



## THE PECOS RIVER SETTLEMENT – 2009

J. Phelps White III

Commissioner  
New Mexico Interstate Stream Commission

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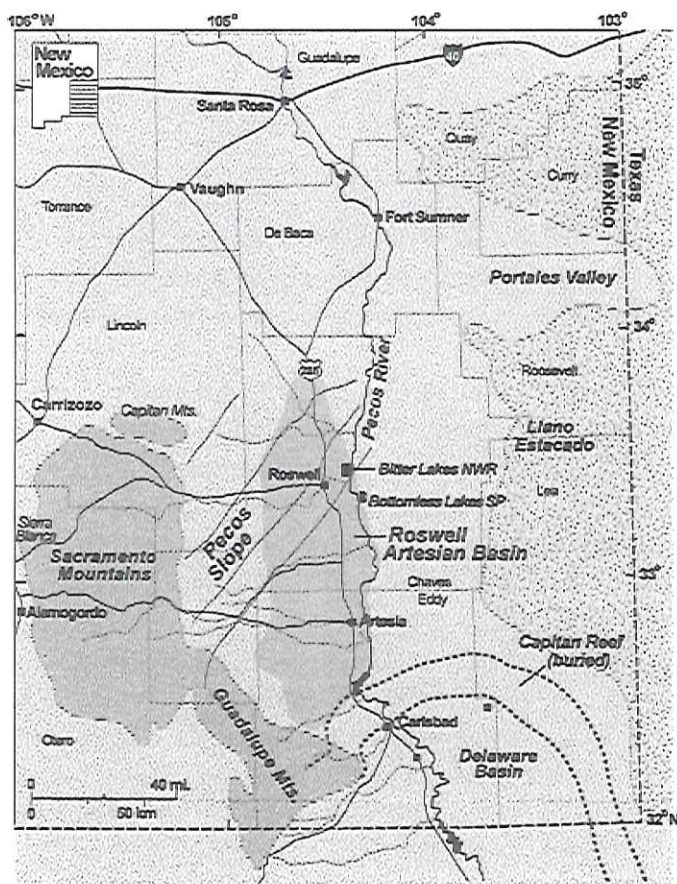
New Mexico Interstate Stream Commission

## ACKNOWLEDGEMENTS

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It should go without saying that the friendship developed with fellow Commissioner James Wilcox of Carlsbad during the evolution of the Pecos River Settlement contributed immeasurably to the ultimate implementation of the Settlement Agreement. On numerous occasions, together or separately, we two commissioners worked on issues during the process which were of common interest to the success of the endeavor.

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The use of water in New Mexico is governed by customs and laws known as The Doctrine of Prior Appropriation, or simply "first in time, first in right". This age old system of water management came to the desert southwest with the early Spanish explorers and settlers. The Doctrine of Prior Appropriation in New Mexico not only recognizes water as a necessary human resource, but dictates that a right to use this public resource requires that any water used must be put to "beneficial use". Going further, beneficial use is neither defined nor prioritized. The Constitution of New Mexico, adopted not long after statehood in 1912, recognizes that the waters of New Mexico belong to the people of New Mexico. Statutes and common law customs governing the use of New Mexico's waters are administered by the State Engineer, who is appointed by the governor and confirmed by the state senate.

The early Spanish immigrants brought The Doctrine of Prior Appropriation with them. Spain, being a rather arid place, recognized the importance of water as a vital human resource which required public management. It is said that the longest running court of law in the modern world is in Valencia, Spain where disputes involving water are heard weekly. Going back further, those Spanish customs and laws can be traced to the Moors of north Africa, who occupied the Iberian Peninsula around the eighth century. The Moors too, recognized the importance of water management. Historians have even drawn a link to Justinian law of ancient Rome to our use of water. Coincidentally, the Spanish also brought with them our sheep, cattle, and horses, which too can be traced to the peoples of north Africa.

Several rivers and streams run through New Mexico into other states. The principle interstate streams in New Mexico are the Rio Grande, San Juan, Pecos, Canadian, Costilla, La Plata, Gila and Animas Rivers. With the exception of the Gila, with each of these rivers is an interstate compact, an agreement between the states governing the allocation of the river's waters to each member of the particular compact. On the Gila allocations are governed by an earlier Supreme Court decree dictating total allocations on the Colorado River system, of which the Gila is a tributary. In the case of the Pecos River, the Pecos River Compact is an agreement between New Mexico and Texas. The negotiations were



interrupted by World War II. It took several years before a negotiated compact was agreed to. Finally, in 1948 an agreement was approved by the New Mexico Legislature and signed by the governor. The agreement was subsequently ratified by the United States Congress. Basically the waters of the river were divided on the basis of the 1947 condition of the river. The compact also included a restriction of "man's activities" on the river, and the requirement that flood waters in New Mexico shall be divided equally between the states. A very complex engineering formula was devised which would be the guiding criteria for the division of the Pecos waters at the state line.

The Pecos River Compact is governed by the Pecos River Commission, in which Texas and New Mexico have a commissioner appointed by the respective governor, and a federal commissioner appointed by the President. New Mexico's role in the Pecos River Compact comes under the purview of the New Mexico Interstate Stream Commission.

The Interstate Stream Commission is an associated agency with the Office of the State Engineer. Principle activities of the commission include overseeing the various compacts, statewide and regional water planning, and water conservation, all for the protection of New Mexico's water. The commission is composed of eight voting members appointed by the governor, plus the State Engineer who is also a voting member and statutory secretary of the commission. Its duties also include the management of two trust funds which derive their income from the income of state trust lands set up under the Ferguson Act many years earlier. The Ferguson Act designated certain trust lands to benefit specific beneficiaries within New Mexico, including schools and other institutions. The Irrigation Works Construction Fund is dedicated to water conservation throughout the state, and the Improvement of the Rio Grande Income fund is dedicated to insuring optimal flow and maintenance of the channel of the Rio Grande River.

In the lower reaches of the Pecos River in New Mexico both ground water and surface water come into play in ascertaining the total volume of water flowing down the river. Both sources are present in the Ft. Sumner and Roswell basins. In the Carlsbad area, surface water from the river is the primary source of water for the Carlsbad Irrigation District, although

the Carlsbad users may supplement shortages of river water with ground water pumped from a ground water aquifer in the Carlsbad area. The Carlsbad Irrigation District depends on water storage at several reservoirs on the river, principally dams and reservoirs near Santa Rosa, Ft. Sumner, and Brantley Dam, north of Carlsbad. An earlier reservoir, Lake Mc Millan became badly silted and later only serves as a settling reservoir for the very muddy water flowing down the river. Also, final distribution of water to Carlsbad flows through another reservoir known as Avalon before finally being distributed to the Carlsbad irrigators through a system of canals and ditches. The Carlsbad Irrigation District was adjudicated a volume of water necessary to irrigate 25,055 acres.

Although history will show that the original irrigators in the Roswell area diverted water from the Hondo and Pecos Rivers, the almost universal use of water in later years was in the pumping of water from the Roswell artesian basin. This very prolific artesian basin is charged from the hills and mountains west of Roswell. Discovery of this basin occurred in late nineteenth century and triggered a major development of the basin. To a very limited degree, the same pattern can be found in the Ft. Sumner area. Courts have ruled in later years that these surface and ground waters must be conjunctively managed in determining legal water rights; that the surface waters and the grounds waters are one in the same.

The Carlsbad Project, as it is referred to, was established in the late 1880's as one of the first, if not THE first project sponsored by the federal agency now known as the Bureau of Reclamation. Through the years the Carlsbad Irrigation District continuously maintained that Roswell's diversion of water, primarily from its artesian basin has resulted in Carlsbad being "shorted" their fair allocation of water. The Doctrine of Prior Appropriation then comes into play. Most of the water rights in the Roswell basin carry a priority date junior to the earliest uses of water in the Carlsbad area, now part of the Carlsbad Irrigation District. An argument might exist that diversions from the Pecos and its tributaries in the Roswell area predate the Carlsbad diversions, but the courts have held otherwise. The threat of a legal challenge of the Doctrine of Prior Appropriation against the Roswell users became a continuous bone of contention between the two areas. A very adversarial attitude existed for many years.



The Pecos Valley Artesian Conservancy District was organized some years after the development of the Roswell artesian basin. It was organized as a public body, financed by advalorem taxes on all real properties north of the Carlsbad Irrigation District in both Chaves and Eddy Counties and extending north of the Roswell area some twenty five miles. Its mission was to protect the waters of the basin, to monitor water use, and to represent the basin in legal matters regarding water rights and water uses, in particular in the threat looming of a priority enforcement by Carlsbad. Much of PVACD's activities involved an adjudication process to determine exactly who owns what water rights in the basin, how much water does the entitlement include, and what is the right's priority date. In addition, in later years PVACD developed a program of buying and retiring water rights, and in plugging wells no longer in use.

An event that eventually brought the two sides together came in the form of a law suit filed against New Mexico by Texas under the Pecos River Compact. Such an action is brought before the United States Supreme Court. Texas originally claimed that New Mexico had under-delivered a huge amount of water, perhaps some 1,000,000 acre feet over a period of several years. The delivery of that amount of water at one time was an impossibility for New Mexico, and even had it been possible it would have totally wrecked the economy of southeastern New Mexico, not to mention economic damage to the entire state.

Water destined to Texas is measured at Red Bluff Reservoir, just south of the Texas state line on the Pecos River. Before arriving at the state line, the water passes through a geologic phenomenon known as Malaga Bend. That stretch of the river is a virtual salt bed, and by the time it reaches Red Bluff it is very salty and hardly worth using for irrigation. Nevertheless, it is transported south from Red Bluff to farms south of the state line in the Pecos/Ft. Stockton region.

New Mexico's initial response to the suit was simply that New Mexico did not owe Texas any water, and New Mexico's defense was on that basis. The Supreme Court appointed a special master to oversee the progress of the suit, but after several years the dispute remained a stalemate. The special master finally declared the two states get to an agreement, or he would do it for them and that neither state would like it. After long

debate, the Supreme Court ruled that New Mexico owed Texas 340,100 acre feet, an amount that had accumulated over a 34 year period. This calculates to an average of about 10,000 acre feet per year. This too is an impossible volume of water to be delivered at one time. The court recognized this and the two states came to an agreement of a settlement of \$14,000,000, which would wipe the slate clean to that point in time. The PVACD at that time had some \$2,000,000 in cash on hand which it owed the New Mexico Interstate Commission for prior loans, loans which had been borrowed from the commission's Irrigation Works Construction Fund, and re-loaned to farmers at very favorable rates for various water conservation projects. That money was repaid to the commission, and the total obligation was paid by New Mexico from that fund.

Potential for continued shortfalls of water delivery to Texas remained after the initial settlement. New Mexico faced a very difficult dilemma over how to best avoid a repeated violation under the compact. In addition, the Carlsbad Irrigation District remained a threat to water users of the Roswell basin, including communities such as Roswell, Artesia, Dexter, and Hagerman. Various plans were studied, including the development of a large well field in the Roswell area using very brackish water to be delivered to the Pecos River. That plan was considered impractical due to the insertion of brackish water into the river, as well as the evaporation loss between the well field and the state line. The onerous threat of a priority water call remained. Such a call could be made by Carlsbad, Texas, or even the U. S. Supreme Court if New Mexico violated the Supreme Court decree.

The dilemma continued over a period of several years. It was determined that a shut down of less senior water rights than Carlsbad's might require the shutting down of rights in the Roswell basin with priority dates all the way back into the 1920's. Carlsbad and Roswell remained adversarial. Shutting down the junior water rights developed after the advent of the compact, was considered. There was strong sentiment in favor of this action by more senior users and legislators. After months of wrangling the director of the Interstate Stream Commission established an "ad hoc" committee of nearly all the stakeholders on the river including farmers, communities, counties, and the oil and gas community. Carlsbad users



also came to the realization that they were also threatened by the severity of the Supreme Court decision.

In the meantime the Interstate Stream Commission commissioned a study to be done aimed at finding the most favorable and least damaging course of action that the state might consider. Three courses of action were looked at. The first was a blanket shut down of all water rights, on a priority basis, until enough water was passing the state line. This was the most onerous, and economists estimated that the economic loss to the valley would amount to some \$300 million the first year. The second course considered the shut down of post 1947 rights, those developed after the compact. This was deemed impractical also. Those rights were far from the river, and ceasing diversion of that water would probably not affect the river any time soon. It would simply mean putting those farmers out of business. The committee finally selected the third option as the best course, that of buying senior water rights, transferring them to a well field in the Seven Rivers region north of Carlsbad and adjacent to Brantley Reservoir. A goal of developing a capacity to augment the river by at least 15,750 acre feet per year was decided upon, which could be delivered to Texas if the need arose. In addition to assuring deliveries to Texas, this "consensus plan" requires additional irrigation water for Carlsbad. The "consensus plan" later evolved into a "Settlement Agreement" between PVACD, The Carlsbad Irrigation District, the New Mexico Interstate Stream Commission, and the federal Bureau of Reclamation.

Such a project would involve the expenditure of a large amount of money, and the people of the Roswell area, the people of the Carlsbad area, and the Interstate Stream went right to work in seeking legislation to accomplish this goal. The legislative delegations of both Chaves and Eddy Counties worked in unison in support of the project. Three legislators stand out as important players in leading the legislative battles that lay ahead; Representative Richard T. Knowles of Chaves County, Representative Joe Stell of Eddy County, and state senator T. Z Jennings of Roswell. There remained some philosophical differences of just how the goal could be accomplished. Principle among those different trains of thought are two. First, particularly among legislators from other regions of the state was that this was a regional issue and that funding should only

come from that region. Second was a practical one in which the Carlsbad Project, being a federal Bureau of Reclamation project, was not allowed to separate its water rights from the land on which it is used. Through intense argument and legislative negotiations, the first argument was put to rest, primarily through the argument that the Supreme Court ruled against New Mexico, not against Pecos River users. It was further argued that some sort of action could affect other regions of New Mexico some day in the future. The second argument was settled with the agreement by all sides that the state would buy water rights AND land, the water rights being stripped from the land in the Roswell basin, and the land remaining to be managed by the Interstate Stream Commission. In the case of Carlsbad, allocations of water to the purchased lands would be diverted to Texas, instead of to the land it historically served.

The consensus plan, and the ultimate Settlement Agreement called for the acquisition of 18,000 acres of land with appurtenant water rights; 11,000 from the Roswell basin, 6,000 from the Carlsbad area, and 1,000 from the Ft. Sumner area. The Settlement Agreement also provided that if preliminary amounts of 7,500 acres and 4,500 acres could be acquired from the Roswell basin and from the Carlsbad area respectively, then the Settlement Agreement could be implemented, provided enough water had been developed for delivery to Carlsbad and/or Texas under the agreement and under the decree.

The Interstate Stream Commission launched an intensive drive to begin acquiring the necessary land and water rights. In order to comply with state laws, the commission asked for "offers" from interested parties, those interested in a sale of their property, including the price which they might accept. Then came the decision by the Interstate Stream Commission, after seeking the best available valuation information, for a consistent basis for negotiating acquisitions from willing sellers. The process began. Considerations for acquisition included seniority of rights offered, proximity to the Pecos River, artesian status, and historical active use of the right. After almost four years, the minimum number of acres in both the Roswell basin, and the Carlsbad Irrigation District were acquired, and the four parties to the consensus plan agreed to implement the settlement agreement in the year 2009.

During this time, a concurrent activity was the construction of the well field in the Seven Rivers area some fifteen miles north of Carlsbad. After long and intensive negotiations, an agreement was struck with Mr. Gil Moutrey who owns extensive farming interests at Seven Rivers. The plan included the drilling of several new wells throughout his property, along with an arrangement with him for the management of the well field, and the commingling of his and ISC's waters through an extensive pipeline system which ultimately would deliver water to Brantley Reservoir at two separate delivery points. Water quality, particularly the monitoring for chlorides, was an important element of the agreement, as was a continuing monitoring of any "draw down" threats that might be occurring in the various wells. Water rights acquired upstream in the Roswell basin were transferred to the new well field after going through the required procedures for water rights transfers and the changing of the place of use, and change of use, as prescribed by law and by the State Engineer.

In addition to the Seven Rivers well field, another smaller one was established in the Lake Arthur area north and east of Seven Rivers. That water, when needed will be delivered via a large pipeline directly to the Pecos River.

A third well field is also available for settlement augmentation purposes via a contractual arrangement with the Hagerman Irrigation Company at Rio Felix.

Under the consensus plan, and under the operations plan for the well fields, no water will be diverted from any well field unless it is needed for delivery to Carlsbad or to the state line.

Today the infrastructure is in place to insure delivery of water to the Carlsbad Irrigation District and to Texas under the Settlement Agreement, as the case may be, and as prescribed by the U. S. Supreme Court Decision in Texas vs. New Mexico. Total cost of the project has been in excess of \$70 million through December, 2010.