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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 FIREBAUGH CANAL WATER
9 DISTRICT, et al.,
10 Plaintiffs,

1:88-cv-0634-OWW

MEMORANDUM DECISION RE: CROSS-
MOTIONS FOR SUMMARY JUDGMENT
(DOCS. 819, 837, 892)

11 v.

12 UNITED STATES OF AMERICA, et
13 al.,
14 Defendants.

15 I. INTRODUCTION.

16 On October 22, 2010, Firebaugh Canal Water District and
17 Central California Irrigation District ("Plaintiffs") filed a
18 motion for summary judgment against the United States seeking
19 judgment (1) that the United States has unlawfully withheld
20 drainage service for the San Luis Unit, and that the United State's
21 duty to provide drainage includes a duty to drain water and
22 contaminants entering Plaintiffs' service areas; (2) that the
23 United States' failure to install and operate drainage facilities
24 is agency action unlawfully withheld in violation of Section
25 1(a)(2) and Section 5 of the San Luis Act; (3) that the United
26 States has acted arbitrarily, capriciously, and not in accordance
27 with law in refusing to install, maintain, and operate federal
28

1 drainage features in the area known as the Northerly Area and in
2 the Northerly portion of Westlands Water District; **(4)** that a trial
3 shall be held to determine the quantities of drainage waters and
4 contaminants originating from irrigation within the San Luis Unit
5 that have entered Plaintiffs' service areas, and enter an
6 injunction requiring the United States to provide for interception,
7 collection, and disposal of such waters and contaminants; and **(5)**
8 that the court should schedule an order to show cause hearing.
9 (Doc. 819 at 60-61).

10 On December 10, 2010, the United States Bureau of Reclamation
11 ("Reclamation"), United States Department of the Interior
12 ("Department"), Gail Norton, and the United States of America
13 (collectively "Federal Defendants") filed a cross-motion for
14 summary judgment against Plaintiffs seeking judgment that Federal
15 Defendants have no duty to provide drainage service to land outside
16 the San Luis Unit, that the United States is complying with its
17 duties under the San Luis Act, and that the current drainage plan
18 in place is not arbitrary and capricious. (Doc. 827). Westlands
19 Water District, Panoche Water District, and Panoche Drainage
20 District ("District Defendants") filed a cross-motion for summary
21 judgment against Plaintiffs on December 10, 2010 seeking judgment
22 on Plaintiffs' section 706(1) claim on the basis that there is no
23 duty under the San Luis Act to provide drainage service to
24 Plaintiffs' lands. (Doc. 832). District Defendants also filed
25 opposition to Federal Defendants' motion for summary judgment on
26 January 10, 2011. (Doc. 848). Environmental Intervenors filed
27 opposition to Plaintiffs' motion for summary judgment on December
28 10, 2010. (Doc. 842).

1 Plaintiffs replied to the cross-motions for summary judgment
2 on January 10, 2011. (Doc. 849). Federal Defendants filed a reply
3 in support of its motion for summary judgment on February 9, 2011.
4 (Doc. 856). District Defendants filed a reply on February 9, 2011.
5 (Doc. 857).

6 **II. FACTUAL BACKGROUND.**

7 In *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th
8 Cir. 2000), the Ninth Circuit affirmed in part and reversed in part
9 the court's entry of partial judgment on March 12, 1995, which
10 required Federal Defendants to fulfill their mandatory drainage
11 duties under the San Luis Act by pursuing a discharge permit with
12 the State of California. The Ninth Circuit held that drainage must
13 be provided but that the court's partial judgment improperly
14 precluded other drainage solutions. Federal Defendants are
15 authorized to pursue under the San Luis Act and remanded this
16 action for further proceedings.

17 On December 18, 2000 the partial judgment was amended to
18 comply with the holding in *Firebaugh*. The amended partial judgment
19 provides in pertinent part:

20 FURTHER ORDERED that the Secretary of the Interior, the
21 United States Department of the Interior, the United
22 States Bureau of Reclamation, and each of them, and their
23 officials, and employees, shall, without delay, provide
24 drainage to the San Luis Unit pursuant to the statutory
25 duty imposed by section 1(a) of the San Luis Act. The
26 Secretary of the Interior, the United States Department
27 of the Interior, the United States Bureau of Reclamation,
28 and each of them, shall no later than January 29, 2001,
submit to this court a detailed plan describing the
action or actions, whether short term or long term, they
will take to promptly provide drainage to the San Luis
Unit, which plan shall contain a schedule of dates by
which the action or actions described in the plan will be
accomplished. Nothing contained herein is intended to
divest the Secretary of the Interior, the United States
Department of the Interior, or the United States Bureau

1 of Reclamation of any discretion they have to select
2 means other than an interceptor drain to provide drainage
3 to the San Luis Unit. Nor is anything contained herein
4 intended to excuse the Secretary of the Interior, the
5 United States Department of the Interior or the United
6 States Bureau of Reclamation from complying with any
7 applicable law.

8 (Doc. 654).

9 On April 18, 2001, Federal Defendants submitted a Plan of
10 Action to "initiate immediately a detailed review of all reasonable
11 alternatives for providing drainage service to lands within the San
12 Luis Unit" and a schedule for completion to the court. (*Sumner Peck
13 Ranch, Inc. et al., v. Department of Interior, et al., 1:91-cv-
14 00048-OWW-DLB, Doc. 483*).¹ The Plan of Action called for a San
15 Luis Drainage Feature Reevaluation ("SLDFR") to analyze feasible
16 alternative means of providing drainage service to the San Luis
17 Unit. The Plan of Action also detailed short-term strategies,
18 including continuation of the Grassland Bypass Project, a drainage
19 program developed in 1995 based on an agreement between the United
20 States and the San Luis & Delta-Mendota Water Authority.

21 The first phase of the SLDFR resulted in preparation of a
22 report entitled "Preliminary Alternatives Report, San Luis Drainage
23 Re-evaluation" published in December 2001 ("PAR").² The PAR
24 discussed twelve drainage service methods for treatment,
25 concentration, disposal, and beneficial use of drain water and
26 salts. The PAR posited three broad conceptual categories of

27 ¹ This case is a consolidation of multiple actions. Several of the operative
28 documents in this case are found on the separate docket for the case *Sumner Peck
Ranch, Inc. et al., v. Department of Interior, et al., 1:91-cv-00048-OWW-DLB*.

² Facts concerning Federal Defendants' course of conduct are derived from the
administrative record (AR).

1 "Preliminary Alternatives" comprised of various combinations of the
2 drainage service methods: (1) In-Valley Alternatives; (2) Out-of-
3 Valley Alternatives; and (3) Beneficial Use Alternatives.

4 The PAR's in-Valley Alternatives provide for use of
5 evaporation ponds and ultimate salt disposal in landfills and deep
6 valley wells. Out-of-Valley Alternatives provide for drainage to
7 two disposal sites: the Pacific Ocean and the San Joaquin Delta.
8 Delta disposal generally entails selenium treatment of irrigation
9 water before ultimate disposal in the Delta. Beneficial Use
10 Alternatives posit use of reverse osmosis technology to produce
11 clean water byproduct from drainage, followed by beneficial use of
12 the clean water and/or salts produced by the process.

13 The second phase of the SLDFR was preparation of the "Plan
14 Formulation Report, San Luis Drainage Feature Re-evaluation,"
15 published in December 2002. The PFR established the "In-Valley
16 Alternative," as the proposed action based on cost, implementation
17 time, and environmental information available. The In-Valley
18 Alternative includes a drainwater collection system, regional
19 drainwater reuse facilities, selenium treatment, reverse osmosis
20 treatment for the Northerly Area, and evaporation ponds for salt
21 disposal.

