FRIENDS OF THE RIVER
1418 20TH STREET, SUITE 100, SACRAMENTO, CA 95811
916/442-3155 • FAX: 916/442-3396 •
WWW.FRIENDSOFTHERIVER.ORG

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Stephen M. Macfarlane, Senior Attorney — Via mail and email
Environment and Natural Resources Division
U.S. Department of Justice
501 I Street, Suite 9-700
Sacramento, CA 95814
Stephen.Macfarlane@usdoj.gov

Shelly V. Randel, Attorney-Advisor — Via email
Office of the Solicitor
Department of the Interior
Washington, D.C.
shelly.randel@sol.doi.gov

Amy L. Aufdemberge, Assistant Regional Solicitor — Via email
Pacific West Region
Department of the Interior
Sacramento, CA
jstruebing@mp.usbr.gov

Re: URGENT: Draft Proposed Settlement terms in *Firebaugh Canal Water District and Central California Irrigation District v. United States of America and Westlands Water District* CV-F-88-634-LJO/DLB and CV-F-91-048-LJO/DLB Violate Civil Laws of the United States

Dear Mr. Macfarlane, Ms. Randel and Ms. Aufdemberge:

This organization, Friends of the River, is devoted to protecting and restoring California rivers. We submit this letter to you as a matter of extreme urgency to prevent violation of the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and other federal laws if the draft proposed settlement of the above action is concluded prior to compliance with these laws.

We are informed and believe that the United States government has been negotiating the proposed settlement in secret-- with a public water district-- instead of identifying and evaluating the critical drainage, selenium, and other environmental issues in public NEPA and ESA processes. This process is in violation of these environmental laws that require public environmental impact analysis and consideration of a range of reasonable alternatives *before* rather than *after* government action. "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." NEPA Regulations, 40 C.F.R. § 1500.1(b). NEPA is an "environmental full

disclosure law." *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir. 1973). "An agency must use its best efforts to find out all that it reasonably can" about the subject and its environmental impacts. *Barnes v. U.S. Dept. of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011).

The Ninth Circuit has held in *Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1111 (9th Cir. 2010), that:

> The Attorney General lacks the power 'to agree to settlement terms that would violate the civil laws governing the agency,' *United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008) (quoting *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761 (4th Cir. 1993)), so the Utah settlement is only valid if it comports with the FLPMA, NEPA, and other relevant law.

We are aware of a document entitled "Principles of Agreement for a Proposed Settlement between the United States and Westlands Water District regarding Drainage" (Draft December 6, 2013). We are also aware of Federal Defendants' Status Report of April 1, 2015 filed in the above action (Document 1000). In that document, the government stated among other things that "negotiators for the United States and Westlands have completed work on a draft proposed settlement agreement, including technical appendices, and that this draft proposed settlement agreement is now under review at the Department of Justice." (Doc. 1000 at p. 3:17-19). The draft settlement agreement, however, has not been made available for public review.

We believe that pursuant to the negotiations the water supply to Westlands would be permanent and also arbitrarily receive a much higher water delivery priority. The terms of the proposed settlement need to be disclosed and evaluated in a public NEPA process *prior to approval*. *Prior to being agreed to*, the settlement terms must be subject to environmental, scoping, and alternatives analysis under NEPA and the ESA. We believe that scientists and federal agencies, including the U.S. Geological Survey and the U.S. Fish and Wildlife Service, have previously concluded that the best solution to the drainage problem would be to retire 300,000 to about 400,000 acres in the western San Joaquin Valley from irrigation. Instead, the government's negotiations with Westlands appear headed toward producing the worst possible environmental outcome of continuing to irrigate lands producing enormous amounts of salt and selenium while allowing Westlands growers to establish in effect a permanent water supply for sale, as opposed to reducing exports as lands are and should be retired from irrigation.

It is time to have the proposed settlement fully evaluated in the public environmental, endangered species, critical habitat and water quality evaluation processes required by NEPA, the ESA and the Clean Water Act. In light of the current extreme drought further endangering fish and water supply and requiring sacrifices by millions of Californians, crafting a dream deal for Westlands in secret while ignoring public NEPA and ESA processes is beyond incomprehensible.

