73 an acre. The study also said “[t]he average farm operation in Westlands [was receiving] an annual subsidy . . . of almost \$500,000.”<sup>81</sup> The actual cost of delivering water to the Westlands was ten times what the growers were paying for it.<sup>82</sup>

In 1989, the General Accounting Office (GAO) reported to Rep. Miller, then chairman of the House Subcommittee on Water, Power, and

<sup>75</sup> See *Peterson v. U.S. Dep’t of Interior*, 899 F.2d 799, 804-07 (9th Cir. 1990) (explaining how the leasing loophole worked).

<sup>76</sup> Philip Shabecoff, *U.S. Issues Rules on Water for West*, N.Y. TIMES, Apr. 10, 1987, available at [query.nytimes.com/gst/fullpage.html?res=9B0DE2D9143AF933A25757C0A961948260&sec=&spon=&pagewanted=print](http://query.nytimes.com/gst/fullpage.html?res=9B0DE2D9143AF933A25757C0A961948260&sec=&spon=&pagewanted=print). The farms that were affected were those with “acreage over the [new] statutory limit[, which] range[d] from 160 acres to 960 acres.” *Id.*

<sup>77</sup> *Id.* (quoting Rep. Miller).

<sup>78</sup> *Id.*

<sup>79</sup> E. PHILLIP LEVEEN & LAURA B. KING, NATURAL RES. DEF. COUNCIL & CAL. RURAL LEGAL ASSISTANCE FOUND., *TURNING OFF THE TAP ON FEDERAL WATER SUBSIDIES* (1985).

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

## 18 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 3

Offshore Energy Resources, that large farming operations in the CVP (mostly Westlands) were reorganizing through partnerships, corporations, and trusts to circumvent the new acreage limitations on leasing that had been placed in the 1982 Reclamation Reform Act.<sup>83</sup>

One consequence of these reorganizations has been a reduction in revenues to which the federal government would have been entitled if the multiple landholdings had been considered collectively as large farms subject to the [1982 Reform Act's] 960-acre limit. This reduction in revenues likely will continue to occur annually under the existing act.<sup>84</sup>

In a 1990 report, the GAO described how cotton king J.G. Boswell had sold 23,238 acres he owned in Westlands to the Westhaven Trust, which Boswell had set up supposedly to benefit 326 employees of his J.G. Boswell Co.<sup>85</sup> The GAO report said that had the trust been required to submit to the 1982 Reform Act's 960-acre limitation (unsurprisingly, Reclamation saw no problem with Boswell's trust), the trust would have had to pay an additional \$2 million a year for its water.<sup>86</sup>

The 1980s became a turning point for Westlands, not because of the 1982 Reform Act, which it managed to continually circumvent despite congressional grumbling,<sup>87</sup> but because of another lurking problem. The unsolved drainage dilemma, which had been merely a nagging annoyance in the early years of the district,<sup>88</sup> reared its ugly head in national headlines about deformed ducks and the poisoning of a national

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<sup>83</sup> GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-6, WATER SUBSIDIES: BASIC CHANGES NEEDED TO AVOID ABUSE OF THE 960-ACRE LIMIT 1 (1989), available at <http://archive.gao.gov/t2pbat12/139927.pdf>.

<sup>84</sup> *Id.* at 3.

<sup>85</sup> GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-90-198, WATER SUBSIDIES: THE WESTHAVEN TRUST REINFORCES THE NEED TO CHANGE RECLAMATION LAW 1-3 (1990), available at <http://archive.gao.gov/d24t8/141618.pdf>.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> Besides Rep. George Miller, other outspoken critics of Westlands were Sen. Bill Bradley (D-N.J.), co-author with Miller of the 1992 Central Valley Project Improvement Act (which took water away from growers for fish and the environment), and former Rep. Sam Gejdenson (D-Conn.), who chaired the House Subcommittee on Oversight and Investigations of the House Interior Committee (now House Resources Committee) in the late 1980s. E-mail from Dan Beard, former U.S. Bureau of Reclamation Commissioner, to author (Mar. 11, 2009) (on file with author).

<sup>88</sup> See E. Phillip LeVeon, *Kesterson as a Turning Point for Irrigated Agriculture*, in SELENIUM AND AGRICULTURAL DRAINAGE: IMPLICATIONS FOR SAN FRANCISCO BAY AND THE CALIFORNIA ENVIRONMENT 104, 106 (1985) (explaining that while the need for a drainage system "was noted from the very outset," the cost was severely underestimated at that time).

wildlife refuge.<sup>89</sup> Along with ongoing, ruinous economic problems stemming from decades of unsustainable water subsidies, the Kesterson controversy, discussed below, signaled the beginning of the decline of Westlands' legendary political clout.<sup>90</sup>

#### IV. THE DRAINAGE CRISIS ERUPTS

The soils of the western San Joaquin Valley are composed of material eroded from the Coast Range Mountains, which are ancient seabed shales.<sup>91</sup> These Cretaceous sedimentary rock shales include a host of salts, trace elements like selenium, arsenic and boron, and heavy metals, which created an alkali desert on the West Side over eons.<sup>92</sup> Some farmland along the flood plain of the San Joaquin River, however, was suitable for farming, especially for a salt-tolerant crop like cotton.<sup>93</sup>

To further complicate matters, several layers of virtually impermeable, thick subterranean clays run below the topsoil and impede the downward percolation of applied irrigation water.<sup>94</sup> The result is that a "perched" shallow groundwater table develops above the clays and near the root zone of the crops and when irrigation continues, the salty shallow groundwater can rise to the root zone and kill the crops.<sup>95</sup> Growers had known since before World War II that if Northern California river water, which itself picks up dissolved salts on its long journey south, was continuously supplied to the West Side farmlands, there needed to be a disposal ditch to carry off the salty shallow drainage waters to the Pacific Ocean.<sup>96</sup>

<sup>89</sup> See Arnold Schultz, *Background and Recent History*, in SELENIUM AND AGRICULTURAL DRAINAGE: IMPLICATIONS FOR SAN FRANCISCO BAY AND THE CALIFORNIA ENVIRONMENT 3, 7-8 (1985).

<sup>90</sup> See LeVeon, *supra* note 79, at 112-14. Two books that were published at the time of the Kesterson poisoning are essential reading for anyone interested in western states water politics and U.S. Bureau of Reclamation history: DONALD WORSTER, *RIVERS OF EMPIRE* (1985), and MARC REISNER, *CADILLAC DESERT* (1986).

<sup>91</sup> Theresa S. Presser, *The Kesterson Effect*, 18 ENVTL. MGMT. 437, 438 (1994), available at [http://wwwrcamnl.wr.usgs.gov/Selenium/Library\\_articles/presser\\_kesterson\\_eff\\_1994.pdf](http://wwwrcamnl.wr.usgs.gov/Selenium/Library_articles/presser_kesterson_eff_1994.pdf). Detailed information about the geology and soil chemistry of the Western San Joaquin Valley is available at the U.S. Geological Survey's online "Selenium Library." See U.S. Geological Survey, Library, <http://wwwrcamnl.wr.usgs.gov/Selenium/library.htm> (last visited Mar. 26, 2009).

<sup>92</sup> Gary Bobker, *Agricultural Point Source Pollution in California's San Joaquin Valley*, 9-WTR NAT. RESOURCES & ENV'T 13 (1995).

<sup>93</sup> Univ. of Cal. Delivers, *Pistachios Prove as Salt Tolerant as Cotton*, <http://ucanr.org/delivers/impactview.cfm?impactnum=97> (last visited Mar. 26, 2009).

<sup>94</sup> See Presser, *supra* note 91, at 448 fig. 3.

<sup>95</sup> See *id.* at 437-38; see also REISNER, *supra* note 32, at 8.

<sup>96</sup> See U.S. DEPT. AGRIC., *supra* note 28, at 8, 12-16.



The practical solution to the problem was to bury perforated pipes below the fields, into which the shallow groundwater would trickle, and slant these pipes to a sump at the low end of the field.<sup>97</sup> The sump waters would then be pumped into an open ditch to be carried away.<sup>98</sup> Where these waste waters would ultimately end up is a question still unresolved.<sup>99</sup>

In 1955, Reclamation proposed a \$7.2 million earthen ditch<sup>100</sup> to carry the salty drainage waters of the San Luis Unit to the Delta<sup>101</sup> for disposal, under a theory that the assimilative capacity of the Delta waters would safely carry the salts out through San Francisco Bay to the Pacific Ocean. The theory, popular at the time, was that “dilution is the solution to pollution.”<sup>102</sup> It was to prove disastrously wrong.

Following congressional approval of the San Luis project in 1960, farmers downslope of the proposed project, including Delta farmers, and San Francisco Bay Area urban interests expressed alarm that the agricultural drainage waters that were to be dumped into the Delta were not safe.<sup>103</sup> Irrigation districts immediately north of the San Luis Unit were worried an earthen drainage ditch would leak salty water into their fields, harming their crops.<sup>104</sup>

<sup>97</sup> See *id.* at 20-25.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See SAN LUIS TASK FORCE REPORT, *supra* note 55, at 287 app. E (offering a detailed chronology of the evolution of the San Luis Drain concept).