22 In March 2003, a combination of local water districts and
23 contractors submitted the Westside Regional Drainage Plan ("WRDP")
24 to Reclamation. The WRDP proposed expansion of the Grassland
25 Bypass Project. The WRDP contemplated that each district would
26 implement drainage control efforts appropriate for their respective
27 needs, and that implementation of the districts' efforts would be
28 coordinated with input from Reclamation into one comprehensive

1 program. The WRDP identified key management practices as land
2 retirement, groundwater management, source control, regional reuse
3 projects, drain water treatment, and salt disposal. Reclamation
4 incorporated the WRDP into the SLDFR, effected changes to the
5 environmental impact statement for the SLDFR, and prepared a
6 revised Plan of Action to submit to the court.

7 On February 5, 2004, Federal Defendants lodged an "Amended
8 Plan of Action for Drainage to the San Luis Unit Central Valley
9 Project" ("Amended Plan") with the court that incorporated input
10 from the WRDP. The Amended Plan stated that the scope of the SLDFR
11 was being expanded to include land retirement among the
12 alternatives for providing drainage to the San Luis Unit. The
13 Amended Plan proposed an amended schedule which provided that a
14 Final Environmental Impact Statement and Record of Decision would
15 be completed by July 2006. The Amended Plan also indicated that
16 Federal Defendants would continue to support implementation of
17 short-term measures by the WRDP proven or likely to provide
18 drainage benefits in the short term.

19 Reclamation published an Addendum to the PFR ("PFR Addendum")
20 in July 2004 that incorporated the WRDP and refined the
21 alternatives identified in the initial PFR. The PFR Addendum
22 revised the number of lands needing drainage, as well as estimates
23 of drainage quality and quantity. The PFR Addendum included land
24 retirement scenarios for each of the In-Valley Alternatives
25 identified in the PFR.

26 Reclamation published a draft environmental impact statement
27 on the SLDFR in May 2005. A final environmental impact statement
28 for the SLDFR was published in May 2006 ("EIS"). The EIS defined

1 the drainage study areas as the lands lying within the authorized
2 service area of the San Luis Unit and Central Valley Project. The
3 drainage study area also included the Grassland Drainage Area,
4 which encompasses lands outside the San Luis Unit—including
5 Plaintiffs' lands.

6 The EIS included a National Economic Development ("NED")
7 analysis of various land retirement scenarios proposed in the PFR
8 and PFR Addendum. The objective of NED analysis "is to determine
9 the change in net value of the Nation's output of goods and
10 services that would result from implementing each project
11 alternative." The EIS identified the In-Valley/Drainage-Impaired
12 Area Land Retirement Alternative as the preferred NED Plan. On
13 November 27, 2006, Reclamation recommended a Secretarial Exception
14 to select an In-Valley Alternative other than the NED Plan, citing
15 impacts to irrigated agriculture and the regional economy. The
16 Secretarial Exception was approved on December 18, 2006, and
17 Reclamation was authorized to select an In-Valley Alternative in a
18 Record of Decision.

19 Reclamation approved a Record of Decision selecting the In-
20 Valley/Water Needs Land Retirement Alternative in March 2007 ("2007
21 ROD"). The 2007 ROD defines drainage service as "managing the
22 regional shallow groundwater from the root zone of
23 drainage-impacted lands and/or reducing contributions of water to
24 the shallow groundwater table through land retirement." Since
25 2007, Federal Defendants have submitted periodic status reports to
26 the court outlining their efforts to comply with the drainage duty
27 imposed by the San Luis Act. Primarily, Federal Defendants status
28 reports have described various studies, discussions, and requests

1 for congressional action effected in connection with the Federal
2 Defendants' endeavor to provide drainage to the San Luis Unit.

3 Reclamation completed the SLDFR Feasibility Study in March
4 2008. The 2008 Feasibility Study estimated the total cost of
5 construction of the In-Valley/Water Needs Land Retirement
6 Alternative to be 2.69 billion dollars. Reclamation transmitted
7 the 2008 Feasability Report to Congress on July 8, 2008.

8 On November 18, 2009, Federal Defendants submitted a Control
9 Schedule ("Control Schedule") describing the actions Reclamation
10 intended to take to comply with the 2007 ROD. After discussing the
11 Control Schedule with the parties at a scheduling conference, the
12 court issued an order which provides:

13 Federal Defendants, through the Bureau of Reclamation,
14 shall perform their undertakings to the Court, as
15 presented in Part I of the Parties' Supplemental Status
16 Report (Doc. 752) including the Control Schedule attached
17 thereto, as the Bureau of Reclamation has proposed to
18 perform them. Nothing in this Order precludes the Federal
19 Defendants from discussing with other Parties alternative
20 means or locations of providing drainage service within
21 the San Luis Unit. Any modifications based on such
22 discussions shall be separately identified in the status
23 reports filed with this Court

19 (Doc. 758, "Scheduling Order").

20 Federal Defendants submitted their most recent status report
21 on April 1, 2011. (Doc. 864). The April 2011 Status Report
22 identifies the following actions currently underway in connection
23 with provision of drainage to the San Luis Unit:

24 1) Reclamation has continued to carry out the activities
25 specified in the Control Schedule, in the manner and on
26 the schedule set forth in the Control Schedule.

27 2) Reclamation has requested appropriations in the amount
28 of \$14,250,000 to continue implementation of actions
identified in the Control Schedule for the 2012 fiscal
year;

1 3) Reclamation continues to undertake actions provided
2 in the ROD in accordance with the schedule of activities
3 and budget described in the Control Schedule. Most of
4 these actions are prerequisites to the construction of a
5 demonstration treatment plant, to be located in the
6 Panoche Drainage District, which will collect data needed
7 for the final design of the reverse osmosis and selenium
8 bio-treatment components of drainage service to be
9 constructed in the San Luis Unit.

10 4) Beginning in December 2009, Reclamation initiated the
11 process for securing a repayment contract with Westlands
12 for the recovery of costs of construction of drainage
13 facilities in Westlands.

14 5) Reclamation continues to support, through grants,
15 cooperative agreements, and other means, drainage
16 projects requested by districts in the San Luis Unit.

17 6) Reclamation and the San Luis & Delta-Mendota Water
18 Authority, on behalf of the Grassland Basin Drainers,
19 continue to implement the December 2009 Agreement For
20 Continued Use of the San Luis Drain ("Third Use
21 Agreement") that will allow the Grassland Bypass Project
22 to continue through December 2019.

23 (Doc. 864).

24 The court heard the parties cross-motions for summary judgment
25 on May 20, 2011. During the May 2011 summary judgment hearing,
26 counsel advised the court that Federal Defendants were
27 contemplating potential modifications to the Control Schedule. The
28 court indicated that the appropriate procedural mechanism would be
a motion requesting modification of the Scheduling Order and
Control Schedule in order to afford all parties an opportunity to
be heard on the matter. District Defendants filed a motion to
modify the scheduling order on June 15, 2011. (Doc. 876). The
parties have been heard on the matter. An order granting the
motion issues concurrently with this memorandum decision.

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1 **IV. DISCUSSION.**

2 **A. Standing**

3 To invoke the jurisdiction of the federal courts, a plaintiff
4 must demonstrate standing under Article III of the United States
5 Constitution. *E.g., L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d
6 644, 655 (9th Cir. 2011) (citing *Lujan v. Defenders of Wildlife*,
7 504 U.S. 555, 560 (1992)). The three requirements of the
8 irreducible constitutional minimum of standing are: (1) the
9 plaintiff must have suffered an "injury in fact;" (2) there must
10 be a causal connection between the injury and the conduct
11 complained of, i.e., the injury has to be "fairly traceable" to the
12 challenged action of the defendant; and (3) it must be "likely,"
13 as opposed to merely "speculative," that the injury will be
14 "redressed by a favorable decision." *E.g., Lujan*, 504 U.S. at 560
15 (citations omitted). A party's standing to seek judicial review of
16 administrative action is typically "self-evident" when the party is
17 the object of the administrative action. *L.A. Haven Hospice*, 638
18 F.3d at 655 (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728,
19 733-34 (D.C. Cir. 2003)). Standing is substantially more difficult
20 to establish where the challenged agency action neither requires
21 nor forbids any action on the part of the complaining party. *Id.*
22 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, ___, 129 S.Ct.
23 1142, 1149 (2009)).

24 District Defendants contend that Plaintiffs have not
25 demonstrated Article III standing, and that trial is necessary to
26 determine standing because District Defendants dispute Plaintiffs'
27 theory of harm. District Defendants misapprehend Plaintiffs'
28 burden of going forward at the summary judgment stage. The Supreme

1 Court has described a plaintiff's burden of proving standing at
2 various stages of a case as follows:

3 Since [the standing elements] are not mere pleading
4 requirements but rather an indispensable part of the
5 plaintiff's case, each element must be supported in the
6 same way as any other matter on which the plaintiff bears
7 the burden of proof, i.e., with the manner and degree of
8 evidence required at the successive stages of the
9 litigation. At the pleading stage, general factual
10 allegations of injury resulting from the defendant's
11 conduct may suffice, for on a motion to dismiss we
12 presume that general allegations embrace those specific
13 facts that are necessary to support the claim. In
14 response to a summary judgment motion, however, the
15 plaintiff can no longer rest on such "mere allegations,"
16 but must "set forth" by affidavit or other evidence
17 "specific facts," Fed. Rule Civ. Proc. 56(e), which for
18 purposes of the summary judgment motion will be taken to
19 be true. And at the final stage, those facts (if
20 controverted) must be supported adequately by the
21 evidence adduced at trial.

22 *Lujan*, 504 U.S. at 561; see also *Churchill County v. Babbitt*, 150
23 F.3d 1072, 1077 (9th Cir. 1998).

24 Plaintiffs have submitted sufficient evidence of specific
25 facts which, taken as true, establish actual harm resulting from
26 Federal Defendants' failure to provide required drainage service to
27 the San Luis Unit. (Doc. 820, Plaintiffs' SUMF Nos. 4 and 5).
28 Although both District Defendants and Federal Defendants purport to
dispute Plaintiffs' evidence, (Docs. 829 and 835), the arguments
advanced in the parties' respective responses to Plaintiffs'
statement of undisputed material facts do not defeat Plaintiffs'
evidence under the burden applicable at the summary judgment stage.
See *Lujan*, 504 U.S. at 561. Plaintiffs have set forth evidence of
specific facts, which, taken as true, is sufficient to support
Plaintiffs' standing at this stage in the proceedings. Although
factual disputes may exist concerning *the extent* to which drainage

1 waters from the San Luis Unit impact Plaintiff's land, such factual
2 disputes do not deprive Plaintiffs of Article III standing at the
3 summary judgment stage. There is a justiciable controversy
4 regarding the nature, scope, and performance of Federal Defendants'
5 drainage duty under the San Luis Act and whether the legally
6 required drainage duty is being implemented.

7 Plaintiffs contend that the court's prior analysis regarding
8 standing supports their substantive claim that the San Luis Act
9 imposes a mandatory duty to drain Plaintiffs' lands; this argument
10 is premised on a fundamental misunderstanding of the court's prior
11 orders and the law of standing. The court's November 2004
12 Memorandum Opinion and Order re: Motions to Dismiss the Fifth
13 Amended Complaint found that Plaintiffs have standing because the
14 interest they assert "bears a 'plausible relationship to the
15 policies underlying [the San Luis Act].'" (*Sumner Peck Ranch, Inc.*
16 *et al., v. Department of Interior, et al.*, 1:91-cv-00048-OWW-DLB,
17 November 19, 2004 Memorandum Opinion and Order, Doc. 948 at 33)
18 (citing, *Clarke*, 479 U.S. at 395)). The 2004 Memorandum Decision
19 found:

20 Plaintiffs seek to protect an interest in having a
21 drainage solution implemented in a timely fashion so that
22 their lands will no longer be harmed by the down-gradient
23 flow of contaminated groundwater. In crafting § 1(a)(2)
24 of the Act, Congress did at least contemplate that
25 irrigation within the San Luis Unit might cause drainage
26 problems to lands outside the Unit. It also appears that
27 Congress thought of the drainage as an integrated system
28 that would benefit others beyond the San Luis Unit, and
Congress relied upon the pressure those outside interests
would put on the State of California to assume the burden
of constructing the drain. Recognizing that the zone of
interest test "is not meant to be especially demanding...
and there need be no indication of congressional purpose
to benefit the would-be plaintiff," Plaintiffs' APA claim
(that the Federal Defendants have unreasonably delayed or
unlawfully withheld agency action) does fall within the

1 zone of interest of the San Luis Act. Plaintiffs have
2 standing to bring their APA claim.

3 *Sumner Peck Ranch, Inc. et al., v. Department of Interior, et al.,*
4 1:91-cv-00048-OWW-DLB, November 19, 2004 Memorandum Opinion and
5 Order, Doc. 948 at 40-41.

6 Contrary to Plaintiffs' contention, the fact that Plaintiffs
7 have a right to seek relief under the zone of interest test does
8 not suggest a right to seek or entitlement to any particular *form*
9 of relief. That Plaintiffs have zone of interest standing only
10 means that if Federal Defendants' drainage acts or omissions are
11 harming Plaintiffs, prevailing in this action is likely to redress
12 Plaintiffs' injury. This does not establish that all of
13 Plaintiffs' injuries can be redressed by a favorable ruling in this
14 case.

15 **B. Chevron Deference**

16 Plaintiffs' claims require review of Federal Defendants'
17 construction of the San Luis Act. Federal Defendants interpret the
18 San Luis Act as not requiring Federal Defendants "to provide
19 drainage service to non-San Luis Unit lands, or to 'collect,
20 intercept, dispose of and control' drainwater, after that
21 drainwater has allegedly flowed downslope into Plaintiffs' service
22 areas." (See Doc. 827 at 14, Federal Defendants' MSJ).

23 When a court reviews an agency's construction of the statute
24 which it administers, it is confronted with two questions.
25 *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).
26 First, the court must determine whether Congress has directly
27 spoken to the precise question at issue; if so, the court must give
28 effect to the unambiguously expressed intent of Congress. *Id.* If

1 the statute is silent or ambiguous with respect to the specific
2 issue, the court proceeds to a second inquiry: whether the agency's
3 interpretation is based on a permissible construction of the
4 statute. *Id.* at 843.

5 **1. Step One: Statutory Language**

6 Step one of the *Chevron* analysis requires the court to
7 evaluate the language of the San Luis Act using "traditional tools
8 of statutory construction." *E.g., Ass'n of Irrigated Residents v.*
9 *United States EPA*, 632 F.3d 584, 596 (9th Cir. 2011). "In
10 determining whether Congress has specifically addressed the
11 question at issue, a reviewing court should not confine itself to
12 examining a particular statutory provision in isolation." *See,*
13 *e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133
14 (2000). Neither section 1(a)(2) of the San Luis Act nor any other
15 provision directly addresses the issue of whether the San Luis Act
16 imposes a mandatory duty to provide drainage service to areas
17 outside the San Luis Unit in order to remediate damage caused by
18 operation of the Unit.

19 Plaintiffs contend that a 1956 Department of the Interior
20 report entitled "San Luis Unit, Central Valley Project" ("1956
21 Feasibility Report"), which is incorporated by reference in the San
22 Luis Act, establishes an express directive to provide drainage to
23 areas outside the geographic boundaries of the Unit. (Doc. 817,
24 Plaintiffs' MSJ at 11-12). However, the San Luis Act mandates
25 provision of drainage service "designed to meet the drainage
26 requirements...as generally outlined in the [1956 Feasibility
27 Report]." 86 P.L. 488; 74 Stat. 156 (1960) (emphasis added). The
28 plain meaning of the word "generally" belies the notion that the

1 1956 Feasibility Report's various recommendations are tantamount to
2 express directives. The word "generally" means "in a general sense
3 or manner; in general terms; *without reference to individuals or*
4 *particulars*. Opposed to specially or particularly." Oxford English
5 Dictionary, Second Edition, <http://www.oed.com>, (last visited
6 September 26, 2011) (emphasis added); *accord* Marriam-Webster's
7 Dictionary, Eleventh Edition, <http://m-w.com>, (last accessed
8 September 26, 2011) ("a : in disregard of specific instances and
9 with regard to an overall picture <generally speaking> b : as a
10 rule : usually").

11 The San Luis Act's general reference to the 1956 Feasibility
12 Report is insufficient to transform everything discussed in the
13 Report into an express congressional directive for purposes of the
14 *Chevron* analysis. As the Ninth Circuit noted, Congress has granted
15 Federal Defendants broad discretion to meet its drainage obligations
16 under the San Luis Act. See *Firebaugh*, 203 F.3d at 578 (noting
17 that Congressional action subsequent to enactment of San Luis Act
18 has conferred substantial discretion on the Department of
19 Interior). As the Court of Appeal found that congressional action
20 abrogated the duty to provide the interceptor drain contemplated in
21 the 1956 Feasibility Report, the 1956 Feasibility Report cannot be
22 invoked to establish express directives for *Chevron* purposes under
23 the current embodiment of the San Luis Act. The *Chevron* analysis
24 proceeds to step two.

25 **2. Step Two: Federal Defendants' Construction**

26 The San Luis Act is comprised of the 1960 Act and the
27 subsequent appropriations riders amending the Act. The starting
28 point for determining whether Federal Defendants' construction of

1 the current embodiment of the San Luis Act is permissible is
2 interpretation of the original Act passed in 1960. *See Los Angeles*
3 *v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) ("When Congress modifies
4 a statute by an appropriations measure...the agency administering
5 the statute is required to effectuate the original statutory scheme
6 as much as possible"); *see also Firebaugh*, 203 F.3d at 577 (citing
7 *Adams*, 556 F.2d at 50 for the proposition that originally imposed
8 drainage duty under San Luis Act remains, subject to modifications
9 effected by appropriations riders).

10 **a. Duty Under the 1960 Enactment**

11 Congress provided express drainage directives when it passed
12 the San Luis Act in 1960. *See Firebaugh*, 203 F.3d at 574.
13 Section(1) (a) (2) of the San Luis Act "expresses a clear indication
14 that either the State of California or the Department of the
15 Interior shall provide a drainage plan prior to construction of the
16 San Luis Unit." *Id.* Section (1) (a) of the San Luis Act provides
17 in part:

18 Construction of the San Luis unit shall not be commenced
19 until the Secretary has...received satisfactory assurance
20 from the State of California that it will make provision
21 for a master drainage outlet and disposal channel for the
22 San Joaquine Valley, as generally outlined in the
23 California water plan, Bulletin Numbered 3, of the
24 California Department of Water Resources, which will
25 adequately serve, by connection therewith, the drainage
26 system for the San Luis unit **or** *has made provision for*
27 *constructing the San Luis interceptor drain to the delta*
28 *designed to meet the drainage requirements of the San*
Luis unit as generally outlined in the report of the
Department of the Interior, entitled "San Luis Unit,
Central Valley Project," dated December 17, 1956.

26 86 P.L. 488; 74 Stat. 156 (1960) (emphasis added). California
27 eliminated one of the two drainage options contemplated in the
28 section 1(a) (2) when it notified the Secretary that it would not

1 provide a master drain for the San Joaquin Valley. Accordingly,
2 when the Secretary decided to proceed with construction of the San
3 Luis Unit, it assumed a mandatory duty to provide the interceptor
4 drain. *Firebaugh*, 203 F.3d at 574. Ascertaining the nature of
5 Federal Defendants' original duty to provide the interceptor drain
6 under section 1(a)(2) is critical to determining the scope of
7 Federal Defendants' current duty, as subsequent Congressional
8 action replaced the duty to provide the interceptor drain with a
9 duty to provide comparable drainage through alternative means. See
10 *id.*

11 The plain language of the section 1(a)(2) does not suggest a
12 duty to provide drainage service to areas outside the San Luis Unit
13 via the interceptor drain. Section 1(a)(2) required the Secretary
14 to make "provision for constructing the San Luis interceptor drain
15 to the delta designed to meet *the drainage requirements of the San*
16 *Luis unit.*" 86 P.L. 488; 74 Stat. 156 (emphasis added). The
17 phrase "to meet the drainage requirements of the San Luis unit"
18 specifically describes the purpose of the interceptor drain
19 contemplated by Congress. The word "requirement" means "a thing
20 that is needed or wanted; a thing that is compulsory; a necessary
21 condition." Oxford English Dictionary, Second Edition,
22 <http://www.oed.com>, (last visited September 26, 2011); accord
23 Marriam-Webster's Dictionary, Eleventh Edition, <http://m-w.com>,
24 (last accessed September 26, 2011) (defining "requirement" as "a.
25 something wanted or needed; necessity; b. something essential to
26 the existence or occurrence of something else: condition").
27 Affording the word "requirements" its ordinary and plain meaning,
28 the phrase "drainage requirements of the San Luis Unit" means

1 drainage needs of the San Luis Unit; it does not mention, much less
2 require, that the interceptor drain be capable of providing
3 drainage to other areas or remediating harm caused by operation of
4 the Unit.

5 Plaintiffs argue that the clause "drainage requirements of the
6 San Luis unit" in section 1(a)(2) is qualified by the phrase "as
7 generally outlined in the report of the Department of the Interior,
8 entitled 'San Luis Unit, Central Valley Project,' dated December
9 17, 1956." 86 P.L. 488; 74 Stat. 156. Plaintiffs contend that
10 the 1956 Feasibility Report contemplated provision of drainage
11 outside the unit. Plaintiffs argue:

12 (a) Collection is required to prevent ". . . a general
13 drainage problem along the lower, or eastern, edge of the
14 service area and perhaps in a few isolated spots
elsewhere." . . . Project Feasibility Report, AR Doc. #815
at Bates 38800 (p. 22 of report).

15 (b) Rising water levels must be controlled by drains to
16 avoid serious drainage problems along the lower edge of
17 the service area. "Collection" and "interception" are
18 required to protect the areas not just within the San
Luis Unit but "along the lower edge of the service area."
Project Feasibility Report, at AR 815:38819

19 (c) Drainage will "lower the water table which otherwise
20 ultimately might stand in the root zone or on the surface
near the lower end of the service area.." Project
Feasibility Report, at AR 815:38821 (p. 39 of report).

21 (d) Drainage ". . . will remove water of poorer quality
22 and thus maintain an overall acceptable quality of
23 groundwater and soils." Project Feasibility Report, at AR
815:38846 (p. 60 of report). Uncontroverted Fact No. 9
(Report sections quoted in subparagraphs 2, 4 and 5).

24 (e) "Soils of the area which will be served by the San
25 Luis Unit contain salts which will be dissolved and
26 carried by the percolating water into the soils in the
lower parts of the service area." "The construction of a
27 drainage system will lower the groundwater table and
prevent the concentration of salts . . . it will be
28 necessary to provide facilities for disposing of these
waters." Project Feasibility Report, at AR 815:38846 (p.
60 of report).

1 (Doc. 819, Plaintiffs' MSJ at 11-12).

2 The language from the 1956 Feasibility Report relied on by
3 Plaintiffs does not support their position. First, the 1956
4 Feasibility Report clearly discusses the drainage needs entailed by
5 the San Luis Unit by reference to the federal service area's
6 geographical boundaries; i.e., the "lower, or eastern edge of the
7 service area." (Id., emphasis added). Second, the 1956
8 Feasibility Report's discussion of the "water table which otherwise
9 ultimately might stand in the root zone" must be understood in the
10 context of the primary purpose of the San Luis Act: irrigation of
11 the federal service area. (Id.). Third, the 1956 Feasibility
12 Report expressly references "soils of the [federal service area]."
13 (Id.). The 1956 Feasibility Report does not suggest that the
14 interceptor drain was intended to serve areas other than the
15 federal service area. The fact that the interceptor drain could
16 have provided incidental or secondary benefits to areas other than
17 the federal service area does not mean that the purpose of the
18 interceptor drain was to provide drainage to areas other than the
19 federal service area. Further, the 1956 Feasibility Report is
20 incorporated into the San Luis Act "generally" and thus cannot be
21 read to impose mandatory duties to perform each of the discrete
22 tasks discussed in the Report. Moreover, the duty to generally
23 implement the drainage contemplated by the 1956 Feasibility Report
24 was modified by congressional action subsequent to the passage of
25 the San Luis Act. *Firebaugh*, 203 F.3d at 577.

26 The duty imposed by section 1(a)(2) must be construed in the
27 context of its placement in the overall statutory scheme set forth
28 in the San Luis Act. See, e.g., *Brown & Williamson*, 529 U.S. at 133

1 (discussing need to evaluate statutory provisions in view of the
2 statute "as a whole" and in light of statute's "core objectives");
3 see also *Ass'n of Irrigated Residents*, 632 F.3d at 596 (same,
4 citing *Brown & Williamson*, 632 U.S. at 596)). The balance of
5 section 1(a) and section 5 of the San Luis Act support the
6 conclusion that section 1(a)(2) did not require the interceptor
7 drain to be capable of providing drainage to areas outside the San
8 Luis Unit.

9 Section 1(a) of the San Luis Act describes the "principal
10 engineering features of the San Luis Unit" as

11 a dam and reservoir at or near the San Luis site, a
12 forebay and afterbay, the San Luis Canal, the Pleasant
13 Valley Canal, and necessary pumping plants, distribution
14 systems, **drains**, channels, levees, flood works, and
15 related facilities.

16 86 P.L. 488; 74 Stat. 156. Congress intended for certain of the
17 San Luis Unit's principal engineering features to be "for joint use
18 with the State of California." 86 P.L. 488; 74 Stat. 156. Section
19 1(a) authorized, but did not require, the Secretary to construct
20 joint-use facilities "to the capacities necessary to serve both the
21 Federal San Luis unit service area and the State's service area."
22 *Id.* Critically, Congress did not designate the San Luis Unit's
23 "necessary drains" as joint-use facilities. See *id.*

24 Section 1(a) limits joint-use facilities to "the dam and
25 reservoir at or near the San Luis site, forebay and afterbay,
26 pumping plants, and the San Luis Canal." *Id.* The fact that
27 Congress did not designate the "necessary drains" required by
28 section 1(a) as joint-use facilities reveals that Congress did not
intend to require the "necessary drains" discussed in section 1(a)

1 to provide drainage service to areas outside the San Luis Unit.
2 Section 1(a) did not require joint-use facilities to be constructed
3 with capacities necessary to serve areas other than the federal
4 service area. *A fortiori*, Congress did not intend to require
5 section 1(a)'s "necessary drains," which were not designated as
6 joint-use facilities, to be designed to do more than provide
7 drainage for the federal service area.

8 Section 1(a) also demonstrates that when Congress contemplates
9 creating infrastructure designed to serve areas outside the San
10 Luis Unit, it knows how to say and do so. It would be anomalous to
11 interpret the phrase "drainage requirements of the San Luis Unit"
12 in section 1(a)(2) as having a broader scope and meaning than the
13 "necessary drains" required by section 1(a), particularly in light
14 of the Ninth Circuit's holding that the term "necessary...drains"
15 in section 1(a) encompasses the interceptor drain. *Firebaugh*, 203
16 F.3d at 574. A court must interpret a statute "as a symmetrical
17 and coherent regulatory scheme," and "fit, if possible, all parts
18 into an harmonious whole." *E.g., Brown & Williamson*, 529 U.S. at
19 133.

20 Section 5 of the San Luis Act reenforces the conclusion that
21 the original drainage duty imposed by section 1(a)(2) was limited
22 to the federal service area. Section 5 of the San Luis Act
23 contemplates that operation of the San Luis Unit could increase
24 drainage requirements in the general area surrounding the Unit
25 notwithstanding provision for the interceptor drain. Section 5
26 provides, in pertinent part:

27 In constructing, operating, and maintaining a drainage
28 system for the San Luis unit, the Secretary is ...
authorized to enter into agreements and participate in

1 construction and operation of drainage facilities
2 designed to serve the general area of which the lands to
3 be served by the San Luis unit are a part, to the extent
the works authorized in section 1 of this Act contribute
to drainage requirements of said area.

4 86 P.L. 488; 74 Stat. 156. In contrast to the duty under section
5 1(a)(2) to provide an interceptor drain "designed to meet the
6 drainage requirements of the San Luis Unit," section 5 discusses
7 drainage "designed to serve *the general area* of which the lands to
8 be served by the San Luis unit are a part." *Id.* (emphasis added).
9 Section 5 reveals that Congress did not intend for the interceptor
10 drain to "serve the general area" surrounding the San Luis Unit.
11 *See, e.g., KP Permanent Make-Up, Inc. v. Lasting Impression I,*
12 *Inc.,* 543 U.S. 111, 118 (2004) (applying presumption that "if
13 Congress includes particular language in one section of a statute
14 but omits it in another, Congress acted intentionally in that
15 exclusion"). Juxtaposition of section 1(a)(2) with section 5
16 establishes that Congress clearly drew a distinction between a
17 drainage system designed to meet the requirements of the San Luis
18 Unit (originally, the interceptor drain) and a drainage system
19 designed to alleviate increased drainage requirements of the
20 general area caused by operation of the San Luis Unit. The
21 permissive language of section 5 defeats the interpretation that
22 the San Luis Act, as enacted in 1960, imposed a mandatory duty to
23 provide drainage to areas outside the San Luis Unit or to remediate
24 adverse effects outside the Unit's boundaries caused by operation
25 of the Unit.³

26
27 ³ It is clear that at the time section 1(a)(2) was passed in 1960, Congress did
28 not contemplate operation of the Unit for decades without provision of the
interceptor drain. To the Contrary, Congress commanded that if the interceptor
drain was not provided, the Unit could not be constructed.

1 **b. Duty After Amendment of the San Luis Act**

2 After construction of the San Luis Unit commenced, Congress
3 abrogated its specific command to provide the interceptor drain
4 through a series of enactments that authorized the Secretary to
5 pursue "other, non interceptor drain, solutions to the drainage
6 duty created by the San Luis Act." *Firebaugh*, 203 F.3d at 578. In
7 1965, Congress began including language in the Department of the
8 Interior's annual appropriations acts that prohibited the Secretary
9 from completing the interceptor drain until formulation of a plan
10 with the State of California "to minimize the detrimental effect of
11 the San Luis Drainage waters." *Id.* at 574-75 (quoting Pub. L. No.
12 105-62, § 510(a), 111 Stat. 1320, 1340 (1997)).⁴ In the late
13 1970s, Congress began appropriating funds to enable the Bureau of
14 Reclamation to examine alternate drainage solutions in cooperation
15 with the State, local water districts, and other entities. *Id.* at
16 577 (citing "Reclamation Wastewater and Groundwater Study and
17 Facilities Act of 1992", Pub. L. No. 102-575, §§ 1601-1617, 106
18 Stat. 4600, 4663 (1992) (enacting 43 U.S.C. §§ 390h to 390h-15
19 (West Supp. 1997); "Central Valley Project Improvement Act", *id.* at
20 §§ 3401-3411, 106 Stat. 4600, 4706)). Congress's actions
21 "supplement[ed] the drainage solutions available to the Department
22 of the Interior," supplanting the San Luis Act's original specific
23 command to provide the interceptor drain with a new and different

24
25 ⁴ "None of the funds appropriated or otherwise made available by this Act may be
26 used to determine the final point of discharge for the interceptor drain for the
27 San Luis Unit until development by the Secretary of the Interior and the State
28 of California of a plan, which shall conform with the water quality standards of
the State of California as approved by the Administrator of the Environmental
Protection Agency, to minimize any detrimental effect of the San Luis drainage
waters." Pub. L. No. 105-62, § 510(a), 111 Stat. 1320, 1340 (1997).

1 command directing the Secretary to exercise discretion to "creat[e]
2 and implement[] a drainage solution for the San Luis Unit."
3 *Firebaugh*, 203 F.3d at 577.

4 Congress's amendments to the San Luis Act granted the
5 Secretary "broad discretion" to craft a drainage solution to meet
6 its duty to provide drainage under the San Luis Act. *See id.* The
7 Secretary's discretion is constrained, however, by the
8 Congressional intent underlying the original command to provide the
9 interceptor drain-to furnish a drainage solution "designed to meet
10 the requirements of the San Luis Unit."⁵ *See, e.g., Adams*, 556
11 F.2d at 50 ("When Congress modifies a statute by an appropriations
12 measure...the agency administering the statute is required to
13 effectuate the original statutory scheme as much as possible"); *see*
14 *also Firebaugh*, 203 F.3d at 577 (citing *Adams*, 556 F.2d at 50 for
15 the proposition that originally imposed drainage duty under San
16 Luis Act remained, subject to modifications effected by
17 appropriations riders). The Secretary's discretion is further
18 constrained by Congress's "clear and manifest intention" that the
19 Secretary "develop a plan that addresses the environmental problems
20 posed by the discharge of agricultural effluent." *Firebaugh*, 203
21 F.3d at 575.

22 Despite the limits on the Secretary's discretion that can be
23 gleaned from language of the appropriations riders, it cannot be
24 said that the San Luis Act as amended by the appropriations riders
25 clearly requires provision of drainage service to areas outside the
26

27 ⁵ "Drainage requirements of the San Luis Unit" is not a static concept. The
28 amount of drainage required is necessarily linked to the amount of irrigation
provided to the San Luis Unit.

1 San Luis Unit or remediation of damage caused by the Unit's
2 operation for over four decades without necessary drainage.

3 **c. Permissibility of the Secretary's Interpretation**

4 An agency's interpretation of a statute is permissible unless
5 it is "arbitrary, capricious, or manifestly contrary to the
6 statute." *E.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d
7 946, 954 (9th Cir. 2009) (citing *Chevron*). Here, Federal
8 Defendants' interpretation of the San Luis Act is permissible, as
9 it is based on analysis of the statute's plain language and the
10 purpose of the statutory scheme the San Luis Act embodies. Federal
11 Defendants acknowledge that the San Luis Act imposes a mandatory
12 duty to provide necessary drainage to the San Luis Unit, and their
13 interpretation of the contours and limits of this duty is based on
14 permissible statutory construction.

15 Federal Defendants have interpreted the San Luis Act as
16 imposing no mandatory duty to provide drainage service outside the
17 Unit or to remediate damage caused by past operations of the Unit;
18 this interpretation is reasonable, lawful, and entitled to
19 deference under *Chevron*. Whether Federal Defendants are currently
20 complying with the duty they have permissibly construed presents a
21 separate question.

22 **C. Review Under the Administrative Procedures Act**

23 The Administrative Procedures Act ("APA") authorizes suit by
24 "[a] person suffering legal wrong because of agency action, or
25 adversely affected or aggrieved by agency action within the meaning
26 of a relevant statute." 5 U.S.C. § 702. Pursuant to section 706
27 of the APA, a court is authorized to

- 28 (1) compel agency action unlawfully withheld or

1 unreasonably delayed; and
2 (2) hold unlawful and set aside agency action, findings,
and conclusions found to be
3 (A) arbitrary, capricious, an abuse of discretion,
or otherwise not in accordance with law"
4 Id. § 706.
(B) contrary to constitutional right, power,
5 privilege, or immunity;
(C) in excess of statutory jurisdiction, authority,
6 or limitations, or short of statutory right;
(D) without observance of procedure required by law;
7 (E) unsupported by substantial evidence in a case
subject to sections 556 and 557 of this title [5
8 USCS §§ 556 and 557] or otherwise reviewed on the
record of an agency hearing provided by statute; or
9 (F) unwarranted by the facts to the extent that
the facts are subject to trial de novo by the
10 reviewing court.

11 5 U.S.C. § 706.

12 **1. 706(2) Claim**

13 The parties dispute whether a claim under section 706(2)
14 survived the pleading phase of this action. A November 19, 2004,
15 Memorandum Decision held that "the [Fifth Amended Complaint]
16 clearly puts the Federal Defendants on notice that Plaintiffs are
17 invoking 706(1), *the only plausible basis for their claim.*" *Sumner*
18 *Peck Ranch, Inc. et al., v. Department of Interior, et al.*, 1:91-
19 cv-00048-OWW-DLB, Doc. 948. As noted in the 2004 Memorandum
20 Decision, the Fifth Amended Complaint does not provide fair notice
21 of any claim under section 706(2). Although the Fifth Amended
22 Complaint alleges that Federal Defendants actions are "arbitrary,
23 capricious, and contrary to law," the gravamen of the APA claim
24 advanced in the Fifth Amended Complaint is that Federal Defendants
25 are unlawfully withholding discrete agency action required by law;
26 this type of claim invokes section 706(1), not 706(2). See *Ass'n*
27 *of Civilian Technicians, Inc. v. United States*, 601 F. Supp. 2d
28 146, 166 (D. D.C. 2009) ("While section 706(1) of the APA permits

1 a court to compel agency action unlawfully withheld, section 706(2)
2 by contrast authorizes a reviewing court to "hold unlawful and set
3 aside agency action, findings, and conclusions found to be . . .
4 arbitrary, capricious, an abuse of discretion, or otherwise not in
5 accordance with law."); compare *Hells Canyon Preservation Counsel*
6 *v. United States Forest Service*, 593 F.3d 923, 933 (9th Cir. 2010)
7 (noting that claim seeking to compel Forest Service to re-define
8 boundary description was better phrased as a section 706(2) claim
9 than a 706(1) claim, as Forest Service had already acted to define
10 boundary) with *Firebaugh*, 203 F.3d at 577 (holding that Plaintiffs'
11 claim that Federal Defendants were failing to provide drainage
12 required by San Luis Act was redressable under section 706(1) as
13 action "unreasonably delayed").

14 Even if the Fifth Amended Complaint is sufficient to state a
15 section 706(2) claim, since 2004, the parties have proceeded to
16 litigate this action under the assumption that only a section
17 706(1) claim remains at issue in this case. As recently as
18 September 2010, a Memorandum Decision Re: Plaintiffs' Motion to
19 Supplement the Administrative Record held:

20 The *sole remaining claim* against Federal Defendants in
21 this case concerns the Bureau of Reclamation's
22 ("Reclamation" or the "Bureau") alleged failure to
23 provide drainage service to the San Luis Unit pursuant to
24 Section 1(a) of the San Luis Act. See 1:91-cv-0048 OWW
25 DLB, Nov. 19, 2004 Mem. Dec. ("11/19/04 Decision") at 25,
26 28-29, 36, 42. This claim arises under Section 706(1) of
27 the Administrative Procedure Act ("APA"), 5 USC § 706(1),
28 which permits a reviewing court to "compel agency action
unlawfully withheld or unreasonably delayed.

(Doc. 806 at 2). The 2010 Memorandum Decision also recognized
that "it is undisputed that only an APA Section 706(1) claim
remains in this case." (Id. at 6). Plaintiffs did not express an

1 objection to this finding. Plaintiffs' belated attempt to reinvent
2 a section 706(2) claim is foreclosed.

3 Assuming *arguendo* that Plaintiffs had a viable claim under
4 section 706(2), Defendants are entitled to summary judgment on the
5 claim Plaintiffs' have articulated. Plaintiffs' motion for summary
6 judgment clarifies that any 706(2) claim is based on their
7 contention that "Federal Defendants refusal to accept that the duty
8 included in section 1(a)(2) of the San Luis Act includes the duty
9 to intercept, collect, dispose of, and control San Luis Drainage
10 waters once those waters escape the Unit...may be set aside as
11 arbitrary and capricious under Section 706(2)(a)." (Doc. 819,
12 Plaintiff's MSJ at 41). Plaintiffs argue that

13 any interpretation of the San Luis Act, or implementation
14 of a drainage system that does not provide for the United
15 State's responsibility for each of the elements of
16 collection, inteception, disposal, and control of
17 downslope migration of water and the effects of pressure
18 transmitted downslope due to a lack of drainage of the
19 San Luis Unit lands, for the past 40 years while
irrigation of the San Luis Unit lands with CVP water
occurred, and subsequent harm to the surrounding
environment, must be set aside as arbitrary, capricious,
an abuse of discretion or otherwise not in accordance
with the law.

20 (Doc. 819, Plaintiffs' MSJ at 43). Plaintiffs' challenge as to
21 Federal Defendants statutory construction of the San Luis Act has
22 been decided against Plaintiffs. No mandatory drainage or other
23 remedial duty to Plaintiffs exists under the San Luis Act.

24 Plaintiffs' attempt to establish a claim under section 706(2)
25 based on Federal Defendants' interpretation of the San Luis Act
26 fails, as the Secretary's interpretation is permissible for all the
27 reasons stated above.

28 ///

1 **2. Section 706(1) Claim**

2 The APA provides relief for a failure to act in section
3 706(1). *E.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55,
4 62 (2004) ("SUWA"). The only agency action that can be compelled
5 under the APA is action legally required. *Id.* A failure to act
6 claim under § 706(1) can succeed only where a plaintiff asserts
7 that an agency failed to take a discrete agency action that it is
8 legally required to take. *Id.* at 64.

9 **a. Scope of Plaintiffs' Remaining section 706(1) Claim**

10 Pursuant to the November 19, 2004 Memorandum Decision Re:
11 Motion to Dismiss the Fifth Amended Complaint and the 2010
12 Memorandum Decision Re: Expansion of the Administrative Record,
13 Plaintiffs may not challenge the form and substance of the drainage
14 solution Federal Defendants have adopted:

15 Plaintiffs' 706(1) claim regarding the drainage
16 obligation was distinguished from SUWA because:

17 Here, Congress has given a statutory command to
18 provide a drainage solution for the San Luis
19 Unit. The Ninth Circuit has determined there has
20 been a failure by the Federal Defendants to
21 provide such a solution. Plaintiffs do not
22 challenge the form of the drainage solution, a
23 challenge that might be precluded under SUWA,
24 but rather that Federal Defendants have failed
25 to provide any drainage solution. Plaintiffs §
26 706 unreasonable delay claim is not barred by
27 the final agency action doctrine.

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

29 To the extent Plaintiffs offer these [] documents to
prove that the drainage solution the Bureau plans to
implement will not prevent impaired groundwater from
migrating under their downslope lands, their challenge is
to the form of the drainage solution, a use expressly
disclaimed by the 11/19/04 Decision.

(Doc. 806 at 8-9).

1 Much of the injunctive relief sought in the Fifth Amended
2 complaint is foreclosed by the limits imposed under section 706(1)
3 and the Supreme Court's holding in *SUWA*. 542 U.S. at 62. The
4 Fifth Amended Complaint seeks imposition of an order requiring:

5 that Federal Defendants manage and/or require the
6 management of the San Luis Unit as follows:

7 a) by determining and measuring the amounts of
8 water moving into the downslope areas;

9 b) by immediately implementing plans to stop
10 migration of groundwater...from the San Luis
11 Unit...across the Firebaugh boundary. Such plans
12 include, but are not limited to

13 (1) regional and field level management
14 practices

15 (2) installation of perimeter drains to
16 intercept the drainage flow;

17 (3) installation of shallow wells...

18 (4) redistribution of available drainage
19 loading capacities...

20 (5) compensation for costs of [Plaintiffs] to
21 handle drainage...

22 (c) by...providing for [] measures and payments

23 *Sumner Peck Ranch, Inc. et al., v. Department of Interior, et al.*,
24 1:91-cv-00048-OWW-DLB, Doc. 930. Plaintiffs also seek to require
25 the Secretary "to provide drainage service at no cost to the
26 general area of the lands to be served by the San Luis Act."
27 (Id.).

28 A court is not authorized under section 706(1) to micro-manage
Federal Defendants' performance of their duties under the San Luis
Act under section 706(1). Rather, the court's power is limited to
ordering Federal Defendants to perform a discrete duty required by
law. *E.g., SUWA*, 542 U.S. at 62. The court may order the
Secretary to provide drainage required by the San Luis Act, but may
not prescribe how. *Firebaugh*, 203 F.3d at 578. The San Luis Act
is mandatory as to the drainage objective to be achieved, but
leaves to the Secretary substantial discretion in deciding how to

1 achieve it. *Id.*

2 The one viable claim for injunctive relief requested in the
3 Fifth Amended Complaint is Plaintiffs' request for general relief
4 requiring the Secretary to comply with its drainage duties under
5 the San Luis Act. As the 2004 Memorandum Decision Re: Motion to
6 Dismiss the Fifth Amended Complaint recognized, "[Plaintiffs]
7 request general relief, i.e., a drainage solution and relief from
8 delay. [The Fifth Amended Complaint's] many prayers for specific
9 relief....cannot stand under...the APA." *Sumner Peck Ranch, Inc.*
10 *et al., v. Department of Interior, et al., 1:91-cv-00048-OWW-DLB,*
11 *Doc. 948.* Whether Plaintiffs are entitled to summary judgment on
12 their claim for general injunctive relief turns on whether Federal
13 Defendants are currently performing their duty to provide drainage
14 under the Act.

15 **b. Plaintiffs' Unreasonable Delay Claim**

16 Plaintiffs seeks summary judgment that Federal Defendants are
17 unreasonably delaying drainage service in violation of section
18 706(1). Plaintiffs also contend that Federal Defendants are
19 subject to contempt proceedings for failing to comply with the
20 court's modified judgment requiring provision of drainage service
21 to the Unite. Federal Defendants contend they are complying with
22 the 2007 ROD, the Control Schedule, and the court's orders to the
23 extent of their authority and appropriations.

24 The last status report filed by Federal Defendants was
25 submitted on April 1, 2011. The report details various measures
26 undertaken and performed by the Federal Defendants to provide
27 drainage to the San Luis Unit. *Inter alia,* the April 2011 Status
28 Report provides that Federal Defendants are complying with the

1 Control Schedule for the 2007 ROD submitted to the court in 2009,
2 including taking the requisite steps necessary to construct a
3 demonstration treatment plant located in the Panoche Drainage
4 District to collect data needed for the final design of the reverse
5 osmosis and selenium bio-treatment components of the drainage
6 service to be constructed in the San Luis Unit.

7 Federal Defendants have also requested Congressional
8 appropriations in the amount of \$14,250,000 to continue
9 implementation of actions identified in the Control Schedule for th
10 2012 fiscal year; continued the process for securing a repayment
11 contract with Westlands for the recovery of costs of construction
12 of drainage facilities in Westlands; continued to support, through
13 grants, cooperative agreements, and other means, drainage projects
14 requested by districts in the San Luis Unit; and continued to
15 implement the December 2009 Agreement For Continued Use of the San
16 Luis Drain that will allow the Grassland Bypass Project to continue
17 through December 2019.

18 The "broad discretion" Federal Defendants have been granted to
19 "[create] and [implement] a drainage solution for the San Luis
20 Unit," *Firebaugh*, 203 F.3d at 577, and the various drainage
21 solutions Federal Defendants are undeniably pursuing at this time,
22 do not at present amount to "unreasonably delaying" discrete action
23 required by law within the meaning of section 706(1).
24 "Unreasonable delay" is a relative concept. In *Firebaugh*, the
25 Ninth Circuit recognized that Congress imbued Federal Defendants
26 with "broad authority to "create" a drainage solution; the
27 necessary implication of this holding is that Federal Defendants
28 are to be given sufficient time to exercise reasonable discretion

1 to create a viable drainage solution. The Department issued its
2 ROD in 2007, its Feasibility Report in 2008, and its Control
3 Schedule for implementing the drainage solutions identified in
4 2009; that a drainage system was not yet in place at the time
5 Plaintiffs' filed their motion for summary judgment in October 2010
6 does not, under the totality of circumstances, constitute
7 unreasonable delay in the context of this case. It is undisputed
8 that the Department is complying with the Control Schedule, more
9 than ten years after final judgment was entered in the Court of
10 Appeal and fourteen years after final judgment in the trial court.

11 Over a decade has passed since the Ninth Circuit's decision in
12 *Firebaugh*. In 2011, Federal Defendants continue to move at a
13 "snail's pace." The extent of their commitment to provide
14 necessary drainage to the San Luis Unit can be questioned, but
15 Federal Defendants' conduct does not at present constitute
16 unreasonable delay as a matter of law. Federal Defendants are
17 frustratingly slow, but "general deficiencies in compliance, unlike
18 the failure to issue a ruling . . . lack the specificity requisite
19 for agency action." *SUWA*, 542 U.S. at 66. Plaintiffs are
20 legitimately frustrated, as is the court, with Federal Defendants'
21 slow progress in implementing measures to comply with their
22 statutory responsibility to provide drainage. Nevertheless, an ROD
23 has been completed and Federal Defendants are complying with the
24 Control Schedule.

25 Plaintiffs are not entitled to summary judgment on their
26 section 706(1) claim, as Federal Defendants are acting to provide
27 the drainage solutions identified in the ROD. Plaintiffs contempt
28 argument is clearly foreclosed because the court's December 23,

1 2009 order directs Federal Defendants to "perform their
2 undertakings to the Court, as presented in Part I of the Parties'
3 Supplemental Status Report (Doc. 752) including the Control
4 Schedule," and it is undisputed that Federal Defendants are
5 complying with the Control Schedule.

6 Plaintiffs are not entitled to a trial "to determine the
7 quantities of drainage waters and contaminants originating from
8 irrigation within the San Luis Unit that have entered Plaintiffs'
9 service areas," because Federal Defendants have no mandatory duty
10 to remediate any such drainage water or contaminants under the San
11 Luis Act. The situation Plaintiffs face is regrettable, but not
12 one that is remediable under the APA. The San Luis Act is not a
13 remediation statute. Plaintiffs' remedy lies with the legislature.

14 **b. District Defendants Opposition**

15 District Defendants oppose Federal Defendants cross-motion for
16 summary judgment on the following basis:

17 The Federal Defendants have cross-moved in part seeking
18 summary judgment that the "United States has not acted
19 arbitrarily and capriciously, and has acted in accordance
20 with the law, in providing for the installation,
21 operation and maintenance of drainage service facilities
22 in the San Luis Unit of the Central Valley Project,
23 including the Northerly Area and the northern sub-area of
24 Westlands Water District, as set forth in the 2007 San
25 Luis Drainage Feature Reevaluation Record of Decision
26 ["2007 ROD"], the 2009 Record of Decision approving a new
27 Use Agreement for the San Luis Drain and extension for
28 the Grasslands Bypass Project, and in Assistance
Agreements with the Panoche Drainage District." (Federal
Defendants' Notice of Cross-Motion and Cross-Motion for
Summary Judgment, Doc. 826, at 3:3-10.) The District
Defendants oppose this portion of the Federal Defendants'
cross-motion for summary judgment because it is beyond
the scope of the issues framed by the Firebaugh
Plaintiffs' operative complaint, and because the
arguments in support appear to be directed towards the
Plaintiffs' premature request for a hearing on an order
to show cause. This summary judgment stage is limited to
the legal question of whether the Federal Defendants'

1 duty to construct a drainage system extends to the
2 Plaintiffs' lands, and should not address whether the
3 Federal Defendants are complying with the Court's 2000
4 Drainage Order.

5 (District Def's Opp., Doc. 848 at 2). District Defendants contend
6 that the issues entailed by the parties cross-motions are frozen in
7 time, specifically, in the year 2004:

8 The Plaintiffs' Fifth Amended Complaint was filed June 1,
9 2004. Thus, the issue framed by the operative pleadings
10 is whether, as of June 1, 2004, the Federal Defendants
11 have fulfilled their drainage obligation to the lands
12 within the San Luis Unit, and to surrounding lands if the
13 Court finds that the drainage obligation extends beyond
14 the lands within the San Luis Unit.

15 (Id. at 2). District Defendants argument is erroneous, as
16 Plaintiffs' only cognizable claim is that Federal Defendants are
17 currently withholding discrete action lawfully required by the San
18 Luis Act; this claim necessarily puts at issue whether Federal
19 Defendants are currently complying with their duties under the San
20 Luis Act.

21 **c. Federal Defendants Motion**

22 Federal Defendants move for an order granting them summary
23 judgment on Plaintiffs' APA claims. (Doc. 826, Federal Defendants'
24 MSJ at 2). Federal Defendants' cross-motion is GRANTED as to
25 Plaintiffs' 706(2) claim. Summary judgment is GRANTED on Federal
26 Defendant's cross-motion regarding the section 706(1) claim,
27 without prejudice to a renewed claim based on future circumstances.

28 **d. District Defendants' Motion**

District Defendants' cross-motion is GRANTED as to Plaintiffs'
706(2) claim. Summary judgment is GRANTED on Federal Defendant's
cross-motion regarding the section 706(1) claim, without prejudice

1 to a renewed claim based on future circumstances.

2 **CONCLUSION**

3 Federal and District Defendants' motions for summary judgment
4 on Plaintiffs' claim under section 706(2) are GRANTED. Plaintiffs'
5 motion for summary judgment on their section 706(1) claim is DENIED
6 without prejudice; Federal and District Defendants' cross-motions
7 are GRANTED without prejudice to a renewed claim based on future
8 circumstances. This memorandum decision shall not serve as
9 precedent for the proposition that a duty to provide drainage
10 sufficient to protect Plaintiffs' lands exists under the San Luis
11 Act.

12 IT IS SO ORDERED.

13 **Dated: September 30, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE