



DEPARTMENT of the INTERIOR

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STATEMENT BY SECRETARY OF THE INTERIOR DON HODEL

PRESENTED BY CAROL HALLETT

ON THE CLOSING OF THE KESTERSON RESERVOIR

I am pleased to announce today that an agreement has been reached by representatives of the Department of the Interior and of Westlands Water District which fulfills the objectives of the Department: to close Kesterson Reservoir expeditiously, to continue planned delivery of irrigation water on lands within Westlands, and to take important steps toward a long-term solution to the drainage problems within the San Joaquin Valley.

Upon formal approval of this agreement by the Westlands Board of Directors, I am prepared to sign it immediately so that California's agricultural economy will not be jeopardized, and environmental concerns are met.

This agreement will assure the closure of Kesterson Reservoir in a much shorter period of time than if the Department had attempted to use its unilateral power and authority under the law to resolve the issue. I have no doubt that any attempt to act unilaterally would have resulted in protracted, divisive and counter-productive litigation.

This consensus approach is the best way for the Department to fulfill its missions both to protect the environment and to provide irrigation

water which is so essential to the agricultural community.

"I particularly appreciate the efforts of the representatives of Westlands and its farmers in reaching a consensus on this issue. The concerted, bipartisan work of Governor Deukmejian, the California congressional delegation, Interior Solicitor Frank Richardson, Assistant Secretary Broadbent, Bureau of Reclamation Regional Director Houston, Western Regional Representative Carol Hallett, and various concerned parties such as the Oakland, California Sierra Club was key to achieving a consensus. Through their efforts, we will be able to bring the process begun on March 15 to a successful conclusion," Hodel said.

I would like to summarize briefly the essential points of this agreement. Westlands will be required to eliminate the flow of drain waters into the San Luis Drain and Kesterson Reservoir. The reduction of drain water will begin this summer and will be phased to allow for development of alternative facilities, and Westlands is required to complete preparation of its preliminary plan for alternative means of disposal by June 1, 1985.

Most importantly, under the agreement there will be a complete termination of drain water from Westlands into Kesterson after June 30, 1986.

Westlands has agreed to take all actions necessary to achieve this schedule. I have been assured that the actions contemplated by the agreement are technically sound and that they will be effective. The Department expressly has the right to go to court to see to it that Westlands' obligations are enforced and has preserved its authority, if all else fails, to take these steps itself to assure compliance.

The Department will continue to provide irrigation water to Westlands during 1985 and, I would reasonably expect, into the future.

The Department of Justice, based in part on the information and professional judgments provided by the Fish and Wildlife Service and the Bureau of Reclamation, has concurred with this solution and has given assurances, as set forth in its letter to the Solicitor dated today, that no enforcement action under the Migratory Bird Treaty Act is warranted against any person who, in compliance with the agreement, delivers water into the San Luis Drain or manages and operates the San Luis Drain and Kesterson Reservoir.

I am pleased we are able to reach an agreement which should protect both environmental and economic concerns in the San Joaquin Valley. Nevertheless, a bipartisan effort in Congress and intensive

consultation with environmental and agricultural interests still will be necessary to achieve a long-term solution to the complex problems associated with wildlife and agricultural drainage in California. I stand ready to help in such an effort.

AGREEMENT

This agreement is entered into this day of March, 1985
between the United States Department of the Interior (Department)
and the Westlands Water District (Westlands)

RECITALS:

The San Luis Drain annually carries to twelve ponds in Merced County, California (Kesterson Reservoir) 7,000 to 8,500 acre feet of agricultural drain water, most of which is from lands in Westlands. The Bureau of Reclamation (Bureau) of the Department furnishes most of the irrigation water used in Westlands. Both Kesterson Reservoir and the San Luis Drain were planned originally as part of a larger drainage system intended to transport the drain water 200 miles north for discharge into the western Sacramento-San Joaquin Delta. A drainage system was necessary because the soil in parts of Westlands contains an impermeable clay layer not far below the surface which traps the irrigation water applied to the land and prevents it from draining naturally. However, as a result of environmental concerns about drain water discharges into the delta and lack of appropriations, the larger system never was completed. The San Luis Drain presently terminates at Kesterson Reservoir, which since 1970 has been operated as part of the Kesterson National Wildlife Refuge.

