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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

In Reply
Refer To: B-199162

February 18, 1981

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The Honorable George Miller
House of Representatives

Dear Mr. Miller:

In your recent letter addressed to the Director of our Community and Economic Development Division you asked several questions regarding the delivery of water by the ~~Water and Power Resources Service (Service)~~ to the Westlands Water District, California (Westlands). As agreed, this will respond to your last question which raises legal issues independent from your other questions.

In your letter you stated your understanding that water deliveries are prohibited to lands on which construction has occurred and for which a valid repayment contract has not been entered into. As indicated in our Director's response, while there have been negotiations for a revised repayment contract between Westlands and the Service, a revised contract has not been approved, and is therefore not yet in effect. Your question is as follows:

"(4) Is it your view that, absent a valid repayment contract, and reauthorization of the enlarged service area by the Congress, sufficient authority exists under current law for the Secretary to make water deliveries to lands on which there is no valid repayment contract?"

"Is it your view that the Department of the Interior at present is complying with the provisions of law concerning the conditioning of water deliveries on the existence of a valid repayment contract?"

For the reasons stated below, it is our opinion that in the described circumstances the Secretary of the Interior does not presently have the authority to provide a firm supply of water to Westlands notwithstanding the provisions in the current temporary water service contract with the district.

B/5615

(The San Luis Act, Public Law No. 86-488, 74 Stat. 156, approved June 3, 1960, authorized the construction of the San Luis Unit of the Central Valley Project. Section 8 of the Act authorized appropriations to a maximum of \$192,650,000 for the construction of distribution systems and drains. It further required a contract "for complete repayment" between the United States and the appropriate water user organization.)

The 1965 Distribution and Drainage Systems Contract between Westlands and the United States, which provided for repayment of construction costs in an amount not to exceed \$157,048,000, was entered into under the authority of section 9(d) of the Reclamation Project Act of 1939, 53 Stat. 1187, 1195, 43 U.S.C. § 485 h(d) (1976). This provision states:

"No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization * * * has entered into a repayment contract with the United States, in a form satisfactory to the Secretary [of the Interior] providing * * *.

* * * * *

"(2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization * * *."

Public Law 95-46, 91 Stat. 225, June 15, 1977, authorized the appropriation within fiscal year 1978, "notwithstanding any other provision of law or contract", of \$31,050,000 for continuation of the construction of distribution systems and drains in the San Luis unit based on the pledge of the Board of Directors of Westlands to repay costs associated with construction authorized by this Act.

[This same Act mandated the creation of a task force (in which this Office participated) to review among other things, the extent to which the San Luis Unit was in conformity with the the San Luis Act.] The Special Task Force Report on San Luis Unit, Central Valley Project, California (Report) was published in 1978.

The Task Force found that the San Luis Drain had been improperly classified as a main storage and conveyance feature when it was actually part of the distribution and drainage system. (pp. 25, 26.)

In a memorandum to the Secretary, dated June 1, 1978, the Interior Solicitor concurring with the Task Force findings stated:

"The 1965 repayment contract is a general obligation by Westlands to repay \$157,048,000 used for construction of the distribution and drainage system in the Unit. This amount is, however, not sufficient to cover the costs expended to date. First, it does not cover the cost of the San Luis interceptor drain, which is part of the distribution and drainage system. Under Section 8 of the San Luis Act, this cost (except interest) must be fully recovered from the users within the Unit * * *. The 1965 repayment contract does not provide for repayment of Westlands' share of the cost of the drain.

"Second, the Act creating the San Luis Task Force authorized an additional \$31,050,000 to be appropriated for the construction of the distribution and drainage system, but required Westlands to pledge prior to the expenditure of that money, 'to repay the costs associated with construction . . .' (Pub. L. 95-46, Sec. 1) Although Westlands has 'pledged' to repay, it has not signed a repayment contract obligating itself to repay.]

"Therefore the existing repayment contract is inadequate to recover the costs which the United States must by law recover. Until a repayment contract is in place which establishes a sufficient repayment obligation on the part of Westlands, the law is clear that no water may be delivered to the District * * *." (Emphasis supplied.)

After making this finding, the Solicitor added:

"I do not believe, however, that water service now being provided to the District need be interrupted until a repayment contract is entered which provides for full recovery of the costs.* * * The finding that the repayment obligation included the San Luis drain was not made until relatively recently, and Westlands has 'pledged' to repay the \$31 million now being spent on additional distribution systems * * *.

"Finally, farmers in Westlands have planted crops this year in the expectation that they will continue to receive federally-subsidized and delivered water under the short-term contracts entered earlier this year.

"Considering all these factors * * * I therefore believe that water service to Westlands may be continued so long as the parties move immediately to enter a repayment contract which obligates Westlands to repay all the costs the United States is obliged by law to recover from the District. I hasten to add, however, that the new repayment obligations must be contractually assumed by Westlands, fully and clearly, within a reasonable time * * * Unless the required adjustment in repayment obligations is swiftly brought to a close, water service must cease." (pp. 31, 32.)

Following the receipt of your letter we wrote to the Secretary of the Interior requesting his views regarding the legal authority for delivering water to Westlands. We received a reply from the Interior Solicitor essentially reaffirming the earlier Solicitor's opinion:

"The Secretary has been guided in this regard by a formal Opinion of the Solicitor issued on June 1, 1978 * * *. In that Opinion, former Solicitor Krulitz concluded that delivery of water to the District in the absence of a sufficient repayment contract is

not authorized by law. Solicitor Krulitz also advised, however, that, for the reasons stated therein, relating primarily to the peculiar history of the San Luis Unit and the District, [it was not necessary to interrupt water service until an adequate repayment contract is executed so long as the United States and the District moved immediately to enter a new contract within a reasonable time.] See Opinion, pp. 31-32. The Secretary promptly initiated negotiations with the District while water deliveries continued pursuant to one-year water service contracts.

"The United States and Westlands reached agreement on a new repayment contract in December 1978 * * *. The contract remains unexecuted due to protracted negotiation of an amended long-term water service contract, preparation of a supplement to the San Luis environmental impact statement, and drafting of legislation to reauthorize the San Luis Unit, all of which are necessary to put the San Luis Unit on a firm legal footing once again.)

"Each of these remaining items is now nearing completion. The Department hopes to submit the needed legislative proposal to reauthorize the San Luis Unit to Congress by early January 1981. Once Congress acts, the new repayment and water service contracts can be executed, approved by the District's voters and the California State Treasurer (a requirement of California law) and validated by a state court (a requirement of federal law).)

"In answer to your precise question, I agree with former Solicitor Krulitz that the peculiar history of this Unit argues against interruption of water deliveries while the items which remain for this Department and for Congress are resolved. Westlands' agreement with the United States on a new repayment contract is a major step toward achieving an overall resolution * * *."

Our review of the adequacy of the Westlands repayment contract leads us to find, as have the Task Force and the Solicitors, that the contract does not satisfy the statutory requirement of a binding contractual obligation to repay the United States for the entire cost of the distribution and drainage systems. Westlands' contractual obligation is \$157,048,000. Because of Public Law 95-46, an additional \$31,050,000 for distribution and drainage system construction based on Westlands' repayment pledge appears legally sufficient to that extent. This totals \$188,098,000. We are informed that as of May 31, 1980, the Westlands distribution and drainage system has cost \$171,629,065. Additionally, the San Luis Drain's cost to that date is \$40,923,203, of which it is estimated that Westlands' share is about \$36 million. Therefore the total cost attributed to Westlands as of May 31, 1980, is approximately \$207 million, well over the total repayment obligation of \$188,098,000.

We concur in the view expressed by the former Solicitor that "Until a repayment contract is in place which establishes a sufficient repayment obligation on the part of Westlands, the law is clear that no water may be delivered to the District." * * *

In his June 1, 1978, Opinion, the former Solicitor said that the delivery of water need not be interrupted provided that negotiations were immediately commenced for a suitable repayment contract. He cited reasons of an equitable nature, that the findings had been made very recently, that \$31 million was covered by a pledge authorized by Public Law 95-46, and finally, that the farmers had already planted crops that year in expectation that they would continue to receive the water under the short-term contracts entered into earlier in 1978.

We appreciate the Solicitor's desire to avoid causing hardship to Westlands. We also note that over 2-1/2 years have elapsed since the Solicitor's review of this matter and a lengthy procedure to achieve Interior's aims lies ahead. However, we are unaware of any exception to the statutory requirement that a legally sufficient contract for the entire repayment obligation (other than the \$31 million authorized to be appropriated under Public Law 95-46) is necessary before water may be delivered under water service contracts signed by Westlands and the Service.)

Your question also referred to the delivery of water to the enlarged service area within the San Luis Unit. (The Task Force found (Report, pp. 26, 27) that the San Luis Act authorized service to approximately 500,000 acres, but that the service area was expanded without proper authorization to approximately 650,000 acres--an additional 150,000 acres.) It stated further that:

"The Task Force believes that the only water that is authorized to be provided to the additional acres in the expanded San Luis service area is a Warren Act type service. * * * such water service (1) only can be provided if there is surplus water available and (2) can be withdrawn to meet prior commitments.* * *"

[The Task Force recommended that authority be sought to increase the size of the authorized service area to include the additional 150,000 acres to encompass the construction of the distribution and drainage systems in the expanded area.) (Report, p. 27)

The former Solicitor's 1978 opinion stated that:

"The Task Force concluded that the expansion of the service area of the San Luis Unit from the approximately 500,000 acres described in the authorizing legislation to more than 650,000 acres has not been authorized by Congress * * * I reach the same conclusion, for substantially the same reasons that persuaded the Task Force." (p. 4)

He concluded (p. 30) that, "Given the specific limitations placed by Congress on this Department, we cannot deliver water to a wider area than authorized by Congress.* * *"

However, based on the rationale previously stated by the former Solicitor and restated by the current Solicitor, water continues to be supplied to Westlands including the area outside of the authorized service area.

(In our view, congressional authorization is needed to include the 150,000 acres that are in the San Luis Unit but outside the Federal service area, in this area.) Until then, a

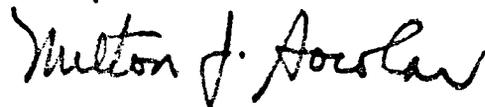
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firm water supply may not properly be afforded to those acres under the Westlands water service contract or similar instruments.]

Finally, both as to lands for which there is not a sufficient repayment contract, and for acreage outside the authorized service area, the Service may furnish water supplies under the authority of the Warren Act of February 21, 1911, ch. 141, 36 Stat. 925, codified at 43 U.S.C. § 523 (1976). However, under this Act, the Service may provide only surplus water; it may not obligate itself to provide a firm water supply.]

We trust that we have been responsive to your inquiry.

Sincerely yours,



For the Comptroller General
of the United States