<sup>101</sup> The Sacramento-San Joaquin Delta is the convergence point of the southbound Sacramento River and the northbound San Joaquin River, in the region of Sacramento and Stockton, which then jointly turn west and flow out through San Francisco Bay to the Pacific Ocean. See *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002). The Delta region comprises over 1100 square miles of sloughs and waterways and half a million acres of prime farmland. See Cal. Delta Prot. Comm’n, *The Delta: Sacramento-San Joaquin Delta Recreation Survey*, [www.delta.ca.gov/recreation/survey/ch-1.asp](http://www.delta.ca.gov/recreation/survey/ch-1.asp) (last visited Mar. 28, 2009). For a detailed history of the Delta’s resources and decline, see U.S. GEOLOGICAL SURVEY, *DELTA SUBSIDENCE IN CALIFORNIA, THE SINKING HEART OF THE STATE* (2000), available at [www.science.calwater.ca.gov/pdf/fs00500.pdf](http://www.science.calwater.ca.gov/pdf/fs00500.pdf).

<sup>102</sup> See U.S. GEOLOGICAL SURVEY, *FACT SHEET 077-02, MONITORING OUR RIVERS AND STREAMS 2* (2005), available at <http://pubs.usgs.gov/fs/fs-077-02/pdf/FS077-02.pdf>.

<sup>103</sup> See STATE WATER RES. CONTROL BD., ORDER NO. W.Q. 85-1, IN THE MATTER OF THE PET. OF ROBERT JAMES CLAU FOR REVIEW OF INACTION OF CAL. REG’L WATER QUALITY CONTROL BD., CENT. VALLEY REGION 5 (Feb. 5, 1985), available at [www.swrcb.ca.gov/board\\_decisions/adopted\\_orders/water\\_quality/1985/wq1985\\_01.pdf](http://www.swrcb.ca.gov/board_decisions/adopted_orders/water_quality/1985/wq1985_01.pdf) [hereinafter *CLAUS PETITION*] (referring to petition to the State Water Resources Board raising numerous issues with agricultural discharges in the San Joaquin Valley, including increased levels of salt and other minerals contained in the soil); see also SAN LUIS TASK FORCE REPORT, *supra* note 55, at 107-17 (summarizing how changes to in-flow and out-flow could lead to additional salinity in crop-land).

<sup>104</sup> See *CLAUS PETITION*, *supra* note 103, at 2, 5, 8.

In 1965, Congress prohibited the selection of a final discharge point for the San Luis effluent until, among other provisions, a pollution study was completed by the U.S. Department of Health, Education, and Welfare.<sup>105</sup> Planning for a drain to the Delta was completed by the late 1970s, but completion of the San Luis Drain was held up by funding restraints and California agency concerns. The State Water Resources Control Board, under then-chairwoman Carla Bard, demanded that Reclamation complete numerous studies to establish the safety of the drainwaters to be dumped in the Delta.

Between 1968 and 1975, Reclamation completed eighty-two miles of the cement-lined San Luis Drain to the 5900-acre Kesterson ranch, a former cattle/dairy ranch in Merced County that was surrounded by the Grasslands Water District, a mixture of popular winter duck-hunting clubs and summer cattle ranches.<sup>106</sup> Reclamation built the first 1280 acres of “holding” or evaporation ponds at the Kesterson Ranch and agreed with the U.S. Fish and Wildlife Service to establish a national wildlife refuge at that site for ducks, geese and migratory birds that would utilize the brackish drainage water, despite warnings by some biologists the drainwater would be lethal to wildlife.<sup>107</sup> Reclamation’s primary purpose for the Kesterson Reservoir ponds was to store drain waters; the wildlife refuge was secondary.<sup>108</sup> The evaporation ponds were viewed as a temporary solution until Reclamation gained approval of a disposal point in the Delta region near the city of Antioch.<sup>109</sup> Drainwater would be held at the Kesterson ponds in the summer and funneled north in the winter during the rainy season.<sup>110</sup>

For the first few years of their existence, the Kesterson Reservoir ponds held fresh water and attracted large numbers of birds and wildlife. In 1978, some mixed drainwater/freshwater was channeled to the evaporation ponds; by 1981, full-strength drainwater was flowing to Kesterson ponds.<sup>111</sup> The results were dramatic. By 1983, all the

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<sup>105</sup> SAN LUIS TASK FORCE REPORT, *supra* note 55, at 164 (recounting how Congress attached a rider mandating the study to the 1966 Central Valley Project Appropriations Act, Pub. L. No. 89-299).

<sup>106</sup> See *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000); see also Grassland Water District, Brochure, [www.grasslandwetlands.org/brochure.php5](http://www.grasslandwetlands.org/brochure.php5) (last visited Mar. 29, 2009).

<sup>107</sup> Felix Smith, *The Kesterson Effect: Reasonable Use of Water and the Public Trust*, 6 SAN JOAQUIN AGRIC. L. REV. 45, 46 n.3 (1996).

<sup>108</sup> CLAUS PETITION, *supra* note 103, at 5.

<sup>109</sup> See Smith, *supra* note 107, at 45, 46; see also *Firebaugh Canal Co.*, 203 F.3d at 570-72.

<sup>110</sup> See *Autobee*, *supra* note 31.

<sup>111</sup> Smith, *supra* note 107, at 47.

## 22 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 3

freshwater fish in the ponds (except tiny mosquito fish) had died off.<sup>112</sup> In the spring of 1983, massive bird die-offs were observed, and federal biologists discovered grotesque deformities in hatchlings of several bird species and an almost total lack of reproduction in several bird species.<sup>113</sup> The deformities were quickly attributed to selenium in the Kesterson food chain.<sup>114</sup> The selenium occurring naturally in the Westlands fields had been dissolved by irrigation and carried to Kesterson in the drainage water.<sup>115</sup>

In February of 1985, the State Water Resources Control Board, in response to a complaint from Kesterson neighbors Jim and Karen Claus, ordered the Kesterson ponds cleaned up or closed, ruling continued irrigation of high selenium soils could be a public nuisance.<sup>116</sup> The next month, on March 15, 1985, in a dramatic public hearing of the House Subcommittee on Water and Power Resources in Los Banos, Interior Department official Carol Hallett, citing apparent violations of the Migratory Bird Treaty Act in the bird deaths at Kesterson, announced the Kesterson evaporation ponds would be closed and water deliveries to Westlands would be shut off.<sup>117</sup>

Two weeks later, on March 29, 1985, Interior Department Secretary Donald Hodel agreed to restore water deliveries to Westlands and to work with the irrigation district to resolve the drainage crisis.<sup>118</sup> Westlands could continue to funnel drainage to Kesterson until June 30, 1986, but after that the failed evaporation-pond experiment at the beleaguered wildlife refuge would be permanently halted.<sup>119</sup> The drainage collector pipes under 42,000 acres of impaired farmlands were

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<sup>112</sup> *Id.* at 62.

<sup>113</sup> *Id.* at 45-46.

<sup>114</sup> See Presser, *supra* note 91, at 437.

<sup>115</sup> Floyd Dominy, the legendary commissioner of the Bureau of Reclamation in the 1950s and 1960s, would later say:

We went ahead with the Westlands project before we solved the drainage problem. We thought we knew how to solve the drainage problem. We thought the Kesterson Reservoir could be flushed on out into the Delta. We didn't have it solidified. So I made a terrible mistake by going ahead with Westlands at the time we did. *Cadillac Desert: Program 3, The Mercy of Nature* (Pub. Broadcasting Serv. 1997).

<sup>116</sup> CLAUSE PETITION, *supra* note 103, at 11-29.

<sup>117</sup> See Robert Lindsey, *Irrigation Water Cut Off by U.S. To Protect Birds*, N.Y. TIMES, Mar. 16, 1985; Science News, *Relief for Refuge's Selenium Problem - Kesterson National Wildlife Refuge*, Mar. 30, 1985.

<sup>118</sup> Robert A. Jones, *Kesterson Area's Farmers Get Water-Cutoff Reprieve*, L.A. TIMES, Mar. 29, 1985, available at [http://articles.latimes.com/1985-03-29/news/mn-20383\\_1\\_irrigation-water](http://articles.latimes.com/1985-03-29/news/mn-20383_1_irrigation-water).

<sup>119</sup> *Federal Authorities Announce Kesterson Refuge Cleanup Plan*, SAN DIEGO UNION-TRIB., July 6, 1985, at A3.

plugged.<sup>120</sup> The Kesterson ponds were later dewatered, the levees knocked down and the toxic ponds' bottoms covered with approximately one million cubic yards of fill dirt, at an overall cost estimated to be \$23 million.<sup>121</sup>

Various local, university, state and federal agencies then launched a joint six-year, \$50 million study on ways to resolve the agricultural drainage crisis in the western Valley.<sup>122</sup> In September 1990, a report was issued, recommending, among other things, retirement of at least 75,000 acres of salt-impaired farmlands.<sup>123</sup>

In 1991, a group of original Westlands landowners led by Sumner Peck Ranch, Inc. (descendants of Westlands patriarch Russell Giffen), filed suit in Fresno federal district court against Reclamation and the Westlands, charging damage to their land by the failure of the water district and the federal agency to complete a drainage system.<sup>124</sup> On March 13, 1995, U.S. District Judge Oliver Wanger issued a partial judgment based on his conclusions that the San Luis Act<sup>125</sup> established a mandatory duty of the Bureau of Reclamation to provide drainage, which had not been excused despite the developments at Kesterson.<sup>126</sup> In the judgment, Judge Wanger ordered the Secretary of the Interior and the Bureau of Reclamation to "take such reasonable and necessary actions to promptly prepare, file and pursue an application for a discharge permit" with the California Water Resources Control Board.<sup>127</sup>

Judge Wanger's judgment was appealed to the U.S. Court of

<sup>120</sup> Chris Chrystal, UNITED PRESS INT'L, Mar. 29, 1985, AM Cycle.

<sup>121</sup> See S.M. BENSON ET AL., KESTERSON CRISIS: SORTING OUT THE FACTS 7 (July 1990), available at [www.osti.gov/bridge/servlets/purl/5142211-14NkoL/5142211.PDF](http://www.osti.gov/bridge/servlets/purl/5142211-14NkoL/5142211.PDF).

<sup>122</sup> THE BAY INST. ET AL., DRAINAGE WITHOUT A DRAIN (Jan. 2003), available at [www.bay.org/Pubs/drainage.pdf](http://www.bay.org/Pubs/drainage.pdf); see also BUREAU OF RECLAMATION ET AL., A STRATEGY FOR IMPLEMENTATION OF THE MANAGEMENT PLAN FOR AGRICULTURAL SUBSURFACE DRAINAGE AND RELATED PROBLEMS ON THE WESTSIDE SAN JOAQUIN VALLEY (draft) 5 (1990) (describing the formation in 1984 of the San Joaquin Valley Drainage Program).

<sup>123</sup> See *id.* at 17. Ed Imhoff, the Interior Department official who headed the 1985-1990 joint agency study of the drainage problems, was interviewed in 2006 about plans that Reclamation had at that time to build another 1270 acres of evaporation ponds similar to those at Kesterson. Imhoff, then retired, responded, "My God. Why would we be replicating something that caused all the deaths and deformities at Kesterson? Why would we do that?" See Bettina Boxall, *Repeat of Tragedy Is Feared in Water Plan*, L.A. TIMES, July 8, 2006, at B1.

<sup>124</sup> See *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp 715 (E.D. Cal. 1993).

<sup>125</sup> Pub. L. No. 86-488, 74 Stat. 156 (1960).

<sup>126</sup> See *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 572-73 (9th Cir. 2000) (citing *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, No. CV-F-91-048 (E.D. Cal. Mar. 10, 1995); *Firebaugh Canal Co. v. USA*, No. CV-F-88-634 (E.D. Cal. Mar. 10, 1995)).

<sup>127</sup> *Id.* at 573.

Appeals for the Ninth Circuit, and in 2000, a majority of the appellate panel in *Firebaugh Canal Co. v. United States* affirmed Wanger in part and reversed him in part.<sup>128</sup> The majority concluded congressional action in the long and tortured history of the San Luis Unit both before and after the Kesterson catastrophe indicated that in meeting its mandate to provide drainage service, Reclamation has discretion to apply to the state of California for a permit to build a drainage canal to the Delta or to explore other options for resolving the drainage crisis.<sup>129</sup>

The dissent by Circuit Judge Stephen S. Trott in the *Firebaugh* ruling, with which this writer agrees, drew a far different conclusion. Judge Trott wrote:

Congress and various agencies of our government have failed for many years to come to grips with the difficult issues in this case, issues arising primarily from legitimate environmental concerns such as what the effluent from the project would do to the San Francisco Bay. The Kesterson Reservoir experience and its incompatibility with the Migratory Bird Treaty Act and other valid health and safety concerns proves once again that for every benefit, there is a cost somewhere that must be borne by someone.

As far as I can tell, when some of the downstream costs of the San Luis Unit became apparent, Congress hit half the brakes, allowing needed irrigation to continue, but blocking the removal of the waste water by an interceptor drain until a plan could be developed that would meet environmental and water quality requirements. As I read the law, Congress' studied and specific instructions on this thorny issue are dispositive and extinguish or excuse any obligation of the Secretary of the Interior to go ahead—at any level—with the interceptor drain. In the first place, nothing in the plain language of the Act requires the construction of a master, or a central, drain. The Act merely authorizes the Secretary to include necessary drains and to make provisions for the construction of a master drain. An authorization is not a mandate.<sup>130</sup>

Judge Trott added, presciently:

After spending months with this record, I'm not at all sure we can find the right answer to the puzzle. The pieces are strewn over half a century, and they appear to have been cut by Congress from competing pieces of wood with no reference to a coherent design. We

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<sup>128</sup> *Id.* at 578.

<sup>129</sup> *Id.* at 574, 578.

<sup>130</sup> *Id.* at 578-79 (Trott, J., dissenting).

have been left with pieces that cannot be assembled to produce any picture at all, much less the one on the box. The Feasibility Report for this project was prepared by the Secretary of the Interior in 1956—when Dwight D. Eisenhower was the President of the United States. In 1965, Congress used an appropriations rider to slow it down. In 1975, twenty-five years ago, the construction of the interceptor drain project went into a stall because of “questions” and “concerns” raised in the public arena; and in 1985, it was stopped dead because of the Kesterson disaster.

The thorny problem of what to do with the noxious effluent is not readily susceptible of a solution that the parties with competing interests will find acceptable. In fact, the question in search of an answer has become a political question beyond our ability, competence, and authority to resolve. It is tempting to turn to the courts when Congress falters or refuses to act, but not appropriate under our Constitution’s allocation of powers.

One can only have sympathy for the plight of the farmers and families this irrigation project was intended to benefit, for it seems now that the well-intentioned project threatens to destroy their lands. Equally valid are the fears of those who may be burdened by the effluent from this initiative. Nevertheless, the answer to their plight lies outside our power to act. It is to Congress and the State of California to which those concerned must turn and then hope that the difficult policy choices we in the judiciary are not equipped to make can be made in those fora.<sup>131</sup>

The result of the Ninth Circuit’s 2000 decision in *Firebaugh* was that Reclamation was ordered back to the drawing board to come up with another drainage plan that was effective, would protect wildlife, and was economically feasible. Eight years dragged by while the Bureau worked on new solutions to the drainage problem, which has plagued desert irrigated agriculture since Mesopotamian times. Everything was tried, from recycling, to treatment techniques to remove salts and trace elements, to salt-tolerant crops and trees, to sprinklers to more quickly evaporate the salty drainwater.<sup>132</sup>

In 2007, Reclamation released the record of decision on its 5000-page San Luis Drainage Feature Re-evaluation Final Environmental Impact Statement (EIS).<sup>133</sup> In brief, the preferred alternative in the EIS

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<sup>131</sup> *Id.* at 580 (Trott, J., dissenting).

<sup>132</sup> CAL. DEP’T OF WATER RES., SELENIUM REMOVAL AT ADAMS AVENUE AGRICULTURAL DRAINAGE RESEARCH CENTER 11-13 (2004), available at [www.dpla2.water.ca.gov/publications/drainage/adams\\_avenue/background.pdf](http://www.dpla2.water.ca.gov/publications/drainage/adams_avenue/background.pdf).

<sup>133</sup> BUREAU OF RECLAMATION, RECORD OF DECISION, SAN LUIS DRAINAGE FEATURE RE-

calls for idling 194,000 acres<sup>134</sup> of high selenium farmland (mostly in Westlands) and building 1900 acres of evaporation ponds while continuing to work on technologies to safely remove salts, selenium and other potential pollutants from the drainage water at a reasonable cost.<sup>135</sup> Costs of a government-built drainage system, with maximum land retirement at up to \$2600 an acre, were estimated at \$2.7 billion.<sup>136</sup>

In his 2007 book, *The New American Story*, former U.S. Senator Bill Bradley (D-New Jersey) complained that “[t]he Bush Administration ha[d] turned over the government posts that are supposed to look out for our national patrimony to the people who want to steal it.”<sup>137</sup> Bradley cited a particularly “egregious example” as follows:

In 1992, Representative George Miller (D-Calif.) and I succeeded in getting a law passed that changed the way water from California’s Central Valley Project, the largest of the nation’s water projects, was allocated and created an environmental fund to protect wildlife in the Central Valley. The fiercest opponent of that law was Jason Peltier, the manager of a trade association that represented the large water interests. Peltier vowed that he and his clients would resist implementation with all the legal and political weapons at their disposal. He then proceeded to oversee the filing of lawsuits that prevented implementation of provisions such as restoration of the

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EVALUATION (2007), *available at* [www.usbr.gov/mp/mp150/envdocs/San\\_Luis\\_Drainage\\_Feature\\_Re-evaluation\\_ROD.pdf](http://www.usbr.gov/mp/mp150/envdocs/San_Luis_Drainage_Feature_Re-evaluation_ROD.pdf).

<sup>134</sup> Vehemently objecting to Reclamation’s preferred alternative, and citing recommendations of the U.S. Fish and Wildlife Service, environmentalists say that a minimum of 379,000 acres of high selenium lands should be retired from agricultural production. Letter from Cal. Sportfishing Prot. Alliance & Cal. Water Impact Network to Dianne Feinstein, U.S. Senator (Apr. 4, 2008), *available at* [http://lloydgcarter.com/files\\_lgc/SenatorFeinstein4.04.08\\_1.pdf](http://lloydgcarter.com/files_lgc/SenatorFeinstein4.04.08_1.pdf) [hereinafter CWIN Letter] (citing U.S. FISH & WILDLIFE SERV., DRAFT FISH AND WILDLIFE COORDINATION ACT REPORT FOR THE SAN LUIS DRAINAGE FEATURE RE-EVALUATION 43-44 (2005), *available at* [www.usbr.gov/mp/nepa/documentShow.cfm?Doc\\_ID=2262](http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=2262)).

<sup>135</sup> See U.S. GEOLOGICAL SURVEY, CALIFORNIA OPEN-FILE REPORT 2008-1210, TECHNICAL ANALYSIS OF IN-VALLEY DRAINAGE MANAGEMENT STRATEGIES FOR THE WESTERN SAN JOAQUIN VALLEY 1 (2008), *available at* <http://pubs.usgs.gov/of/2008/1210/of2008-1210.pdf>; see also BUREAU OF RECLAMATION, RECORD OF DECISION, SAN LUIS DRAINAGE FEATURE RE-EVALUATION 1, 12-13 (2007), *available at* [www.usbr.gov/mp/mp150/envdocs/San\\_Luis\\_Drainage\\_Feature\\_Re-evaluation\\_ROD.pdf](http://www.usbr.gov/mp/mp150/envdocs/San_Luis_Drainage_Feature_Re-evaluation_ROD.pdf); BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, SAN LUIS DRAINAGE FEATURE RE-EVALUATION 2-34 (2006), *available at* [www.usbr.gov/mp/nepa/documentShow.cfm?Doc\\_ID=2227](http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=2227).

<sup>136</sup> See GOV’T ACCOUNTABILITY OFFICE, GAO-08-307R, *supra* note 2, at 19. For a technical analysis of the Bureau’s drainage EIS, see U.S. GEOLOGICAL SURVEY, CALIFORNIA OPEN-FILE REPORT 2008-1210, TECHNICAL ANALYSIS OF IN-VALLEY DRAINAGE MANAGEMENT STRATEGIES FOR THE WESTERN SAN JOAQUIN VALLEY (2008), *available at* <http://pubs.usgs.gov/of/2008/1210/of2008-1210.pdf>.

<sup>137</sup> BILL BRADLEY, *THE NEW AMERICAN STORY* 101 (2007).

Trinity and San Joaquin rivers and various reforms in water contracts. (The Trinity restoration is still in limbo; after fourteen years of litigation and conflict, the restoration of the San Joaquin was finally announced in 2006.) As principal deputy assistant secretary for water and science, Peltier now helps award the Interior Department's water contracts. It appears that one of his major aims is to give the Westlands Water District, which happens to be a former client, a twenty-five-year lease—and an option for an additional twenty-five years—on 1.15 million acre-feet of water (each acre-foot is 326,000 gallons) at a low price, which the water district can then use for its own agricultural production or resell at a profit to municipalities and corporations or other Central Valley farmers. In a state where water is the lifeblood and four-fifths of it goes to agriculture, even though agriculture represents only 2 percent of California's GDP, Peltier wants the federal government to make a fifty-year noncompetitive commitment to one rural water district.<sup>138</sup>

Peltier, who denied improper meddling with California water contracts, resigned his Interior position in June of 2007 and now is the chief deputy general manager of the Westlands Water District.<sup>139</sup>

The years 2007 and 2008 were not good ones for the Westlands. Cutbacks in water deliveries due to either drought conditions or fishery problems reduced the district's water supply by an estimated 30-50%. In 2008, for the first time in history, the commercial and recreational salmon seasons were canceled along the California and Oregon coasts because of a precipitous drop in Delta salmon populations the last few years.<sup>140</sup>

In December of 2007, Judge Wanger, responding to a suit filed by environmental groups, issued an order to protect the Delta Smelt, a species protected under the federal Endangered Species Act.<sup>141</sup> Western Valley growers argued the ruling would cut deeply into their Delta water supplies and cause major economic damage to the farming community.<sup>142</sup>

<sup>138</sup> *Id.* at 101-02.

<sup>139</sup> See Kevin Bogardus & Mike Soraghan, *Head of Interior Department Conduct Board Joins Lobbying Firm*, THE HILL, July 11, 2007, available at <http://thehill.com/business--lobby/head-of-interior-department-conduct-board-joins-lobbying-firm-2007-07-11.html>.

<sup>140</sup> See Peter Fimrite, *All Salmon Fishing Banned on West Coast*, S.F. CHRON., May 2, 2008, at B2.

<sup>141</sup> *Natural Res. Def. Council v. Kempthorne*, No.1:05-CV-1207-OWW-GSA, 2007 U.S. Dist. LEXIS 91968 (E.D. Cal. Dec. 14, 2007); see Endangered Species Act of 1973, 16 U.S.C.A. §§ 4321-4347 (Westlaw 2009).

<sup>142</sup> See Harry Cline, *California Reels from Save-the-Minnow Ruling*, W. FARM PRESS, Sept. 15, 2007 (recounting reactions to Judge Wanger's earlier, related grant of a preliminary injunction to protect the smelt pending additional studies in *Natural Res. Def. Council v. Kempthorne*, 2007 U.S.



The order followed a May 2007 decision by Judge Wanger that Reclamation's assessment of the risk to smelt from the federal agency's massive pumps in the south Delta was illegal and must be rewritten.<sup>143</sup> State and federal water-project managers had relied on the flawed "biological opinion" by the U.S. Fish and Wildlife Service to justify increased water exports to farms and cities south of the Delta.<sup>144</sup> A rewritten biological opinion was issued in December of 2008, confirming the suspicion of environmentalists that Reclamation's Delta pumping was indeed hurting the fishery.<sup>145</sup> It appears from these events that the go-go days of heavy pumping from the Delta are over, and environmental cutbacks in Delta pumping—in all but heavy rainfall years—will become the "new normal" despite Westlands' protestations.

Because of the enormous cost of completing a federal drainage canal, Westlands has suggested to the government it would take over resolution of the drainage crisis in exchange for debt forgiveness, a guaranteed water supply, and takeover of some federal project plumbing.<sup>146</sup> U.S. Senator Dianne Feinstein (D-California) was approached about the possibility of brokering a deal for Westlands in Congress. Reclamation proposed draft legislation in November of 2008 and circulated it to interested parties.<sup>147</sup> The reaction of environmental and fishing interests was swift and hostile.<sup>148</sup>

In exchange for relieving the federal government of responsibility for finding a drainage solution, growers in the San Luis Unit and the

Dist. LEXIS 48261 (E.D. Cal. July 3, 2007)).

<sup>143</sup> See *Natural Res. Def. Council v. Kempthorne*, No.1:05-CV-1207-OWW-GSA, 2007 U.S. Dist. LEXIS 91968, at \*4 (E.D. Cal. Dec. 14, 2007).

<sup>144</sup> *Id.* at \*4-7.

<sup>145</sup> See U.S. FISH & WILDLIFE SERV., FORMAL ENDANGERED SPECIES ACT CONSULTATION ON THE PROPOSED COORDINATED OPERATIONS OF THE CENTRAL VALLEY PROJECT (CVP) AND STATE WATER PROJECT (SWP) 203 (2008), available at [www.fws.gov/sacramento/es/documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_OCR.pdf](http://www.fws.gov/sacramento/es/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf).

<sup>146</sup> See Letter from U.S. Bureau of Reclamation Mid-Pacific Regional Office to Dianne Feinstein, U.S. Senator (May 9, 2008), available at [www.usbr.gov/mp/sldcr/06-correspondence/BOR's%20Drainage%20Response%205-9-08\\_1.pdf](http://www.usbr.gov/mp/sldcr/06-correspondence/BOR's%20Drainage%20Response%205-9-08_1.pdf) [hereinafter BOR Letter]; see also Michael O'Hare, Froude Reynolds with more on the Westlands Scam (Apr. 29, 2008), [www.samefacts.com/2008/04/energy-and-environment/froude-reynolds-with-more-on-the-westlands-scam/](http://www.samefacts.com/2008/04/energy-and-environment/froude-reynolds-with-more-on-the-westlands-scam/); BUREAU OF RECLAMATION, DRAINAGE WORKING GROUP DISCUSSION DRAFT 2-4 (Nov. 26, 2008), available at [www.usbr.gov/mp/sldcr/01-enabling/DRAFT%20LEGISLATION%2011-26-08.pdf](http://www.usbr.gov/mp/sldcr/01-enabling/DRAFT%20LEGISLATION%2011-26-08.pdf) (draft legislation for the San Luis Unit Drainage Resolution Act) [hereinafter DRAFT LEGISLATION]; CWIN Letter, *supra* note 134.

<sup>147</sup> See BOR Letter, *supra* note 146. News accounts indicated Sen. Feinstein might introduce drainage language in Congress early in 2009. See, e.g., Michael Doyle, *Valley Priorities Resurface*, FRESNO BEE, Jan. 7, 2009, at A3.

<sup>148</sup> See, e.g., CWIN Letter, *supra* note 134.

federal irrigation districts immediately north of Westlands in the Delta-Mendota Service area wanted the draft legislation<sup>149</sup> to include the following:

- Congressional approval of the Grasslands Bypass Project<sup>150</sup> (which would likely permit federal irrigation districts north of Westlands to continue dumping their untreated drainage waters directly into the San Joaquin River free of regulatory oversight from the state of California);
- A water-delivery contract in perpetuity (most CVP water contracts are for twenty-five years);<sup>151</sup>
- A \$100 million reduction in the bill the San Luis Unit owes the federal government for capital costs associated with construction of the San Luis Unit<sup>152</sup> (The San Luis Unit still owes over \$450 million in interest-free capital construction costs);<sup>153</sup>
- Subsidized electricity for any drainage-treatment options requiring electrical power;<sup>154</sup>
- Relief from certain provisions of the 1992 Central Valley Project Improvement Act, including pricing provisions.<sup>155</sup>
- Transfer from the federal government to Westlands of title to “all pumping and diversion facilities along the San Luis Canal or the Mendota Pool,” the Pleasant Valley Pumping Plant, and distribution and drainage-collector systems.<sup>156</sup>
- A provision—one that drew fierce criticism from fishing and environmental groups<sup>157</sup>—would allow Westlands and the adjacent federal water districts to have two years *after* the legislation is passed to provide state and federal authorities with

<sup>149</sup> See BOR Letter, *supra* note 146; see also DRAFT LEGISLATION, *supra* note 146, at 4.