A brief summary of additional violations of laws of the United States likely carried out by the proposed settlement terms include:

The continued authorization of water supply to poisoned lands within Westlands that are unsuitable for irrigation, suggested to be permanently retired from irrigation by other federal agencies and in some cases already retired, would be contrary to Reclamation laws and regulations going back to the beginning of the 20th century.

The settlement would provide for a substantial increase in future exports from the Delta watershed by the Central Valley Project (CVP) and Westlands in conflict with California state law established by the Delta Reform Act calling for reduced reliance on the Delta. In addition to requiring NEPA and ESA compliance this appears to violate the Reclamation Act of 1992 (CVPIA).

Violation of NEPA, the ESA and the CVPIA by approving key terms of the next Westlands contract including contract total amount before environmental review.

Agreement to issue a new long-term CVP contract with respect to the San Luis Unit, contrary to the CVPIA.

Waiving acreage limits for Westlands contrary to Reclamation Acts including 1902 and 1982.

Waiving tiered pricing for Westlands contrary to the Reclamation Act of 1992.

Waiving Westlands' capital repayment obligations contrary to the Reclamation Acts including 1939, and 1982.

We are informed and believe that the proposed settlement terms would cause numerous adverse environmental impacts and adverse cumulative impacts requiring preparation of an Environmental Impact Statement (EIS) under NEPA, as well as adverse impacts on listed species and designated critical habitats requiring preparation of a biological assessment by the Bureau and consultations with the National Marine Fisheries Service and U.S. Fish and Wildlife Service under the ESA.

You are hereby requested to immediately transmit a copy of this letter to the persons reviewing the proposed settlement agreement at the Department of Justice. You are also hereby requested to immediately transmit a copy of this letter to the responsible officials for the settlement agreement and negotiations at the Bureau of Reclamation and the Department of the Interior along with concerned officers and employees of the National Marine Fisheries Service and U.S. Environmental Protection Agency.

Our purpose here is to ensure that all persons involved with approving or reviewing the proposed settlement at the Department of Justice, Department of the Interior, other concerned federal agencies and also the Court are aware of the Ninth Circuit holding in *Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1111 (9th Cir. 2010) set forth at the beginning of this letter, that:

> The Attorney General lacks the power 'to agree to settlement terms that would violate the civil laws governing the agency,' *United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008) (quoting *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761 (4th Cir. 1993)), so the Utah settlement is only valid if it comports with the FLPMA, NEPA, and other relevant law.[i]

It is only possible to determine if the proposed settlement comports with NEPA by carrying out the NEPA process before agreeing to the settlement. Please feel free to contact me to discuss this situation or with any questions you may have at (916) 442-3155 ext. 207 or at bwright@friendsoftheriver.org .

Sincerely,

/s/ E. Robert Wright
Senior Counsel
Friends of the River

[i] The Ninth Circuit said in *United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008), that: "Our conclusion is in line with a decision of the Fourth Circuit in a similar context. Relying on this Court's opinion in *Guadamuz* [*v. Bowen*, 859 F.2d 762, 767 (9th Cir. 1988)] the Fourth Circuit held, in *Executive Business Media, Inc. v. U.S. Department of Defense*, 3 F.3d 759, 761 (4th Cir.1993), that the Attorney General's decision to settle a contract case was judicially reviewable where the claim alleged that the settlement 'fail[ed] to comply with competitive bidding procedures.' Acknowledging the Attorney General's plenary power over litigation to which the federal government is a party, the Fourth Circuit nevertheless explained that 'plenary power means absolute authority to pursue legitimate objectives and does not include license to agree to settlement terms that would violate the civil laws governing the agency.' *Id.* at 762. We find the Fourth Circuit's reasoning persuasive in this case. We agree with its statement that, '[w]e think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality.' *Id.* at 762. We adopt the reasoning of the Fourth Circuit in *Executive Business.*"