In mid-1983, waterfowl nesting studies in Kesterson Reservoir revealed incidences of embryo deformity and mortality. Preliminary hypotheses were that selenium in some of the soils in Westlands was being carried with the drain water into Kesterson Reservoir and was bioconcentrating there in the vegetation and other biota which adversely affected waterfowl. Immediate steps were taken to try to eliminate vegetation in 6 of the 12 ponds at Kesterson Reservoir to minimize exposure to waterfowl while

preserving the remaining six ponds for continued study. American coots did not nest at Kesterson Reservoir in the spring of 1984. Twelve adult coots and two pied-billed grebes were diagnosed in September 1984 as likely to have died in 1983 as a result of selenium poisoning. In September 1984, a waterfowl hazing program was implemented to discourage waterfowl from using Kesterson Reservoir. The Department had initiated early in 1984 cooperative studies of the selenium problem by the Bureau, the Fish and Wildlife Service and the U.S. Geological Survey and expanded its San Luis Unit Special Study to address drainage alternatives in light of the new information about the presence of selenium in the San Luis Drain and at Kesterson Reservoir. The Department's intent was and is to do everything necessary to prevent health risks to humans and to wildlife from the selenium in the San Luis Drain and Kesterson Reservoir.

On February 5, 1985 the California Water Resources Control Board ordered the Department to present to the Board by July 5, 1985 a plan to double line or to close down and clean up Kesterson Reservoir as a drainage disposal facility by February 1988.

On March 14, 1985 the Secretary of the Interior was advised by the Department's Solicitor that, because the hazing program was not entirely effective, employees performing their official duties in connection with the operation of Kesterson Reservoir could not be assured that their actions would not be found to violate the Migratory Bird Treaty Act if waterfowl died from ingesting selenium.

Based on that advice, the Department understandably decided to begin immediately the process of plugging, the San Luis Drain and closing Kesterson Reservoir. Because of the time it would take to fabricate, procure and install plugs in the drainage pipes running into the San Luis Drain, it also appeared appropriate to cease delivery of water to the lands that drain into the San Luis Drain to the extent necessary to halt the flow of drain water

into Kesterson Reservoir. The effect of the foregoing was a federal government mandate to Westlands to take the steps necessary to halt the flow of drain water into Kesterson Reservoir.

At the same time, however, the Department and Westlands have recognized the serious effect closure of Kesterson Reservoir could have on farming in Westlands, farm related businesses, the institutions which finance the farming operations of Westland's customers, and the economies of local communities and of the State of California, including loss of jobs and family income. A long-term reliable irrigation water supply is essential to the long-term viability of farming operations in Westlands. Substantial investments and important life decisions have been made in the expectation that the irrigation water could continue to be delivered and drained.

The purposes of this Agreement are five-fold:

- 1) to facilitate the expeditious stoppage of the flow of drain water from Westlands into the San Luis Drain north of Bass Avenue, Fresno County and into Kesterson Reservoir in an orderly and environmentally sound manner on the schedule set forth in paragraph 2 of this Agreement by no later than June 30, 1986;
- 2) to continue the delivery of irrigation water to Westlands during 1985 for use on the lands now draining into the San Luis Drain, while at the same time Westlands, in compliance with the mandate of the federal government, designs and installs alternative means for disposal of drain water in an efficient and environmentally sound manner;

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- 3) to encourage the development of environmentally sound means of disposing of the drain water from lands in Westlands presently draining into the San Luis Drain;
- 4) to provide conditions under which irrigation water delivered to Westlands may be used throughout Westlands in future years; and
- 5) to encourage farmers in Westlands and in other areas served by the Bureau to employ sound water conservation practices which will help reduce their drainage problems.

The achievement of the schedule set forth in paragraph 2 of this Agreement will require the cooperation of federal, state and local agencies, and the private sector. Westlands has represented to the Department that it can achieve the schedule. The parties have entered into this Agreement upon having received appropriate assurance from the Department of Justice with respect to the Migratory Bird Treaty Act as set forth in their letter attached hereto.

The Department and Westlands recognize that lack of adequate drainage constitutes a major problem for agriculture in Westlands and other water districts on the west side of the San Joaquin River. This problem must be solved in an economically and environmentally sound manner if irrigated agriculture is to continue there and serious threats to the economic stability of the area are to be avoided. In cooperation with the existing State-Federal coordination team, the Department has initiated extensive scientific and engineering studies. Unless Federal,

state, and local agencies, and interested private parties continue to work together, an environmentally responsible solution is not achievable.

IT IS AGREED:

1. The Department and Westlands agree to begin immediately the process of closing the San Luis Drain north of Bass Avenue and the Kesterson Reservoir as a disposal system for water drained from lands in Westlands. The closure shall be done in accordance with the schedule in paragraph 2.

2. Westlands and its customers currently served by the San Luis Drain shall proceed expeditiously to design, install, and operate alternative means for disposal of drain water from Westlands on a time schedule which will result in the following percentage reductions in the average flow of water in the San Luis Drain at Bass Avenue, Fresno County (the lowest point of discharge of such water from Westlands into the San Luis Drain). These "Alternative Means" may include but are not limited to evaporation ponds, irrigation of salt-tolerant crops and recycling.

The schedule is as follows:

<u>End of Month</u>	<u>Percentage of Reduction of Flow</u>
September 1985	20
November 1985	40
February 1986	60
April 1986	80
JUNE 1986 AND THEREAFTER	100

As long as Westlands has proceeded and continues to proceed diligently and in good faith to do everything in its ability, including obtaining private financing, necessary to meet such schedule, the foregoing schedule may be modified, but in no event extended beyond June 30, 1986, if installation or operation of the Alternative Means has been delayed by causes beyond Westlands' control. Any such modification of the schedule is subject to the approval of the Department, which shall not be unreasonably withheld.

3. Westlands shall submit to the Department and to the United States Department of Justice no later than June 1, 1985, for information purposes only, preliminary plans, including to the extent feasible, time schedules, descriptions of environmental safeguards, and proposed private financing, for the design, installation and operation of the Alternative Means. Final plans shall be submitted no later than October 1, 1985. Additionally, at least two months prior to each date by which Westlands is required by paragraph 2 to achieve a specified reduction and eventual termination of flow in the San Luis Drain, Westlands shall submit to the Department, for information purposes only, contingency plans for the attainment of such reduction and eventual termination by means of blockage of the drainage collector System in Westlands' (System) as provided for in paragraph 4, which plans shall show the location of each point at which the System would be blocked.

4. (a) Westlands represents that: (i) if at any time the schedule in paragraph 2, or any approved modification thereof, cannot be met through the installation and operation of Alternative Means, the schedule nonetheless can be met by blocking the flow of water through, along and around the System, (ii) title to the System is in the United States, (iii) Westlands has obtained, and now holds or has transferred to the United States, easements and other rights sufficient to permit access by Westlands and by the United States to all parts of the System, and (iv) such rights are sufficient to permit both Westlands and the United States to block the System as provided for herein. Westlands agrees to obtain immediately and perfect, from those who hold any interest in land on which a part of the System is located, including those who hold a fee, leasehold, operating or security interest in such land, all rights, including licenses, permits and easements, necessary to permit it to perform its obligations under subparagraph 4(b), which rights shall be in form and in substance satisfactory to the Department. Westlands shall maintain all such easements, licenses, permits and other rights which it now holds or hereafter acquires. Westlands shall execute, deliver and if necessary record any licenses or other instruments that may be

necessary to permit the Department, as well as Westlands, to exercise rights held by Westlands in connection with actions taken hereunder to block the System. The Department shall execute, deliver and if necessary record any licenses or other instruments that may be necessary to permit Westlands, as well as the Department, to exercise rights held by the United States in connection with actions taken hereunder to block the System.

(b) If at any time the schedule in paragraph 2, or any approved modification thereof, cannot be met by Westlands for whatever reason through the installation and operation of Alternative Means, Westlands agrees to take immediately and without regard to cost or consequences actions to block the flow of water through, along and around the System at a number of points sufficient to effect the reduction and eventual termination of drainage flows as set forth in the schedule in paragraph 2.

5. In the event Westlands, for whatever reason, does not reduce or terminate the flow of drain water from Westlands into the San Luis Drain north of Bass Avenue in accordance with the schedule in paragraph 2, the Department shall have the additional right, exercisable in its sole discretion and irrespective of the pendency of any action to enforce Westlands' obligations under paragraph 4, to perform at Westlands' expense Westlands' obligation under paragraph 4. The Department may perform Westlands' obligation directly or through contractors selected by the Department, and in such performance the Department need not follow the contingency plans submitted by Westlands pursuant to paragraph 3.

6. The Department agrees to deliver water to Westlands during 1985 pursuant to the terms and conditions of the Second Amendment to Stipulated Agreement dated March 1, 1985 without regard to the provisions of subparagraphs 2(d) and 2(e) thereof.

7. The Department agrees that water delivered to Westlands in years beyond 1985 may be distributed to all areas of Westlands in accordance with the law and whatever agreement or court order then governs delivery of water to Westlands as a whole.

8. Westlands shall hold the United States free and harmless from and indemnify it against any and all losses, damages, claims and liabilities arising from Westlands' performance or non-performance of this Agreement and from any performance by the United States of Westlands' obligations hereunder, and from any other exercise by the United States of its rights and remedies hereunder.

9. This Agreement shall constitute a binding agreement between the parties, and neither party shall challenge or otherwise seek to avoid the effect of any provision hereof in any pending or future judicial or administrative proceeding. To the extent there exists a conflict or inconsistency between this Agreement and any claim or defense to a claim by the parties to this Agreement in Westlands Water District v. United States of America or Barcellos & Wolfson, Inc. v. Westlands Water District, the provisions of this Agreement shall prevail and the parties shall seasonably submit to the court conforming amendments to their pleadings including, but not limited to, the filing of this Agreement.

10. Westlands and the Department, through the Bureau of Reclamation, shall in good faith negotiate a separate agreement for the purpose of authorizing Westlands to utilize that portion of the San Luis Drain south of Bass Avenue for transporting drain water within Westlands for such term and under such conditions and wildlife protection measures as the Secretary may deem appropriate. Except as use of the San Luis Drain is authorized in such agreement and in paragraph 2 hereof, Westlands waives any and all claims to the right to use the San Luis Drain and Kesterson Reservoir.

11. Except as provided herein, each of the parties reserves its rights and remedies regarding the delivery of irrigation water and the disposition of drain water for future negotiation or litigation, including but not limited to, Westlands' claim of right to adequate drainage service by the United States for all lands within Westlands needing such service, including, without limitation, the lands which now drain into the San Luis Drain and Kesterson Reservoir, and any and all of the United States defenses thereto.

12. In the event either party is ordered by competent state or federal authority to take actions inconsistent with this Agreement, it shall remain in the discretion of the party so ordered to determine whether to appeal such order. If no appeal is taken or if an appeal is taken but fails, then that party shall not be constrained by this Agreement from complying with such order and shall be relieved of its obligations under this Agreement to the extent they are inconsistent with such order.

13. Nothing herein contained shall create rights or remedies as third party beneficiaries or otherwise in favor of persons or parties who are not signatories to this Agreement.

14. Time is of the essence for the performance by Westlands of this Agreement. This Agreement shall be specifically enforceable. In that connection and despite the fact that consequences of blockage of

the System as provided for herein may be severe, Westlands hereby waives all equitable defenses it may have to any specific enforcement action brought by the United States.

United States Department of the Interior

By _____

Westlands Water District

By _____