<sup>150</sup> See DRAFT LEGISLATION, *supra* note 146, at 4.

<sup>151</sup> See BOR Letter, *supra* note 146; see also DRAFT LEGISLATION, *supra* note 146, at 6-7.

<sup>152</sup> See DRAFT LEGISLATION, *supra* note 146, at 8.

<sup>153</sup> Garance Burke, *GAO: Farmers Owe Feds More Than \$450M for Calif. Water Project*, ASSOCIATED PRESS, Jan. 17, 2008, available at [www.signonsandiego.com/news/state/20080117-1510-ca-waterfight.html](http://www.signonsandiego.com/news/state/20080117-1510-ca-waterfight.html).

<sup>154</sup> See DRAFT LEGISLATION, *supra* note 146, at 22-23.

<sup>155</sup> See *id.* at 18; see also BOR Letter, *supra* note 146.

<sup>156</sup> DRAFT LEGISLATION, *supra* note 146, at 12.

<sup>157</sup> See, e.g., Letter from Friends of the Trinity River et al. to Mike Finnegan, Bureau of Reclamation 3 (Aug. 15, 2008), available at [www.fotr.org/comments/Comments\\_SLU\\_0808.pdf](http://www.fotr.org/comments/Comments_SLU_0808.pdf) (responding to an earlier draft of the legislation that contained the same provision as in Draft Legislation, *supra* note 146. Environmentalists thought that the drainage treatment “solutions” were highly suspect, that enough problem lands were being suggested for retirement, and that Westlands would be given unfair advantage over other federal water districts. See, e.g., CWIN Letter, *supra* note 134 (criticizing the plans as expressed in the preferred alternative of Reclamation’s EIS).

an acceptable drainage plan.<sup>158</sup>

Undiscussed was the fact that neither Judge Wanger's order of 1995 nor the Ninth Circuit's 2000 decision in *Firebaugh* requires the federal government to actually pay for a drainage solution. The ultimate financial burden for any drainage fix still remains with the San Luis Unit under current law and the decisions from Judge Wanger and the Ninth Circuit.

Critics of the proposed legislation, including farm groups as well as anglers and environmentalists, suspect Westlands' real motive in taking over the unsolvable drainage problem could be to secure a reliable water source that it can then sell on the open market (including for urban uses) in California, reaping windfall profits as the marginal lands in the district continue to salt up and go out of production—a charge Westlands denies.<sup>159</sup>

After sitting idly by for thirty years, the Central Valley Regional Water Quality Board, in November of 2008, sent a letter to Westlands, giving the district ninety days to apply for a waste-discharge permit and present a plan to clean the soils of salts and toxins.<sup>160</sup>

In public comments on the proposed Westlands bailout legislation, the California Water Impact Network and the California Sportfishing Protection Alliance noted that the National Economic Development Alternative cost/benefit analysis for the San Luis Drainage EIS showed that the Bureau of Reclamation, by favoring a proposal to idle only 194,000 acres of selenium-tainted problem lands (similar to the proposed Westlands legislation) instead of the maximum land-retirement scenario of 394,000 acres in the San Luis Unit (favored by wildlife agencies and fishery groups) could end up costing taxpayers an extra \$780 million by 2050.<sup>161</sup> The \$780 million figure is based on an annual loss of \$15.6 million in net benefits under the smaller land-retirement option, as compared to a net benefit of \$3.6 million a year if all 394,000 acres of drainage problem lands are retired in Westlands and in federal irrigation districts to the north (downslope).<sup>162</sup>

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<sup>158</sup> DRAFT LEGISLATION, *supra* note 146, at 19-20.

<sup>159</sup> See Letter from Friends of the Trinity River et al. to Frederico Barajas, Bureau of Reclamation 2-3 (Apr. 18, 2008), available at [www.fotr.org/comments/Comments\\_Drainage\\_Process\\_0408.pdf](http://www.fotr.org/comments/Comments_Drainage_Process_0408.pdf).

<sup>160</sup> Traci Sheehan, Cal. Progress Rep., Time Seeping Out For Drainage Debacle? State Regulators Give 90 Days To Act on Half-Century Old Environmental Problem, Nov. 10, 2008, [www.californiaprogressreport.com/2008/11/time\\_seeping\\_ou.html](http://www.californiaprogressreport.com/2008/11/time_seeping_ou.html).

<sup>161</sup> See BUREAU OF RECLAMATION, SAN LUIS DRAIN ENVIRONMENTAL IMPACT REPORT, app. N tbl. N-10 at p. N-17, available at [www.usbr.gov/mp/nepa/documentShow.cfm?Doc\\_ID=2240](http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=2240).

<sup>162</sup> *Id.*

An estimated 100,000 acres in the Westlands have already gone out of production in the last few years because they salted up for lack of drainage.<sup>163</sup> This includes land covered by a \$140 million 2002 Interior Department settlement of a lawsuit against Reclamation and Westlands filed by nineteen old-guard Westlands families who saw 32,400 acres of their farmland ruined by lack of drainage.<sup>164</sup> That controversial settlement included \$70 million for just four prominent farming families: (1) the Wolfsen family got \$40 million for nearly 10,000 acres of ruined land; (2) the family of Bill Jones, a former local assemblyman, state senator, California Secretary of State, and gubernatorial candidate, got more than \$10 million; (3), the Peck/Giffen family got \$18 million; and (4) the family of the late John “Jack” O’Neill got \$19 million.<sup>165</sup>

On December 1, 2008, the California Water Impact Network (CWIN) and the California Sportfishing Protection Alliance<sup>166</sup> (CSPA) filed suit in Sacramento Superior Court seeking (1) to halt all water exports from the Delta until the fishery is stabilized, and (2) to have the court declare irrigation of high-selenium soils an unreasonable use of water and a public nuisance.<sup>167</sup> A week later, Westlands and a coalition of water districts filed suit to block the reductions in Delta pumping ordered by the California Department of Fish and Game to protect fish, contending the U.S. Constitution bars state control over CVP water.<sup>168</sup>

In January of 2009, state and federal fishery biologists said populations of two indicator species of Delta fish, smelt, and threadfin shad, again dropped to record lows in 2008.<sup>169</sup> Biologists are not surprised.<sup>170</sup> Four of the five years of highest water exports from the

<sup>163</sup> Mark Arax, *Four Families To Split Big Share of Farm Deal*, L.A. TIMES, Dec. 20, 2002, Metro Section, pt. 2, at 6.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* The U.S. Justice Department, on March 5, 2003, faced with unanimous opposition from the California congressional delegation, agreed that it would pay for the settlement of the Westlands drainage suit with a Justice Department claims court fund and not take the money out of the U.S. Bureau of Reclamation budget for other California water projects. 10 Cal. Capitol Hill Bull. 6, Mar. 13, 2003.

<sup>166</sup> Another plaintiff was Felix Smith, the retired U.S. Fish and Wildlife Service biologist who had discovered the first deformed bird at Kesterson and who had “blown the whistle” to the news media when former Interior Secretary James Watt tried to keep the wildlife refuge poisoning secret.

<sup>167</sup> Mike Taugher, *Activists Sue To Shut Down Delta Pumps*, CONTRA COSTA TIMES, Dec. 1, 2008, available at [www.klamathbucketbrigade.org/ContraCostaTimes\\_ActivistssuetoshutdownDeltapumps120308.htm](http://www.klamathbucketbrigade.org/ContraCostaTimes_ActivistssuetoshutdownDeltapumps120308.htm).

<sup>168</sup> Colin Sullivan, *Dueling Calif. Lawsuits Roil Supply Battles*, GREENWIRE, Vol. 10, No. 9.

<sup>169</sup> Mike Taugher, *Delta Fish Hit Record Lows in 2008*, OAKLAND TRIB., Jan. 5, 2009, available [http://findarticles.com/p/articles/mi\\_qn4176/is\\_20090105/ai\\_n31175154/](http://findarticles.com/p/articles/mi_qn4176/is_20090105/ai_n31175154/).

<sup>170</sup> *Id.*

Delta's state and federal pumping plants were 2003, 2004, 2005, and 2006.<sup>171</sup>

## V. WESTLANDS TODAY AND THE SUBSIDIES THAT KEEP IT GOING

In September of 2009, as this is written, Westlands growers are awaiting introduction of the bill by Sen. Feinstein that will hopefully provide them a secure—if diminished—supply of northern California water and relieve Reclamation of responsibility for the half-century-old drainage problem.<sup>172</sup>

While Westlands growers contend that cutbacks in water supplies have devastated the western San Joaquin Valley economy,<sup>173</sup> it should be remembered that many West Side communities were desperately poor decades before the current cutbacks in water to Westlands, back in the days when cheap water flowed freely and Westlands got its full (or nearly full) annual allotment of 1.15 million acre-feet of Delta water—enough water to meet the needs of 11 million urban users.<sup>174</sup>

In July of 2008, California newspapers reported on a study, funded by OxFam America and the Rockefeller Foundation, that said the 20th U.S. Congressional District, represented by Congressman Jim Costa (D-California), encompassing Westlands and the southwestern side of the San Joaquin Valley, was the poorest congressional district in America.<sup>175</sup> The study, *The Measure of America*, noted that only 6.5% of the district's adults were college graduates, compared to 62.6% in the top-ranked district, the wealthy Upper East Side of Manhattan in New York City.<sup>176</sup> Average annual income in Costa's district was roughly \$17,000 compared to \$51,000 in the New York City District.<sup>177</sup> Most disturbing, residents of Manhattan's Upper East Side lived, on average, four and a

<sup>171</sup> Mike Taugher, *Water Crisis Has Parallels with Financial Meltdown*, CONTRA COSTA TIMES, Jan. 11, 2009.

<sup>172</sup> Environmentalists say Sen. Feinstein has informed stakeholders in the drainage dispute that any congressional bill must receive the approval of Rep. Miller, the long-time Westlands critic. Interview with Tom Stokely (Jan. 10, 2008).

<sup>173</sup> Dennis Pollock, *Lawmakers Hear Valley's Plea on Water*, FRESNO BEE, July 9, 2008, at C1.

<sup>174</sup> See, e.g., SUSAN PECK, CALIFORNIA FARMWORKER HOUSING (Cal. Inst. for Rural Studies Feb. 1989), available at [www.cirsinc.org/Documents/Pub0289.6.PDF](http://www.cirsinc.org/Documents/Pub0289.6.PDF).

<sup>175</sup> See Michael Doyle, *Results Are In: California's San Joaquin Valley Is the Worst*, MCCLATCHY NEWSPAPERS, July 16, 2008 (citing SARAH BURD-SHARPS, KRISTEN LEWIS & EDUARDO BORGES MARTINS, THE MEASURE OF AMERICA: AMERICAN HUMAN DEVELOPMENT REPORT 2008-2009 (2008)).

<sup>176</sup> *Id.*

<sup>177</sup> See BURD-SHARPS ET AL., *supra* note 7.

half years longer than the residents of Costa's district.<sup>178</sup> In Fresno County, the poverty rate runs at 20%.<sup>179</sup> It is 17.2% in Kings County and 18.1% in Kern County.<sup>180</sup>

In Huron, which had an estimated population of 7174 in 2007,<sup>181</sup> and which is the Westlands district's biggest town and 98% Hispanic,<sup>182</sup> 34.6% of the town's residents live below the poverty line, compared to 12.4% statewide.<sup>183</sup> Fourteen percent of the town's residents had income levels 50% below the poverty level.<sup>184</sup> Eighty-five percent of Huron residents below the poverty level were renters.<sup>185</sup>

Eighty-two percent of the children at Huron's continuation high school qualified for the free lunch program.<sup>186</sup> Of these students, *none* qualified for gifted and talented programs.<sup>187</sup> A quarter of the children were in migrant education programs and 71% were designated as English learners,<sup>188</sup> meaning English was their second language. Eighty-eight percent of the students' parents did not graduate from high school.<sup>189</sup> There is no high school inside the boundaries of the 1000-square-mile Westlands.<sup>190</sup>

Despite Westlands' recent claims of economic devastation due to water supply reductions, poverty in the Westlands, excepting growers, has always been a constant in wet years or drought years. Crushing poverty and its negative impact on rural San Joaquin Valley areas was reported as far back as the 1940s by sociologist Walter Goldschmidt,

<sup>178</sup> BURD-SHARPS ET AL., *supra* note 7.

<sup>179</sup> U.S. Dep't of Agric. Econ. Research Serv., Data Sets, [www.ers.usda.gov/Data/PovertyRates/PovListpct.asp?st=CA&view=Percent&longname=California](http://www.ers.usda.gov/Data/PovertyRates/PovListpct.asp?st=CA&view=Percent&longname=California) (last visited Apr. 16, 2009).

<sup>180</sup> *Id.*

<sup>181</sup> City-Data.com, Huron, California, [www.city-data.com/city/Huron-California.html](http://www.city-data.com/city/Huron-California.html) (last visited Apr. 16, 2009).

<sup>182</sup> *See id.*

<sup>183</sup> City-Data.com, Huron, California (CA) Poverty Rate Data - Information About Poor and Low Income Residents, [www.city-data.com/poverty/poverty-Huron-California.html](http://www.city-data.com/poverty/poverty-Huron-California.html) (last visited Apr. 16, 2009).

<sup>184</sup> *See id.*

<sup>185</sup> *See id.*

<sup>186</sup> City-Data.com, Chestnut High (Continuation) School in Huron, CA, [www.city-data.com/school/chesnut-high--continuation--ca.html](http://www.city-data.com/school/chesnut-high--continuation--ca.html) (last visited Apr. 16, 2009).

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See* Frank Gornick, School and Community Needs Must Be Considered in Westlands' Land Retirement Discussions, [www.westhillcollege.com/district/about/documents/WestlandsWaterDistrict.pdf](http://www.westhillcollege.com/district/about/documents/WestlandsWaterDistrict.pdf) (noting Mendota and Firebaugh have new high schools); *cf.* Westlands Water Dist., Map, [www.westlandswater.org/wwd/aboutwwd/districtmap.asp?title=District%20Map](http://www.westlandswater.org/wwd/aboutwwd/districtmap.asp?title=District%20Map) (last visited Sept. 13, 2009) (showing that Mendota and Firebaugh high schools fall outside the Westlands area).

who compared a small town surrounded by small farms on the East Side of the Valley with a community in the south Valley dominated by large factory farms.<sup>191</sup> “Industrial agriculture brings an urbanized society,” he wrote, “and industrialization is taking over the rural scene. But the kind of urban society that exists in the future depends upon the agricultural policy that develops in the next few years.”<sup>192</sup> Goldschmidt would not like how things turned out.

In the late 1970s, University of California at Davis economist Dean MacCannell analyzed five census tracts in the Westlands area and learned the median education was roughly at the seventh-grade level for the entire study area population and only at a fourth-grade level for those with Spanish surnames.<sup>193</sup> The study noted that “[s]ocial conditions for all people in the Westlands are inferior to the other rural areas of the [V]alley; conditions for the Mexican American population of the district are still worse.”<sup>194</sup> Little has changed in over thirty years.

In 2005, Fresno County Supervisor Phil Larsen, who represents the Westlands area, described inadequate housing in Mendota, a town in Westlands: “A lot of people are living in garages here.”<sup>195</sup> Larson was commenting on Westlands’ donation of sixty-five acres (of salted-up land that the district had fallowed) for a low-income housing project.<sup>196</sup> Some live in their cars or trucks or camp in secluded spots with no sanitation or piped water.<sup>197</sup> And, surprisingly, there is hunger among the poorest in this land of plenty, the nation’s fruit basket. In a 2007 report by the UCLA Center for Health Policy Research, researchers estimated 120,500 low-income adults in the San Joaquin Valley had skipped meals

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<sup>191</sup> GOLDSCHMIDT, *supra* note 21.

<sup>192</sup> *Id.* at 272.

<sup>193</sup> See DEAN MACCANNELL, REPORT ON CURRENT SOCIAL CONDITIONS IN THE COMMUNITIES IN AND NEAR THE WESTLANDS WATER DISTRICT 21 (Davis: Univ. of Cal. 1980). “In areas such as the Westlands . . . , where giant corporate operations are the norm, we find poverty, inequality, ignorance, and a full range of related social pathologies. There is no better illustration than what can be provided by documentation of current social conditions in the Westlands water district.” *Id.* at 3.

<sup>194</sup> DEAN MACCANNELL, DRAFT REPORT ON CURRENT SOCIAL CONDITIONS IN THE COMMUNITIES IN AND NEAR THE WESTLANDS WATER DISTRICT 10 (1980).

<sup>195</sup> See Snigdha Sen, *Westlands Gives Land for Housing in Mendota*, FRESNO BEE, Aug. 27, 2005, at C1.

<sup>196</sup> *See id.*

<sup>197</sup> See COUNCIL OF FRESNO COUNTY GOV'TS, REGIONAL HOUSING NEEDS ALLOCATION PLAN (2001), available at [www2.co.fresno.ca.us/4510/4360/General\\_Plan/GP\\_REVISIED\\_Final\\_Housing\\_Element/pdf/AppenL.pdf](http://www2.co.fresno.ca.us/4510/4360/General_Plan/GP_REVISIED_Final_Housing_Element/pdf/AppenL.pdf) (“The housing shortage was so severe that many workers were found packed 10 or 12 into trailers and sleeping in garages, tool sheds, caves, fields and parking lots.”).

and occasionally had gone to bed hungry in the previous year.<sup>198</sup> The study found that in 2005, 38.6% of low-income Kings County adults reported “food insecurity,” defined as having to choose between food and other necessities, such as rent or prescription medicine.<sup>199</sup> Tulare County had some 18,200 low-income adults (14%)—the highest prevalence in California—with “very low food security,” defined as families reducing their food intake and going to bed hungry.<sup>200</sup>

Unsafe drinking water in farmworker encampments remains a serious health threat,<sup>201</sup> and air quality in the San Joaquin Valley is considered among the worst in the nation.<sup>202</sup> Its childhood asthma rate is California’s highest.<sup>203</sup> According to the nonprofit group Valley Clean Air Now, “[o]n average the Valley exceeds the federal health-based standards for ground-level ozone 35-40 days [per year] and more than 100 days over the state ozone standard.”<sup>204</sup> The Valley exceeds the state standard for particulate matter on an average of 90-100 days per year.<sup>205</sup>

Sociologists and other researchers have long been aware of the problems associated with a huge migrant farmworker population,<sup>206</sup> which swells by tens of thousands of people during the harvest season.<sup>207</sup> A 2003 study of welfare reform in California farm country, in the wake of national welfare reform by Congress in 1998, pointed out the following:

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<sup>198</sup> Farin Martinez, *Valley Residents Suffer Hunger; Region Is the Hardest-Hit in State*, *Researcher Says*, FRESNO BEE, June 16, 2007, at B1.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Cmty. Water Ctr., *The Problem*, [www.communitywatercenter.org/water-valley.php?content=The+Problem](http://www.communitywatercenter.org/water-valley.php?content=The+Problem) (last visited Apr. 13, 2009) (“Drinking water quality in the San Joaquin Valley is the worst in California, [and] low-income immigrant Latino farm-workers . . . suffer[] from the effects of widespread . . . water contamination and dilapidated water infrastructure.”).

<sup>202</sup> CITY OF FRESNO, *CAN WE IMPROVE AIR QUALITY?* (2008), *available at* [www.fresno.gov/NR/rdonlyres/DB41F259-98AF-4D40-9E15-064BCAE2E189/9834/10June2008ESAirQualityIssues.pdf](http://www.fresno.gov/NR/rdonlyres/DB41F259-98AF-4D40-9E15-064BCAE2E189/9834/10June2008ESAirQualityIssues.pdf).

<sup>203</sup> *Id.* (“[C]hildren living here are 66% more likely than average to develop asthma.”).

<sup>204</sup> Valley CAN, *San Joaquin Valley Fact Sheet*, [www.valley-can.org/fact\\_sheets\\_info/sjv\\_fact\\_sheet.php](http://www.valley-can.org/fact_sheets_info/sjv_fact_sheet.php) (last visited Apr. 13, 2009).

<sup>205</sup> *Id.*

<sup>206</sup> *See, e.g.*, William A.V. Clark, *Immigration, High Fertility Fuel State’s Population Growth*, 54 CAL. AGRIC. No. 1, *available at* <http://calag.ucop.edu/0001JF/pdf/immigr.pdf>. “One-third of the state’s farmworkers lack adequate shelter.” *Id.* at 18.

<sup>207</sup> Philip L. Martin & J. Edward Taylor, *For California Farmworkers, Future Holds Little Prospect for Change*, 54 CAL. AGRIC. No. 1, Jan. 2000, at 20, *available at* <http://calag.ucop.edu/0001JF/pdf/calfarm.pdf>. Approximately 800,000 to 900,000 people per year earn a living as farm laborers in California, and “[t]he vast majority are Hispanic immigrants.” *Id.* at 19.



The San Joaquin Valley includes a farm work force that is more than 95% immigrant, has unemployment rates which ranged from 12-20% in the 1990s, and includes counties with some of the highest welfare-use rates in the United States—15% to 20% of residents of major agricultural counties were receiving cash welfare benefits in the mid-1990s.<sup>208</sup>

That study further noted:

Agriculture has been a port of entry for immigrants with little education for over a century, and over 80% of the seasonal farm workers in California are immigrants from rural Mexico with less than six years [of] schooling. While most of these immigrants do not receive cash welfare assistance, in part because they often are not eligible, their children born in the United States are U.S. citizens, and therefore usually eligible for welfare benefits.

Second-generation children of seasonal workers who are educated [in] the United States tend to leave farming counties for urban counties, where wages and prospects for upward mobility are better. In contrast, second-generation children who lack the education and motivation to succeed in urban counties frequently remain in agricultural areas. However, they are often unwilling to follow their parents into the fields, yet are unable to find jobs that provide earnings and benefits which exceed welfare benefits—explaining why employment rates can be similar between agricultural and [urban] counties while welfare rates are significantly different.<sup>209</sup>

The unemployment and the limited formal education among some second-generational children of seasonal workers may also be linked to evidence of increased gang and drug activity in such rural communities. A 2007-2008 Fresno County Grand Jury reported found that:

- Gang activity is rampant in Fresno County.
- Gang membership increased 33% from 2001 to 2006.
- Gang membership in Fresno County is five . . . times the national average per capita.
- During 2005, more than 3,500 gang members were booked into the Fresno County Jail.
- Incarceration costs \$50 to \$70 per day per inmate . . . .
- On a given day in October 2006, out of a census of 3,510

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<sup>208</sup> J. Edward Taylor, Philip L. Martin & Richard Green, *Welfare Reform in Agricultural California*, 28 J. AGRIC. & RES. ECON. 169, 169 (2003).

<sup>209</sup> *Id.* at 172.

inmates, 1,485 were identified as gang members in the Fresno County Jail. The cost for the gang members was in excess of \$74,250.<sup>210</sup>

In a speech to Congress on December 13, 2005, the 20th District's Congressman, Jim Costa, urged support of the Methamphetamine Remediation Act (H.R. 798) to combat the scourge of methamphetamine abuse nationwide.<sup>211</sup>

While meth abuse is currently sweeping the country, causing great alarm for law enforcement and health officials, we in California's San Joaquin Valley have been fighting rampant meth abuse, production and clean up for over 20 years.

Meth is California's largest drug threat, and the Valley suffers one of the highest rates of abuse, both in production and use.<sup>212</sup>

Children having children is also a problem among the offspring of farmworkers.<sup>213</sup> "Latinos still have the highest incidence of teen pregnancy in California, but look at the hot spots: San Joaquin Valley, Imperial Valley, patches around Salinas," says Hugo Morales, a Harvard University graduate who operates Radio Bilingue, which serves Fresno's farmworker community.<sup>214</sup> "That's where the poverty is. This is the common factor, and education is the key to getting out of poverty."<sup>215</sup>

However, education is difficult. The Fresno Unified School District graduates only 58% of eligible students from high school and only 41% of Latino children.<sup>216</sup> Mendota High School, on the Westlands border, did not even open until 1993.<sup>217</sup> There are no high schools inside the Westlands boundaries.<sup>218</sup> Some 98.7% of the Mendota High School

<sup>210</sup> County of Fresno, Board Briefing Report, Apr. 4, 2008, at attachment B, *available at* [www.co.fresno.ca.us/ViewDocument.aspx?id=18237](http://www.co.fresno.ca.us/ViewDocument.aspx?id=18237) (responding to the 2006-07 Fresno County Grand Jury Final Report No. 1).

<sup>211</sup> 151 CONG. REC. H11465 (daily ed. Dec. 13, 2005) (statement of Rep. Costa), *available at* [www.govtrack.us/congress/record.xpd?id=109-h20051213-40](http://www.govtrack.us/congress/record.xpd?id=109-h20051213-40).

<sup>212</sup> *Id.*

<sup>213</sup> See Johnson, *supra* note 9, at 11 (noting, however, that the Valley's teen pregnancy rate for whites is also the state's highest).

<sup>214</sup> Marilyn Berlin Snell, *Tale of Two Immigrants*, SIERRA, Nov. 2004, *available at* [www.sierraclub.org/sierra/200411/immigrants3.asp](http://www.sierraclub.org/sierra/200411/immigrants3.asp) (quoting Hugo Morales).

<sup>215</sup> *Id.*

<sup>216</sup> JAY P. GREENE, BLACK ALLIANCE FOR EDUC. OPTIONS, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES 14 (2002), *available at* [www.manhattan-institute.org/pdf/cr\\_baeo.pdf](http://www.manhattan-institute.org/pdf/cr_baeo.pdf).

<sup>217</sup> See Mendota High Sch., Our School, [www.mendotausd.k12.ca.us/schools/mendotahs/index.cfm?fuseaction=menu&menu\\_id=501](http://www.mendotausd.k12.ca.us/schools/mendotahs/index.cfm?fuseaction=menu&menu_id=501) (last visited Apr. 13, 2009).

<sup>218</sup> See *supra* note 190.

## 38 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 3

students are Latino.<sup>219</sup> Only .5% of the students are white,<sup>220</sup> suggesting that the children of the growers, who are overwhelmingly white, live far from their fathers' fields.

As noted earlier, there are also reports of high teenage pregnancy rates in some rural central valley communities with higher percentages of immigrant farmworkers.<sup>221</sup> "Kern County has the highest pregnancy rate among teens under age 15 in the entire state of California," according to Vandana Kohli, a professor in California State University at Bakersfield's Department of Anthropology and Sociology.<sup>222</sup> The other rural counties of the San Joaquin Valley are not far behind. The Valley's overall teen birth rates are the highest in the state and over twice that of the San Francisco Bay Area.<sup>223</sup> Two of every three babies born to teens in California are born to Latinas.<sup>224</sup>

In contrast to the squalid conditions of the farmworker towns and the bleak prospects for the offspring of immigrant farmworkers, the Environmental Working Group (EWG) estimates that annual subsidies to the Westlands' claimed 700 farms,<sup>225</sup> in the form of crop subsidies (\$6

<sup>219</sup> MENDOTA HIGH SCH., SCHOOL ACCOUNTABILITY REPORT CARD 2 (2006), available at [www.mendotausd.k12.ca.us/files/mnu\\_menu\\_20.doc](http://www.mendotausd.k12.ca.us/files/mnu_menu_20.doc).

<sup>220</sup> *Id.*

<sup>221</sup> See Johnson, *supra* note 9.

<sup>222</sup> News Release, Cal. State Univ. Bakersfield, Grant to Combat Teen Pregnancy in Kern County (Nov. 1, 2000), available at [www.csub.edu/csubnews/2000/fall/114-teenpregnancy.html](http://www.csub.edu/csubnews/2000/fall/114-teenpregnancy.html).

<sup>223</sup> Cal. Dep't Educ., Teen Pregnancy and Parenting in California, [www.cde.ca.gov/ls/cg/pp/teenpregnancy.asp](http://www.cde.ca.gov/ls/cg/pp/teenpregnancy.asp) (last visited Apr. 15, 2009) (citing a rate of 69 births per 1000 females ages 15-19).

<sup>224</sup> *Id.*

<sup>225</sup> The actual number of "farms" or "farmers" in Westlands is in much dispute, and Westlands has never provided a publicly available list of all of its "farmers," "farms," or "water users;" neither has it confirmed whether the "farmers" are people actually involved in farming or merely have their names listed on land deeds or as part of family trusts. In a 2007 letter to the Delta Vision Blue Ribbon Task Force, Westlands representative Thomas Birmingham referred to "approximately 600 farms" in Westlands. Letter from Thomas Birmingham, General Manager/General Counsel, Westlands Water Dist., to Phil Isenberg, Chair, Delta Vision Blue Ribbon Task Force (Sept. 14, 2007), available at [http://deltavision.ca.gov/docs/Draft\\_Vision\\_Comments/Comments\\_from\\_Westlands\\_Water\\_District\\_9-14-07.pdf](http://deltavision.ca.gov/docs/Draft_Vision_Comments/Comments_from_Westlands_Water_District_9-14-07.pdf). The Westlands website also refers to "600 family-owned farms that average 900 acres in size." Westland Water Dist., Who We Are, [www.westlandswater.org/wwd/aboutwwd/aboutwwd.asp?title=Who%20We%20Are&cw=800](http://www.westlandswater.org/wwd/aboutwwd/aboutwwd.asp?title=Who%20We%20Are&cw=800) (last visited Apr. 3, 2009). However, recently the press has referred to 700 "farms." Kelly Zito, *Group Wants Chemical-Filled Farmland Retired*, S.F. CHRON., Dec. 2, 2008, available at [www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/02/BAOH14FHR2.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/02/BAOH14FHR2.DTL). Unexplained is how the district apparently went from 600 to 700 growers or farms in less than a year. The large farms, in excess of 10,000 or even 20,000 acres, frequently operate under several different corporate names, making it difficult to track ownership. Oddly enough, neither Congress nor the California Legislature (nor the mainstream news media) has asked for a list of the actual number of water users now in the district, how much acreage they are farming, and whether there are

million), water subsidies (\$24 million) and power subsidies (\$71 million), total over \$100 million a year.<sup>226</sup>

One little-noticed subsidy is cheap electricity to pump all that water uphill from the Delta to the Westlands. EWG estimates the electricity subsidy for the CVP is \$100 million a year, with Westlands getting \$71 million of that annual power subsidy in 2002—an average of \$165,000 per farm.<sup>227</sup> EWG determined that “[i]n 2002 and 2003 CVP agribusinesses paid only about 1 cent per kilowatt-hour[, which was] 10 to 15 times lower than [Pacific Gas & Electric Co.’s] industrial, agricultural, and residential power rates during this time period.”<sup>228</sup>

In addition to traditional crop subsidies for cotton, wheat, and rice, there are many other forms of subsidies for growers in the Valley, including tax breaks for farmland under California’s Williamson Land Act<sup>229</sup> (which reduces local property taxes on farmland by 20-75%); technical aid from local, state and federal farm advisors; low-interest or interest-free loans and outright grants from state water-bond programs or state agencies; and many state and federal tax breaks for various farming activities.<sup>230</sup>

Most Westlands growers live far from the bleak and industrialized farmlands of the district; many reside in an exclusive enclave of mansions in north Fresno, in the zip code 93711, which receives more federal farm subsidy money than any other zip code in America.<sup>231</sup> And even the City of Fresno (with an urban area population nearing half a million), which has long prided itself as the capital of the nation’s most productive farm county (with a gross annual farm income of more than

interlocking ownerships operating under different names.

<sup>226</sup> See Env’tl. Working Group, [www.ewg.org/featured/8](http://www.ewg.org/featured/8) (offering numerous studies on farm subsidies in general and Westlands subsidies in particular).

<sup>227</sup> RENEE SHARP & BILL WALKER, ENVTL. WORKING GROUP, POWER DRAIN: BIG AG’S \$100 MILLION ENERGY SUBSIDY (2007), available at [www.ewg.org/reports/powersubsidies](http://www.ewg.org/reports/powersubsidies).

<sup>228</sup> *Id.*; see also NATURAL RES. DEF. COUNCIL & PAC. INST., ENERGY DOWN THE DRAIN 37-45 (2004), available at [www.nrdc.org/water/conservation/edrain/edrain.pdf](http://www.nrdc.org/water/conservation/edrain/edrain.pdf) (analyzing the substantial energy requirements for water delivery to Westlands’ croplands). Massive amounts of Delta water must be lifted hundreds of feet to reach Westlands. *Id.* at 39.

<sup>229</sup> For more information on the Williamson Land Act, see Cal. Dep’t of Conservation, Williamson Act Program, [www.conservation.ca.gov/dlrp/lca](http://www.conservation.ca.gov/dlrp/lca) (last visited Apr. 16, 2009).

<sup>230</sup> According to the Internal Revenue Service, even the cost of fertilizer is deductible. Internal Revenue Serv., Farm Business Expenses, [www.irs.gov/publications/p225/ch04.html#en\\_US\\_publink100077363](http://www.irs.gov/publications/p225/ch04.html#en_US_publink100077363) (last visited Apr. 16, 2009). Former Fresno County Administrator Bruce Spaulding told this writer in the mid 1980s that he got more tax revenue from a busy 7-11 convenience food store in Fresno than he did from one of the mega-farms in Westlands.

<sup>231</sup> See Mark Arax, *Water War Divides San Joaquin Valley Farmers*, L.A. TIMES, Sept. 5, 2000, at A3.

\$5.3 billion),<sup>232</sup> was determined to be the poorest of America's fifty largest cities, finishing even behind post-Hurricane Katrina New Orleans, in a 2005 study by the Brookings Institution.<sup>233</sup> The study found that 43.5% of Fresno's poor people live in "extreme poverty neighborhoods" compared, for example, to 22.4% of the poverty-stricken in Los Angeles.<sup>234</sup>

## VI. CONCLUSION

The subsidized factory farm economy, it seems, doesn't have much of a trickle down effect for the families and communities of workers who bring in the harvest.<sup>235</sup> In fact, it appears as though this system has helped to foster a culture of unsustainable farming practices, caused large scale environmental degradation, and has created a massive socioeconomic rift between land owners and their primarily Latino workforce. Despite efforts by numerous environmental groups and myriad other community organizers, this publicly supported system of subsidized factory farming in the region has already caused considerable damage to both the local community and the natural environment.

Now, even with new legislation that will determine the future viability of Westlands' critical irrigation import infrastructure, it seems inevitable that the political clout of the nation's most powerful irrigation district will somehow prevail to perpetuate this culture of social, economic, and natural inequity.

Indeed, one cannot help but see two different agricultural worlds among the Eastern and Western flanks of the San Joaquin Valley. The East Side, where the original irrigation colonies began 130 years ago, is full of orchards and vineyards and farmhouses every quarter of a mile

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<sup>232</sup> Fresno County Farm Bureau, Fresno County Agric., [www.fcfb.org/Fresno-Ag/Fresno-Ag.php](http://www.fcfb.org/Fresno-Ag/Fresno-Ag.php) (last visited Aug. 24, 2009).

<sup>233</sup> See Ann M. Simmons, *Fresno's Concentration of Poor Tops in U.S., Study Says*, L.A. TIMES, Oct. 13, 2005, at B4 (citing ALAN BERUBE, *KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* (2005)).

<sup>234</sup> Simmons, *supra* note 233.

<sup>235</sup> The Government Accountability Office found that "of the 1.8 million individuals receiving farm payments from 2003 through 2006, 2,702 had an average adjusted gross income . . . that exceeded \$2.5 million and derived less than 75 percent of their income from farming, ranching, or forestry operations, thereby making them potentially ineligible for farm payments." See *generally* GOV'T ACCOUNTABILITY OFFICE, HIGHLIGHTS OF GAO-09-67, FEDERAL FARM PROGRAMS, USDA NEEDS TO STRENGTHEN CONTROLS TO PREVENT PAYMENTS TO INDIVIDUALS WHO EXCEED INCOME ELIGIBILITY LIMITS (2008), at "Highlights" page. Despite the ineligibility, the U.S. Department of Agriculture had paid them over \$49 million. *Id.* It seems unlikely that federal farming aid for the wealthy, whether they are actually "farmers" or not, will end anytime soon.

and small towns every few miles. In the Westlands, with a single giant farm sometimes reaching tens of thousands of acres, one can drive for many miles down Interstate 5 through cotton and row-crop fields without ever seeing a farmhouse or the all-but-invisible farm-worker communities. It is a stark contrast indeed. The original drafters of the 1902 Reclamation Act, who wanted to populate the American West with small family farms, would not recognize it and would certainly not approve.

