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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FIREBAUGH CANAL WATER DISTRICT, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendants.

1:88-cv-00634 OWW DLB

Partially Consolidated With:
1:91-cv-00048 OWW DLB

MEMORANDUM DECISION RE
PLAINTIFFS' MOTION TO
SUPPLEMENT THE ADMINISTRATIVE
RECORD (DOC. 765)

SUMNER PECK RANCH, *et al.*,

Plaintiffs,

v.

UNITED STATES BUREAU OF
RECLAMATION, *et al.*,

Defendants.

I. INTRODUCTION.

Before the court for decision is Central California Irrigation District and Firebaugh Canal Water District's ("Plaintiffs") motion to supplement the Administrative Record ("AR") with twenty-two (22) additional documents. Doc. 765. Of

1 those, Federal Defendants have agreed to add four (listed below)
2 to the AR, but object to the remaining eighteen (18). Doc. 793.
3 Defendants Westlands Water District, Panoche Water District, and
4 Panoche Drainage District ("District Defendants") object to
5 supplementation of the record with any of the documents. Doc.
6 795. District Defendants also request that "the scope of the
7 issues remaining before the Court and the scope of the AR should
8 be clarified prior to the upcoming motions for summary
9 judgment...." *Id.* Environmental Intervenors take no position on
10 the motion. Doc. 796. Plaintiffs filed a reply. Doc. 802.

11
12 The sole remaining claim against Federal Defendants in this
13 case concerns the Bureau of Reclamation's ("Reclamation" or the
14 "Bureau") alleged failure to provide drainage service to the San
15 Luis Unit pursuant to Section 1(a) of the San Luis Act. See
16 1:91-cv-0048 OWW DLB, Nov. 19, 2004 Mem. Dec. ("11/19/04
17 Decision") at 25, 28-29, 36, 42. This claim arises under Section
18 706(1) of the Administrative Procedure Act ("APA"), 5 USC §
19 706(1), which permits a reviewing court to "compel agency action
20 unlawfully withheld or unreasonably delayed."
21
22

23 II. APPLICABLE LEGAL STANDARD

24 The APA generally limits the scope of judicial review to the
25 administrative record. 5 U.S.C. § 706 (directing the court to
26 "review the whole record or those parts of it cited by a
27 party."). "When a plaintiff challenges a final agency action,
28

1 judicial review normally is limited to the administrative record
2 in existence at the time of the agency's decision." *Friends of*
3 *The Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).
4 Under such circumstances, the agency is only required to "justify
5 its final action by reference to the reasons it considered at the
6 time it acted." *Id.*

8 However, where a plaintiff invokes 5 U.S.C. § 706(1) to
9 compel an agency to take an action mandated by law, "review is
10 not limited to the record as it existed at any single point in
11 time, because there is no final agency action to demarcate the
12 limits of the record." *Id.* (emphasis added); see also
13 *Independence Min. Co., Inc. v Babbitt*, 105 F.3d 502, 511-12
14 (where "court is examining an agency's actions prior to final
15 agency decision for purpose of measuring agency delay,... there
16 is no date certain by which to evaluate an agency's
17 justifications for its actions."). The reason for this
18 distinction is that, "when a court is asked to review agency
19 inaction before the agency has made a final decision, there is
20 often no official statement of the agency's justification for its
21 actions or inactions." *San Francisco Baykeeper v. Whitman*, 297
22 F.3d 877, 886 (9th Cir. 2002). *Friends of the Clearwater* defines
23 an exception to the record review rule for cases challenging
24 agency delay.¹

27
28 ¹ Plaintiffs invoke a list of eight exceptions to the record review
rule, which appear to come from *Esch v. Yeutter*, 876 F.2d 976, 992 (D.C. Cir.

1 The caselaw provides limited guidance on the application of
2 this exception. *Friends of the Clearwater*, a case challenging
3 the Forest Service's failure to prepare a supplemental
4 environmental impact statement ("SEIS") under NEPA, supplemented
5 the record with studies prepared by the Forest Service after the
6 agency sent plaintiffs a letter refusing to prepare a SEIS. 222
7 F.3d at 560-61. Likewise, in *San Francisco Baykeeper*, the Ninth
8 Circuit permitted consideration of an extra-record program review
9 document describing past and ongoing agency action. 297 F.3d at
10 886. The district court in *Consejo de Desarrollo Economico de*
11 *Mexicali, AC v. United States*, 438 F. Supp. 2d 1207, 1221 (D.

12
13
14 1989):

- 15 (1) when agency action is not adequately explained in the record before
16 the court;
17 (2) when the agency failed to consider factors which are relevant to its
18 final decision;
19 (3) when an agency considered evidence which it failed to include in the
20 record;
21 (4) when a case is so complex that a court needs more evidence to enable
22 it to understand the issues clearly;
23 (5) in cases where evidence arising after the agency action shows
24 whether the decision was correct or not;
25 (6) in cases where agencies are sued for a failure to take action;
26 (7) in cases arising under the National Environmental Policy Act; and
27 (8) in cases where relief is at issue, especially at the preliminary
28 injunction stage.

(emphasis added). The sixth *Esch* exception parallels the exception articulated in *Friends of the Clearwater*.

Federal Defendants and District Defendants entirely ignore the *Friends of the Clearwater* line of cases, and instead insist on applying the familiar four exceptions permitting supplementation in 706(2) cases when: (1) necessary to determine if the agency considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) necessary to explain technical terms or complex subjects; or (4) there has been a showing of bad faith. *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (citing *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir 2005)). A court is not limited to those four exceptions in a 706(1) case.

1 Nev. 2006), *rev'd on other grounds*, 482 F.3d 1157 (9th Cir.
2 2007), a 706(1) action to compel agency action unlawfully
3 withheld, applied the *Friends of the Clearwater* exception more
4 broadly, refusing to limit its review to the administrative
5 record and those documents that met one of the Lands Council
6 exceptions, instead considering "materials submitted by
7 Plaintiffs as they relate to the present matter."
8

10 III. ANALYSIS

11 A. The Lodged Administrative Record.

12 Federal Defendants lodged a certified AR consisting of more
13 than 38,700 pages on March 21, 2010. The documents concern three
14 drainage-related decisions: (1) the 2007 Record of Decision,
15 with a feasibility report to Congress, on the San Luis Drainage
16 Feature Re-Evaluation ("2007 SLDFR ROD"); (2) the development,
17 issuance, and implementation of Use Agreements for the San Luis
18 Drain through the Grasslands Bypass Project, including a related
19 2009 Record of Decision ("2009 GBP ROD"); and (3) Reclamation's
20 approval of funding agreements for local drainage projects,
21 including projects consistent with the Westside Regional Drainage
22 Plan. In general, the AR documents largely date to the early
23 1990s and later, after reclamation began to consider "in-valley"
24 drainage treatment and disposal options following the closure of
25 Kesterson Reservoir. A few earlier reference documents are also
26 included.
27
28

1 B. Scope of the Remaining Claims in this Case.

2 Whether it is appropriate to supplement the record with the
3 offered documents turns, in part, on the purpose(s) for which the
4 documents are offered. It is undisputed that only an APA Section
5 706(1) claim remains in this case. To prevail on a 706(1) claim,
6 Plaintiffs must demonstrate that: (1) an agency had a
7 nondiscretionary duty to act; and (2) the agency either
8 unreasonably delayed or unlawfully withheld an action on that
9 duty. *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181,
10 1187 (E.D. Cal. 2010) (citing *Norton v. S. Utah Wilderness*
11 *Alliance* ("SUWA"), 542 U.S. 55, 63-64 (2004)).

12
13 The nature of the drainage duty owed by Federal Defendants
14 has been circumscribed by the Ninth Circuit's ruling in *Firebaugh*
15 *Canal Co. v. U.S.*, 203 F.3d 568, 574, 576 (9th Cir. 2000), which
16 acknowledged that "the San Luis Act clearly expresses the intent
17 of Congress to provide for the interceptor drain prior to the
18 construction of the San Luis Unit," approved of the "district
19 court's finding that the San Luis Act mandated the Secretary to
20 provide the interceptor drain," and further found that the
21 "district court properly held that [subsequent] appropriations
22 riders, without more, failed to repeal the Secretary's duty to
23 provide drainage under the San Luis Act." However, these
24 findings "d[id] not end the inquiry":

25
26
27 The Government contends that Congress, through actions
28 taken after the San Luis Act, has encouraged the
Department of Interior to investigate and pursue

1 drainage solutions other than the interceptor drain
2 contemplated by the San Luis Act. Since the late 1970s,
3 Congress has appropriated funds so that the Bureau of
4 Reclamation could, in cooperation with the State, local
5 water districts, and other entities, examine solutions
6 to drainage other than the construction of the master
7 drain.FN6 We reject the Government's contention that
8 this action has eliminated the Bureau's duty to provide
9 drainage; however, we do find that the subsequent
10 Congressional action supplements the drainage solutions
11 available to the Department of the Interior. See *City*
12 of *Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C.Cir.
13 1977); *Skoko v. Andrus*, 638 F.2d 1154, 1158 (9th Cir.
14 1979); *District of Columbia v. Potomac Elec. Power Co.*,
15 402 A.2d 430, 435-36 (D.C. 1979). If, as the district
16 court concluded, the interceptor drain was the only
17 method through which the Department could meet its
18 drainage obligations under the San Luis Act, then the
19 alternative drainage solutions that Congress has
20 supported for years would be superfluous. Thus,
21 although the San Luis Act limits the drainage solution
22 to an interceptor drain to the Contra Costa Delta, the
23 subsequent Congressional action indicates that the
24 Department of the Interior can meet its drainage
25 obligations through means other than the interceptor
26 drain. Therefore, we hold that the subsequent
27 Congressional action has not eliminated the
28 Department's duty to provide drainage, but that it has
given the Department the authority to pursue
alternative options other than the interceptor drain to
satisfy its duty under the San Luis Act.

FN 6: See "Reclamation Wastewater and Groundwater Study and Facilities Act of 1992", Pub. L. No. 102-575, §§ 1601-1617, 106 Stat. 4600, 4663 (1992) (enacting 43 U.S.C. §§ 390h to 390h-15 (West Supp.1997)); "Central Valley Project Improvement Act", *id.* at §§ 3401-3411, 106 Stat. 4600, 4706.

Id. at 577.

Footnote 6 refers to the Reclamation Wastewater and Groundwater Study and Facilities Act of 1992, Pub. L. No. 102-575, §§ 1601-1617, 106 Stat. 4600, 4663 (1992), which generally provides the Secretary of Interior the authority:

to undertake a program to investigate and identify opportunities for reclamation and reuse of municipal, industrial, domestic, and agricultural wastewater, and

1 naturally impaired ground and surface waters, for the
2 design and construction of demonstration and permanent
3 facilities to reclaim and reuse wastewater, and to
4 conduct research, including desalting, for the
5 reclamation of wastewater and naturally impaired ground
6 and surface water.

7 *Id.* at § 1602(a). The Secretary's ability to implement a program
8 to reclaim impaired groundwater was limited to measures
9 recommended in a 1990 Management Plan (otherwise known as the
10 "Rainbow Report"):

11 The Secretary shall not investigate, promote or
12 implement, pursuant to this title, any project intended
13 to reclaim and reuse agricultural wastewater generated
14 in the service area of the San Luis Unit of the Central
15 Valley Project, California, except those measures
16 recommended for action by the San Joaquin Valley
17 Drainage Program in the report entitled A Management
18 Plan for Agricultural Subsurface Drainage and Related
19 Problems on the Westside San Joaquin Valley (September
20 1990).

21 *Id.* at § 1602(d). The Rainbow Report recommends a complex mix of
22 "in-valley" solutions, without an interceptor drain with its
23 terminus at the Contra Costa Delta. AR 38352-60.

24 In light of the Ninth Circuit's decision, the text of the
25 Reclamation Wastewater and Groundwater Study and Facilities Act
26 of 1992 cited therein, and the Rainbow Report, the Bureau has no
27 obligation to construct an interceptor drain so long as the
28 Bureau can find some other solution that works. Plaintiffs
cannot be permitted to pursue a 706(1) claim that the Bureau has
unlawfully delayed construction of an interceptor drain, because
the Bureau has no absolute, non-discretionary obligation to
construct an interceptor drain. The Bureau simply has an

1 unavavoidable obligation to implement some kind of drainage
2 solution.

3 The district court has already so determined in the 11/19/04
4 Decision, which applied *SUWA*'s holding that a claim under 706(1)
5 can only proceed "where a plaintiff asserts than an agency failed
6 to take a discrete agency action that it is required to take."
7 11/19/04 Decision at 25 (citing 124 S. Ct. at 2379) (emphasis
8 added). *SUWA* addressed a challenge to a statute that gave
9 discretion to agency decisionmakers in the form of broadly-
10 worded, open-ended commands. *Id.* at 27. Under those
11 circumstances, the final agency action requirement was not
12 satisfied. *Id.* Plaintiffs' 706(1) claim regarding the drainage
13 obligation was distinguished from *SUWA* because:
14
15

16 Here, Congress has given a statutory command to provide
17 a drainage solution for the San Luis Unit. The Ninth
18 Circuit has determined there has been a failure by the
19 Federal Defendants to provide such a solution.
20 Plaintiffs do not challenge the form of the drainage
solution, a challenge that might be precluded under
SUWA, but rather that Federal Defendants have failed to
provide any drainage solution. Plaintiffs § 706
unreasonable delay claim is not barred by the final
agency action doctrine.

21 *Id.* at 28-29.² Plaintiffs did not seek reconsideration of this
22 ruling.
23

24 ² The district court also rejected the argument that Plaintiffs' had
25 standing to sue over the drainage obligation as intended beneficiaries of the
26 San Luis Act. 1:09-cv-00048, Doc. 928 at 46-47; Doc. 948 at 31. Instead,
27 Plaintiffs were found to have standing to assert an APA claim based on failure
28 to provide drainage because Plaintiffs fell within the zone of interest of the
San Luis Act. Specifically, Plaintiffs interests are not "so marginally
related to or inconsistent with the purposes implicit in the statute that it
cannot reasonably be assumed that Congress intended to permit the suit." Doc.
948 at 33.

1 To the extent Plaintiffs offer these offered documents to
2 prove that the drainage solution the Bureau plans to implement
3 will not prevent impaired groundwater from migrating under their
4 downslope lands, their challenge is to the form of the drainage
5 solution, a use expressly disclaimed by the 11/19/04 Decision.
6 Plaintiffs also suggest that the Bureau has construed its
7 drainage obligation too narrowly, and thereby unlawfully
8 withholds action on its drainage "obligation" (e.g., the alleged
9 obligation to protect downslope landowners). Plaintiffs maintain
10 certain questions were never addressed by the *Firebaugh* ruling:
11

12 [N]amely, whether the duty to provide drainage to the
13 San Luis Unit means intercepting, controlling and
14 disposing of drainage water originating in the San Luis
15 Unit before it does damage to adjoining areas and, if
16 that duty is neglected, whether the duty continues to
17 follow the escaped poor quality drainage water and
18 hydraulic pressure that originated in and was caused by
19 the irrigation of the San Luis Unit by the CVP.

20 Doc. 802 at 2. It is unclear whether this amounts to anything
21 other than a disguised challenge to the form of the drainage
22 solution.

23 Plaintiffs offer several alternative purposes for the
24 documents. During oral argument, Plaintiffs advanced the theory
25 that the documents help define the Bureau's duty by demonstrating
26 either: (a) Congress' intent that "drainage" includes "control of
27 the corpus of drainage water" generated by irrigation within the
28 San Luis Unit; or (b) the Bureau's own interpretation of the San
Luis Act consistent with that intent. Plaintiffs also suggest

1 the documents help to demonstrate that the Bureau's delay in
2 providing drainage is unreasonable under the circumstances. See
3 Doc. 766 at 6. These legal theories are not completely
4 foreclosed by previous decisions. Whether these theories justify
5 supplementation of the record with the particular documents
6 offered is a different question.
7

8 C. Documents Federal Defendants Agree to Add to the Record.

9 Federal Defendants do not object to supplementation of the
10 record with the following four documents:
11

12 Document 815 (337 pp) -- "San Luis Unit, Central Valley
13 Project, California, A Report on the Feasibility of Water
14 Supply Development" Report of the Regional Director,
15 Substantiating Report and Cooperating Agencies Reports, May
16 6, 1955.

15 Document 826 (52 pp) -- "San Luis Unit Central Valley
16 Project California Plan for Disposal of Subsurface
17 Agricultural Drainage," United States Department of the
18 Interior, Bureau of Reclamation, June 1, 1969.

17 Document 834 (35 pp) -- Schmidt, K.D. 1988 Report of Aquifer
18 Tests for Shallow Wells in Firebaugh Mendota Area.
19 Unpublished report Prepared for the San Joaquin Valley
20 Drainage Program, Sacramento California, May 16, 1988.

20 Document 835 (53 pp) - Schmidt, K.D. 1989 Results of 14 Day
21 Aquifer tests Near Mendota. Unpublished Report Prepared for
22 the San Joaquin Valley Drainage Program, Sacramento,
23 California, February 9, 1989.

22 Federal Defendants concede Documents 834 and 835 were cited in
23 documents already included in the AR and were considered by the
24 decisionmakers. Federal Defendants also agree that Documents 815
25 and 825 provide relevant historical information.
26

27 Despite these concessions, District Defendants object to
28 inclusion of these documents in the record. In particular,

1 District Defendants maintain that the duty to provide drainage
2 has been conclusively determined to only apply to the lands
3 within the San Luis Unit. Accordingly, District Defendants
4 question the relevance of Documents 835 and 836, which concern
5 groundwater conditions in the Plaintiffs' service area. Although
6 there are legitimate questions about the legal significance of
7 these documents, Federal Defendants' concession that these four
8 documents are appropriately included in the record is sufficient
9 to include them. The request to supplement is GRANTED as to
10 Documents 815, 825, 834, and 835. District Defendants' objection
11 to the inclusion of these four documents in the AR is OVERRULED.
12
13
14

15 D. Many of the Remaining Documents Either Do Not Need to be
16 Added to the Record to be Considered or Are Already Part of
17 the Record.

18 Many of the documents for which supplementation is sought are:

- 19 (a) better considered through the mechanism of judicial notice,
20 (b) citable legal authorities that can be referenced as a matter of
21 law, or (c) already part of the record.

22 1. Documents 816-817, 828-829, 831-832 Are Best Considered
23 through the Mechanism of Judicial Notice.

24 This group of documents consists of transcripts, or portions of
25 transcripts, before committees of Congress or the California
26 legislature, either prior to the enactment of the San Luis Act
27 (Documents 816-17), in connection with proposed amendments thereto
28

1 (Document 828), or regarding Kesterson Reservoir (Document 828, 831 and
2 832).

3 Document 816 (201 pp) -- Report on Hearings before the
4 Subcommittee on Irrigation and Reclamation of the Committee
5 on Interior and Insular Affairs, United States Senate, 85th
6 Congress, Second Session, on S.1887, "A Bill to Authorize
7 the Secretary of Interior to Construct the San Luis Unit of
8 the Central Valley Project, California, to Enter into an
9 Agreement with the State of California with Respect to the
10 Operation and Construction of Such Unit, and for Other
11 Purposes," March 17 and 18, 1958.

8 Justification for Inclusion: This report includes the
9 exchange between Senator Anderson and Harvey Banks of
10 the DWR in the Subcommittee before the adoption of the
11 San Luis Act approving the amendment that included the
12 requirement that drainage be provided. The exchange
13 indicates that the purpose of the requirement of
14 drainage is to protect downslope lands from impacts.

12 Document 817 (60 pp) -- Excerpts from report of Hearing
13 before the Subcommittee on Irrigation and Reclamation of the
14 Committee on Interior and Insular Affairs, U.S. Senate, 86th
15 Congress, First Session, on S.44 "A Bill to Authorize the
16 Secretary of Interior to Construct the San Luis Unit of the
17 Central Valley Project, California, to Enter into an
18 Agreement with the State of California with Respect to the
19 Operation and Construction of Such Unit, and for Other
20 Purposes," March 16, 1959

17 Justification: Transcript of testimony of C.W. Bates,
18 Manager of Central California Water District requesting
19 that the San Luis Unit Act include a requirement of
20 interception and collection of drainage associated with
21 irrigation of the San Luis Unit in order to protect the
22 lower elevations lands from drainage impacts.

21 Document 828 (62 pp) -- Hearing on HR 4390, to Amend the Act
22 of June 3, 1960 (74 Stat. 156) Authorizing the Secretary of
23 the Interior to Construct the San Luis Unit, Central Valley
24 Project, California, April 20, 1977

23 Justification: Commissioner of Reclamation describes
24 drainage requirement as: "pick up and remove the
25 drainage water from beneath those project lands that
26 are affected" (p. 16, Bates 39526).

26 Document 829 (692 pp) -- Joint Hearing of the Assembly
27 Water, Parks and Wildlife committee and Senate Natural
28 Resources and Wildlife Committee on San Joaquin Valley
Agricultural Drainage and Kesterson National Wildlife
Refuge, Nov. 16, 1984

1 Justification: The Department of Interior agrees that
2 the Interceptor Drain and collection of drainage was to
3 protect both existing agricultural lands such as the
4 Plaintiffs from downslope flows and lands in the San
5 Luis Unit going into production (p. 14 , Bates 39591).
6 The Bureau agrees that even though drainage waters are
 outside of the San Luis Unit because Kesterson was
 utilized as a disposal site, the Department of Interior
 has a duty to clean up the selenium that has escaped
 Kesterson through seepage of drainage water (p. 44,
 Bates 39620) .

7 Document 831 (321 pp) -- Agricultural Drainage Problems and
8 Contamination at Kesterson Reservoir, Hearing before the
9 Subcommittee on Water and Power resources of the Committee
 on Interior and Insular Affairs, House of Representatives,
 held in Los Banos, California, March 15, 1985.

10 Justification: Testimony before United States Committee
11 on Interior and Insular Affairs, House of
12 Representatives, about increasing pollution of shallow
13 waters within Firebaugh Canal Water District (p. 125-
 126, Bates 40419-40420) and effect of subsurface waters
 flowing downslope and appearing on lower lands (p. 426,
 Bates 40570) .

14 Document 832 (147 pp) -- Hearing before the Subcommittee on
15 Water and Power of the Committee on Energy and Natural
16 Resources, United States Senate, 95th Congress, First
17 Session on ... S.1157, A Bill to Authorize the Secretary of
18 the Interior to Perform Studies Relating to Disposal of
 Drain Water and to Construct Interim Corrective Measures
 Deemed Necessary for the San Luis Interceptor Drain, July
 16, 1985.

19 Justification: Testimony of Assistant Secretary for
20 Water and Science of Department of Interior in regard
21 to plans to correct for drainage impacts caused by
22 closure of Interceptor Drain system and Kesterson
 Reservoir and admitting that drainage water not
 intercepted may affect Grasslands area in same manner
 (p. 42-44, Bates 40697-40698) .

23 These documents are judicially noticeable portions of the
24 legislative history of the San Luis Act, and may be relied upon by the
25 parties in legal argument. Plaintiffs offer no specific reason why
26 they must be included the AR. The request to supplement the record
27 with Documents 816-817, 828-829 and 831-832 is DENIED. Federal
28

1 Defendants' and District Defendants' objections to inclusion of these
2 documents in the record are SUSTAINED.

3
4 2. Documents 818, 820 & 833 are Legal Authorities that Can
be Cited by the Parties and the Court.

5 Document 818 (7pp) -- San Luis Act, Public Law 86-488, 74
6 Stat. 156

7 Justification: Although the Court could take judicial
8 notice of the contents of the San Luis Act and the fact
9 it has not been amended to alter the Department of
Interior's duties since its adoption, inclusion within
the Administrative Record is appropriate for the
Court's convenience.

10 Document 820 (3 pp) -- Order upon Motion for Preliminary
11 Injunction in *CCID v. Udall*, No. 2356 ND Civil, Southern
12 District of California, Northern Division, by Judge M.D.
Crocker, July 15, 1963

13 Justification: Judge Crocker entered judgment in the
14 action between FCWD and CCID and United States denying
15 the preliminary injunction sought but finding: "That
16 such act clearly requires a drainage system to protect
Plaintiff's land (FCWD and CCID) and must be complied
with and drainage provided before water is delivered to
and stored in the San Luis Dam."

17 Document 833 (6 pp) -- Judge Edward D. Price's Memorandum
18 Decision denying Firebaugh Plaintiffs' Request to Intervene
19 in *Westlands v. United States*, USED Case No. CV F-81-245
Consolidated with No. CV F-79-106 ("Barcellos"), December
30, 1986

20 Justification: Judge Price Memorandum of Decision
21 "Clearly, the removal of this drainage system tenders a
22 serious threat to the downslope lands lying below the
Westlands Water District (p. 4: 23-25, Bates 40824).

23 As with the previous group of documents, there is no need to
24 supplement the AR with copies of the San Luis Act or Judge
25 Crocker's or Judge Price's unpublished decisions in related
26 cases. These legal authorities can be cited by any party or the
27 court. The request to supplement the record is DENIED as to
28 Documents 818, 820, and 833. Federal Defendants' and District

1 Defendants' objections to inclusion of these documents in the
2 record are SUSTAINED.

3
4 3. Documents 830 is Already in the Administrative Record.

5 Document 830 (84 pp) -- California State Water Resources
6 Control Board Order No. WQ-85-1

7 Justification: The State Water Resources Control Board
8 finds that the Bureau leakage of drainage water from
9 Kesterson Reservoir into subsurface aquifers is a
discharge and pollution by the Bureau (p. 25, Bates
39389).

10 The document submitted by Plaintiffs is an incomplete copy of WQ
11 85-1. A complete copy is already in the record. Plaintiffs
12 agree that the request to supplement the record with Document 830
13 should be DENIED. Federal Defendants' and District Defendants'
14 objections to inclusion of this document in the AR are SUSTAINED.

15
16 E. Remaining Documents.

17 Document 819 (28 pp) -- Agreement between the United States
18 and the California Department of Water Resources for
19 Construction and Operation of the Joint Use Facilities of
the San Luis Unit, December 30, 1961.

20 Justification: Agreement shows interpretation of San
21 Luis Act required each act of collection, interception
and transport away from San Luis Unit and Plaintiffs'
downslope lands.

22 This document does not address drainage in the San Luis
23 Unit. Plaintiffs have not explained its relevance to their
24 706(1) claim. The motion to supplement the AR with Document 819
25 is DENIED. Federal Defendants' and District Defendants'
26 objections to inclusion of this document in the AR are SUSTAINED.
27

1 Document 821 (9 pp) -- Statement of United States Bureau of
2 Reclamation to the Water Pollution Subcommittee of the
3 California Assembly's Interim Committee on Water, by Vernon
4 J. Hanson, Regional Project Development Engineer, December
5 9, 1963.

6 Justification: Department of Interior description of
7 drainage system is to collect, intercept and prevent
8 damage to adjacent areas as well as protect San Luis
9 Unit lands.

10 Document 822 (43 pp) -- Letter from Acting Commissioner of
11 Reclamation William I. Palmer to Congressman John McFall,
12 December 13, 1963.

13 Justification: Commissioner of Reclamation commitment
14 that San Luis Act will be complied with and drainage
15 interception and disposal will be operative when
16 needed.

17 Document 823 (8 pp) -- "The Bureau and the Drain," a talk
18 given by Robert J. Pafford, Jr., Regional Director, Bureau
19 of Reclamation at the Water Resources Conference, Fresno,
20 California, May 1964.

21 Justification: Bureau of Reclamation describes that
22 drainage problems caused by shallow and rising saline
23 water in lower eastern edge of San Luis service area
24 will occur if facilities to collect and dispose of
25 water are not in operation. Assures that operation will
26 commence no later than July 1968.

27 Document 824 (8 pp) -- "The Bureau and the Drain," a talk
28 given by Robert J. Pafford, Jr., Regional Director, Bureau
of Reclamation at the Water Resources Conference, Fresno,
California, May 14, 1965.

Justification: Bureau of Reclamation Regional Director
admits that destruction will occur unless drainage
interception is provided.

Document 825 (26 pp): "Drainage Problems in the San Luis
Unit, Central Valley Project," by John A. McKeag, Drainage
Specialist, United States Bureau of Reclamation, February
1967.

Justification: Bureau of Reclamation describes
drainage problems that will occur when imported surface
water supply is provided if drainage is not collected,
intercepted and disposed of.

1 Document 827 (7 pp): Water Projects Review Analysis, San
2 Luis Unit CVP by Mid-Pacific Region, Bureau of Reclamation,
March 14, 1977.

3 Justification: Department of Interior describes
4 adjacent areas to the San Luis Unit being destroyed
5 over time if the drain is not completed and operated
6 and problems caused by highly saline waters entering
San Joaquin River (pps 2-3, 7, Bates 39509, 39510,
39514).

7 These documents, dating to the 1960s and 1970s, are
8 descriptions of the nature and impact of the area-wide drainage
9 problem, issued by the Bureau and various Bureau employees. In
10 general, Federal Defendants disclaim that these documents were
11 not relied on or considered by Reclamation in developing any of
12 the three actions described in the AR. Although, under *Friends*
13 *of the Clearwater*, the record is not strictly limited to those
14 documents considered by Federal Defendants in developing the 2007
15 SLDFR ROD, the Grasslands Bypass Project, and/or in approving the
16 local drainage projects, Plaintiffs have failed to offer any
17 valid legal theory for inclusion of these documents in the AR.

18 The motion to supplement the AR with Documents 821-25 and
19 827 is DENIED. Federal Defendants' and District Defendants'
20 objections to inclusion of these documents in the AR are
21
22 SUSTAINED.

23 Document 836 (57 pp) -- Factors Affecting Drainage in
24 Firebaugh Canal Water District and in Firebaugh Canal Water
25 District and in Firebaugh Canal Water District and Kenneth
D. Schmidt and Associates, October 1, 2002.

26 Justification: Further tests and modeling of quality
27 of downslope migrating drainage water and quantity of
28 drainage water entering Firebaugh and CCID from San
Luis Unit after termination of interception and
collection Department of Interior Drainage Reevaluation

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2 Federal Defendants agreed to include earlier data concerning
3 groundwater conditions in Plaintiffs' service area collected and
4 analyzed by Dr. Schmit in 1988 and 1989 (Documents 834 and 835).
5 Plaintiffs assert Dr. Schmit verbally informed the Bureau of the
6 content of his 2002 report (Document 836) in a telephone call
7 referenced by the Bureau in the AR. Federal Defendants object
8 that the verbal communication referenced in the EIR was different
9 from the content of the report and insist that the report was not
10 provided to the agency during the administrative process.

11
12 However, Federal Defendants concede that the agency did consider
13 Dr. Schmit's two previous reports. Although it is not clear how,
14 if at all, his reports will be relevant to the legal issues
15 before the court on summary judgment, under *Friends of the*
16 *Clearwater*, the record in a 706(1) case is not limited to those
17 documents before the agency at any particular date and time. For
18 the sake of completeness, Plaintiffs' request to supplement the
19 record with Dr. Schmit's 2002 report (Document 836) is GRANTED.
20 Federal Defendants and District Defendants' objections are
21 OVERRULED.
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24
25 IV. CONCLUSION

26 The motion to supplement the record is GRANTED as to
27 Documents 815, 826, 834, 835, and 836, and DENIED as to all other
28 Documents.

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Plaintiffs shall prepare a form of order consistent with this memorandum decision within five (5) days of electronic service.

SO ORDERED
DATED: September 17, 2010

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge