Saving Water in the Pecos

One Coin, Two Sides, Many Overdrafts (and No Bailouts?)

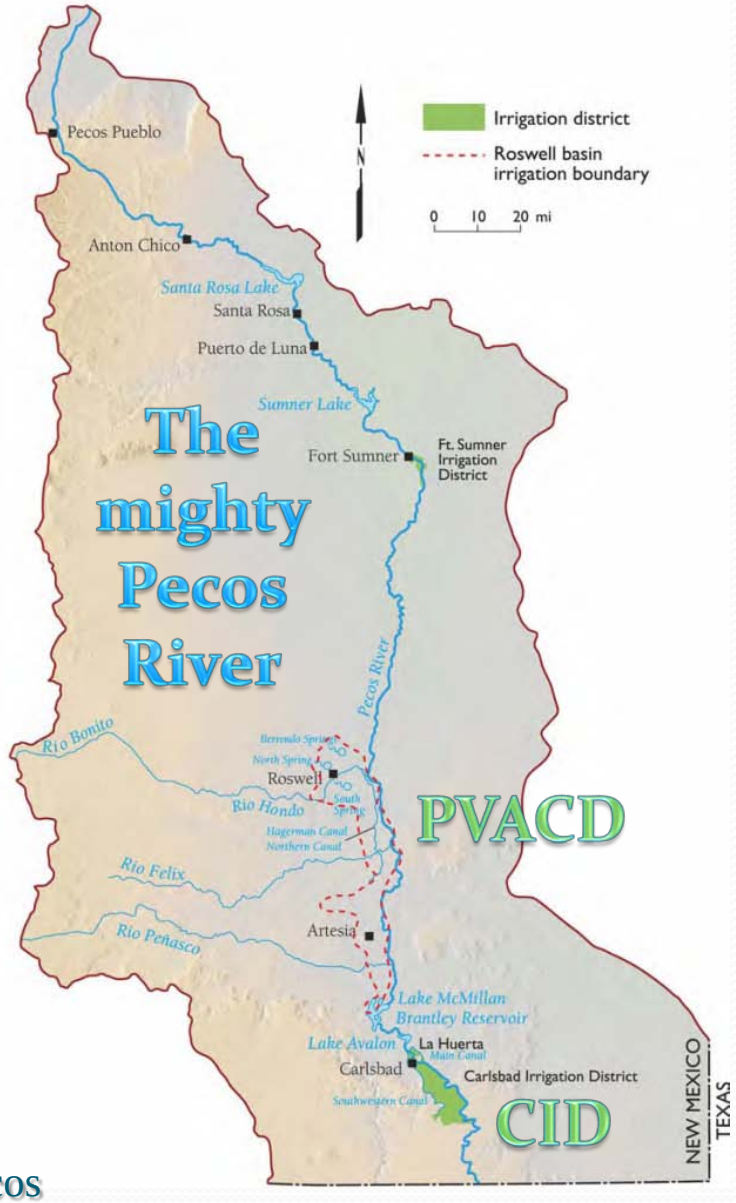
Josh Mann, Esq.

Presented to:

One Source: Evolution of the Policies Surrounding Ground and Surface Water Management in the West

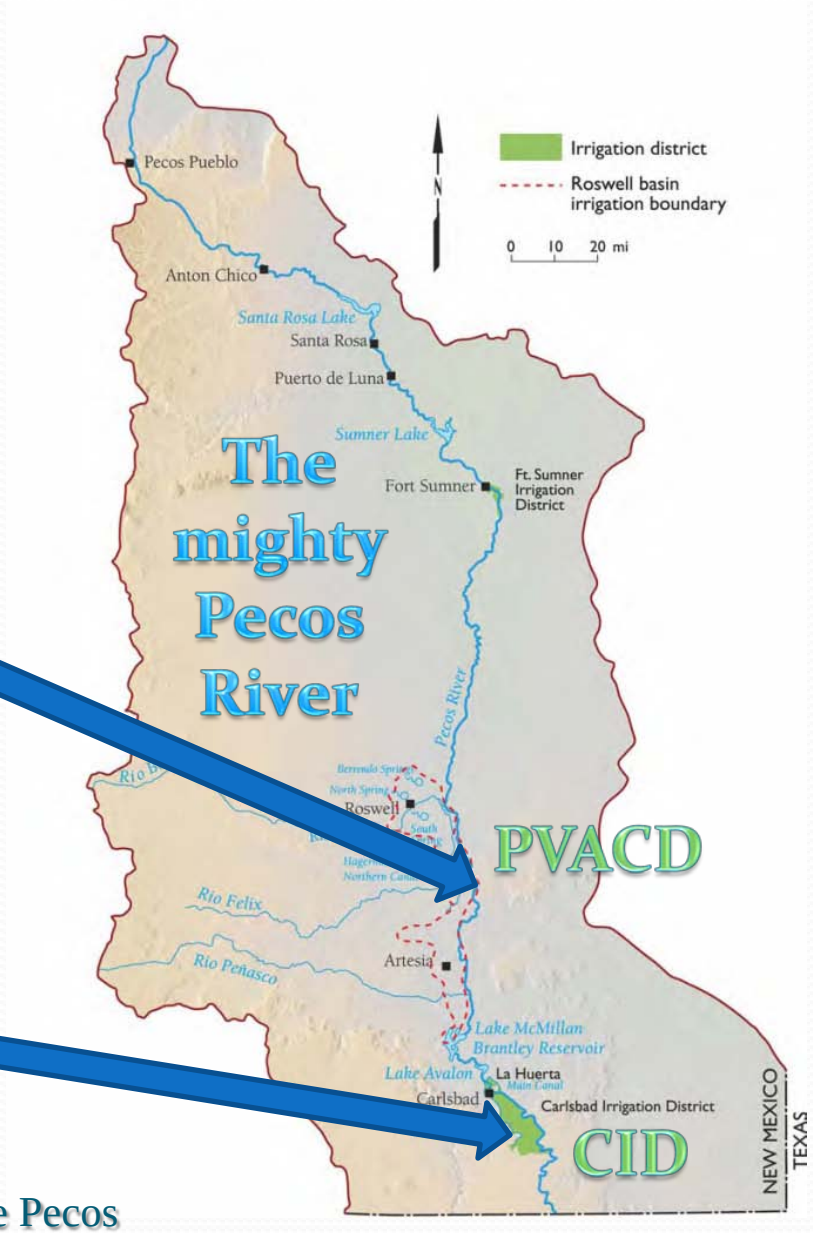
April 15, 2011

Introduction



Saving Water in the Pecos

The Players

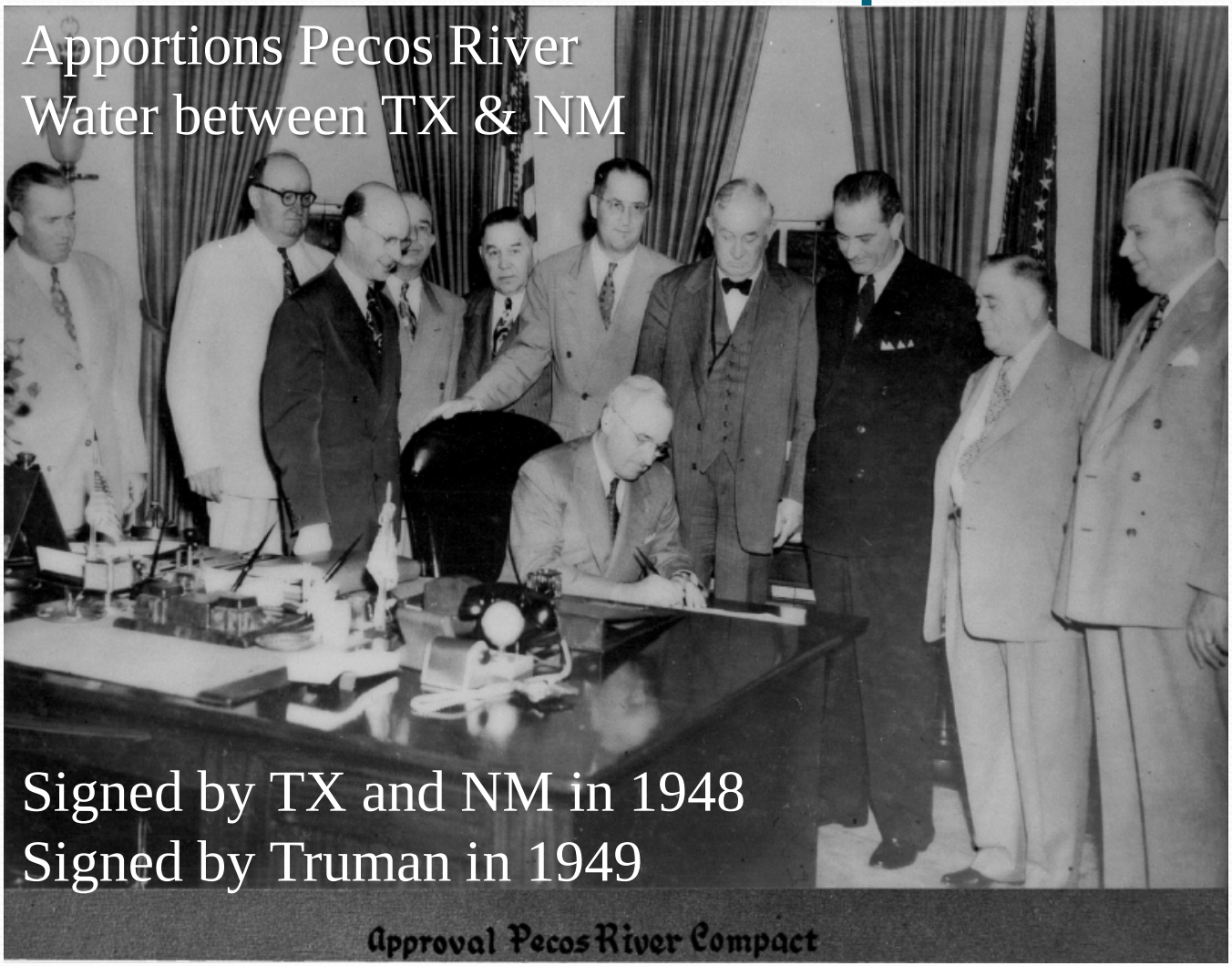


Saving Water in the Pecos

Key Points

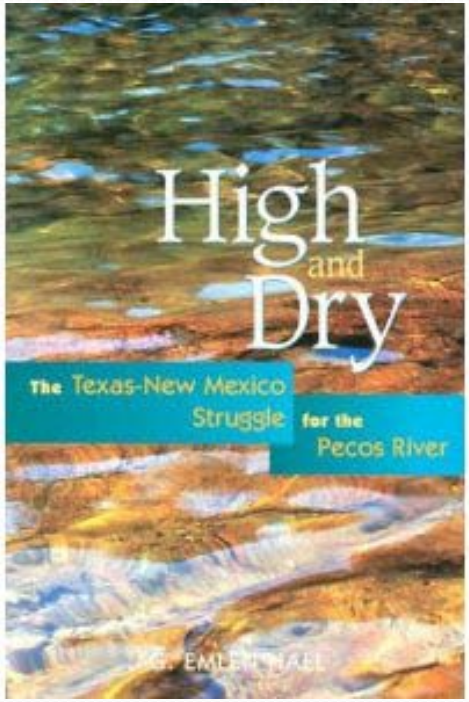
- The story of the Pecos Settlement raises many interesting issues:
  - The limits of science to understand and describe complex and dynamic river systems
  - Conjunctive (mis)management of water resources
  - Is the Doctrine of Prior Appropriation dead?
    - Should water flow uphill towards $?
    - Should public $ flow to protect private water rights
  - Fed v. State control of water
  - The importance of good strong leadership

The Pecos River Compact



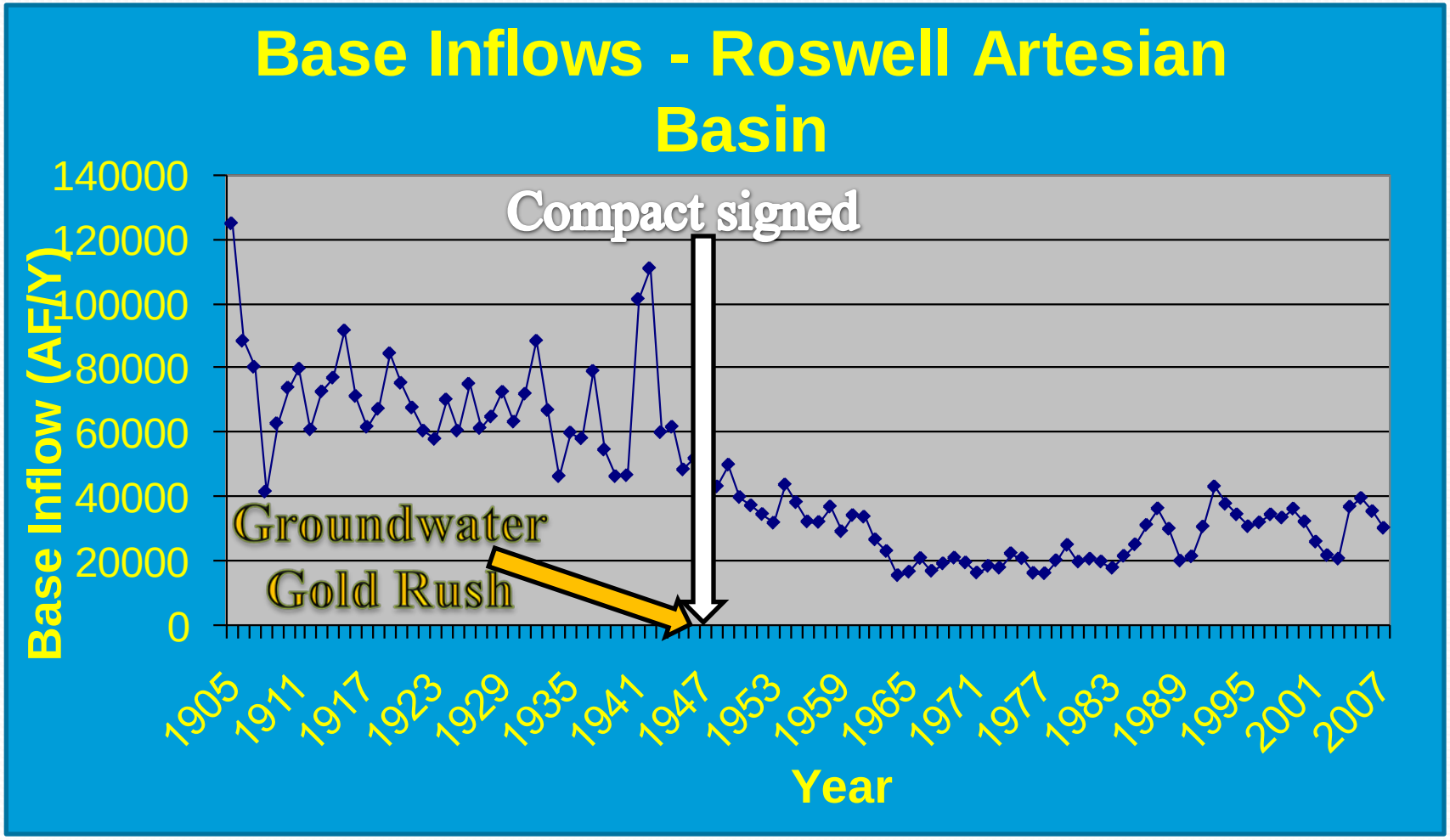
The Pecos River Compact

"…based on the belief that science could accurately describe western rivers, that law could apportion what science described, and that technology could improve what science saw and law regulated."



- <u>High and Dry</u> by Em Hall

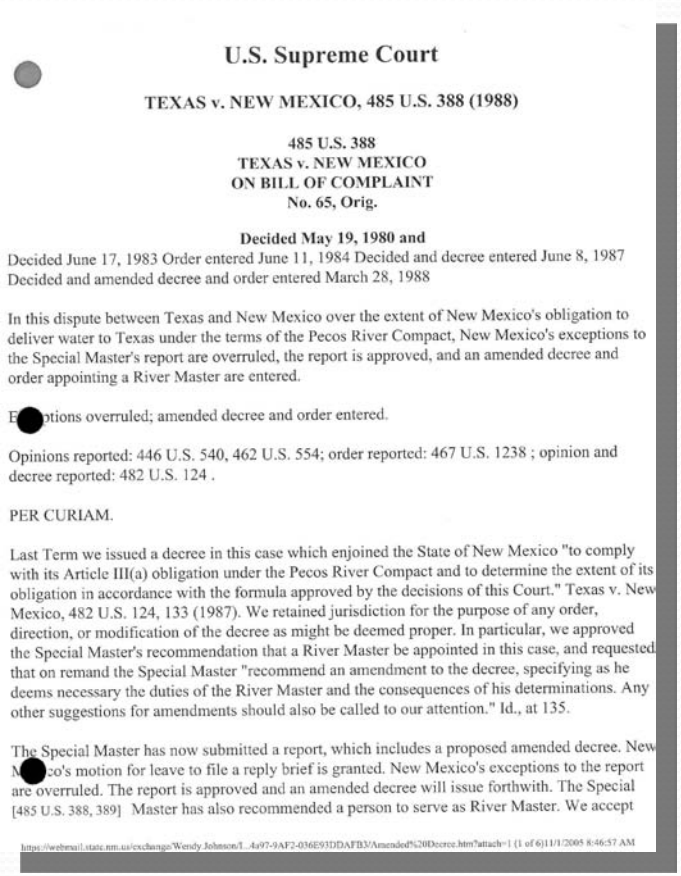
TX v. NM


Base Inflows - Roswell Artesian Basin
Compact signed
Groundwater Gold Rush
Base Inflow (AF/Y)
140000
120000
100000
80000
60000
40000
20000
0
1905
1911
1917
1923
1929
1935
1941
1947
1953
1959
1965
1971
1977
1983
1989
1995
2001
2007
Year

TX v. NM

- TX sues NM for violating Pecos Compact and wins
- U.S. Sup. Ct. issues

  Amended Decree in 1988
  - NM under-delivered 10,000 AFY from 1950 to 1983
  - NM owed **$14 million**
  - NM rapid "repayment" required if future shortfall



U.S. Supreme Court

TEXAS v. NEW MEXICO, 485 U.S. 388 (1988)

485 U.S. 388
TEXAS v. NEW MEXICO
ON BILL OF COMPLAINT
No. 65, Orig.

Decided May 19, 1980 and
Decided June 17, 1983 Order entered June 11, 1984 Decided and decree entered June 8, 1987
Decided and amended decree and order entered March 28, 1988

In this dispute between Texas and New Mexico over the extent of New Mexico's obligation to deliver water to Texas under the terms of the Pecos River Compact, New Mexico's exceptions to the Special Master's report are overruled, the report is approved, and an amended decree and order appointing a River Master are entered.

Exceptions overruled; amended decree and order entered.

Opinions reported: 446 U.S. 540, 462 U.S. 554; order reported: 467 U.S. 1238 ; opinion and decree reported: 482 U.S. 124 .

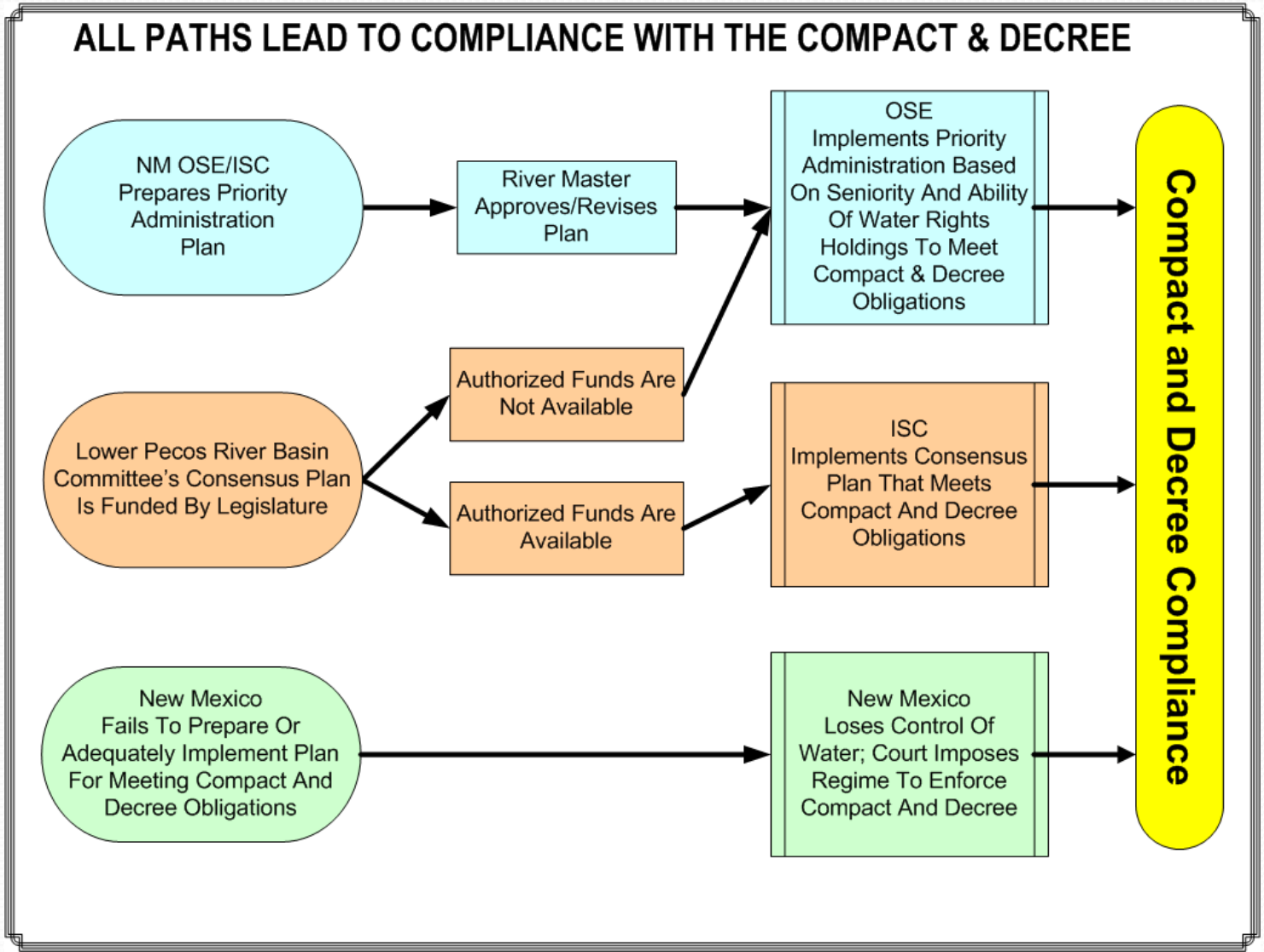
PER CURIAM.

Last Term we issued a decree in this case which enjoined the State of New Mexico "to comply with its Article III(a) obligation under the Pecos River Compact and to determine the extent of its obligation in accordance with the formula approved by the decisions of this Court." Texas v. New Mexico, 482 U.S. 124, 133 (1987). We retained jurisdiction for the purpose of any order, direction, or modification of the decree as might be deemed proper. In particular, we approved the Special Master's recommendation that a River Master be appointed in this case, and requested that on remand the Special Master "recommend an amendment to the decree, specifying as he deems necessary the duties of the River Master and the consequences of his determinations. Any other suggestions for amendments should also be called to our attention." Id., at 135.

The Special Master has now submitted a report, which includes a proposed amended decree. New Mexico's motion for leave to file a reply brief is granted. New Mexico's exceptions to the report are overruled. The report is approved and an amended decree will issue forthwith. The Special
[485 U.S. 388, 389] Master has also recommended a person to serve as River Master. We accept

https://webmail.state.nm.us/exchange/Wendy.Johnson/I...4a97-9AF2-036E93DDAFB3/Amended%20Decree.htm?attach=1 (1 of 6)11/1/2005 8:46:57 AM

The Consensus Plan



The Pecos Settlement

- March 25, 2003 - Pecos Settlement Signed
- Objectives
  - Permanent compliance with the Compact and Amended Decree
  - Increased and stable water supply for Sr. CID
  - Reduced likelihood of a priority call for Jr. PVACD

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Settlement Agreement") is entered into this 25th day of March 2003 by and between the state of New Mexico *ex rel.* the State Engineer; the New Mexico Interstate Stream Commission; the United States of America, Department of the Interior, Bureau of Reclamation; the Carlsbad Irrigation District; and the Pecos Valley Artesian Conservancy District. These Parties are sometimes individually referred to as "**Party**" or collectively as "**Parties.**"

RECITALS

A. The New Mexico State Engineer ("**State Engineer**") is an official of the state of New Mexico, exercising authority pursuant to, *inter alia*, NMSA 1978 Chapter 72, including the general supervision of the waters of the state and of the measurement, appropriation, and distribution thereof and such other duties as required. The state of New Mexico, on the relation of the State Engineer, is a party to the adjudication pending in the District Court in and for the Fifth Judicial District (the "**Adjudication Court**") in *State of New Mexico ex. rel. State Engineer v. L.T. Lewis, et. al.*, Nos. 20294 and 22600 Consolidated (the "**Adjudication**").

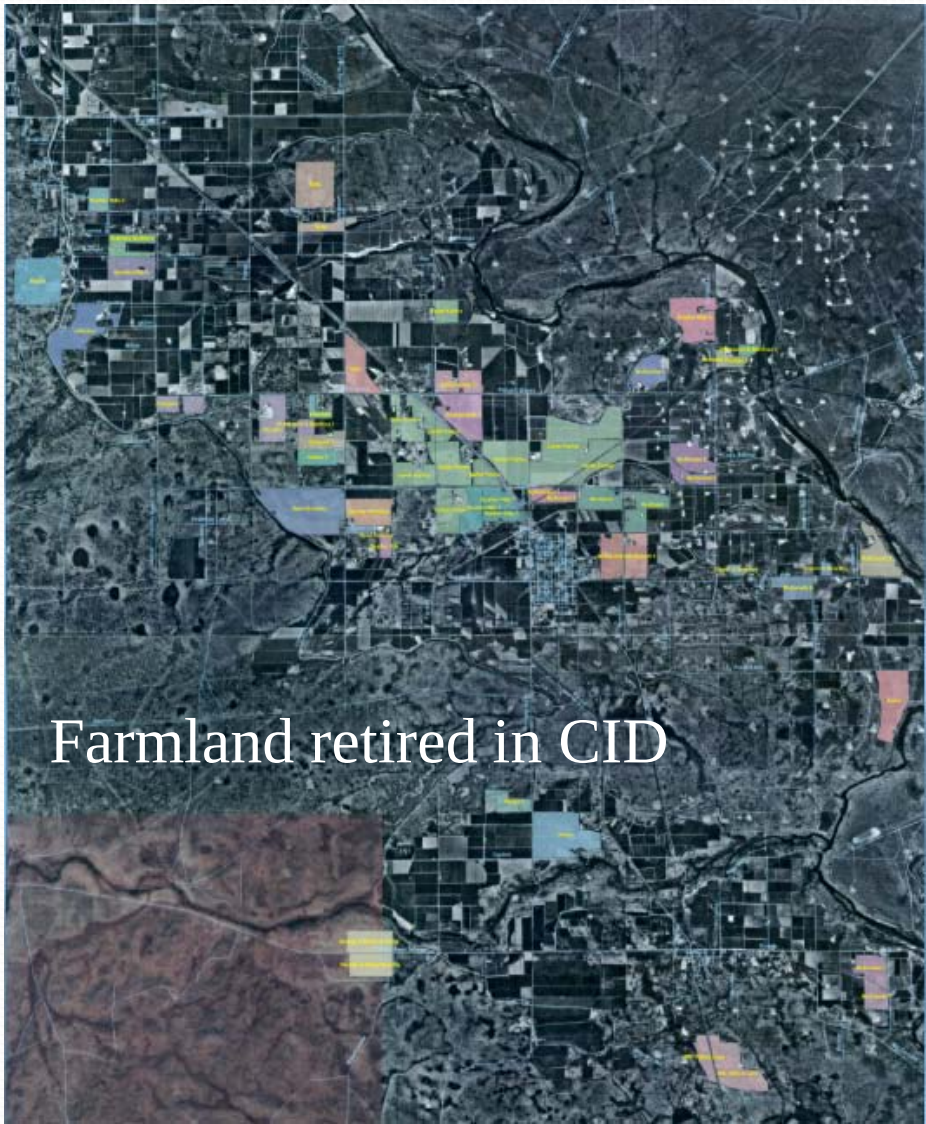
B. Pursuant to NMSA 1978 Article 72, Chapter 14,[1] the New Mexico Interstate Stream Commission ("**ISC**") is authorized, to, *inter alia*, negotiate compacts with other states, investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of the state of New Mexico. With regard to the Pecos River specifically, the ISC has undertaken a program pursuant to § 72-1-2.2 (1991) to purchase and retire and place in a state water conservation program administered by it adequate water rights over a period of years to increase the flow of water in the Pecos River and diminish the impact of man-made depletions of the stream flow in order to meet the state's future obligations under the Pecos River Compact, § 72-15-19 *et. seq.* (1949) (the "**Pecos River Compact**"), and the Decree of the United States Supreme Court in *Texas v. New Mexico*, 485 U.S. 388 (1988) (the "**Pecos River Decree**"). Pursuant to § 72-1-2.4 (2002), the ISC is required to determine the need for projects to be funded with appropriations for compliance with the Pecos River Compact and may expend funds for the purchase of land with appurtenant water rights or rights to the delivery of water and take other appropriate actions that would effectively aid New Mexico in compliance with the Pecos River Decree.

C. The United States has interests in and obligations with respect to the Carlsbad Project, a federal reclamation project located on the Pecos River in New Mexico ("**Carlsbad Project**" or "**Project**"). The United States is a party to the Adjudication.

D. The Carlsbad Irrigation District ("**CID**") is an irrigation district organized under the laws of the state of New Mexico, NMSA 1978 Article 73, Chapter 10, and has interests in and obligations with respect to the Carlsbad Project. CID is a party to the Adjudication.

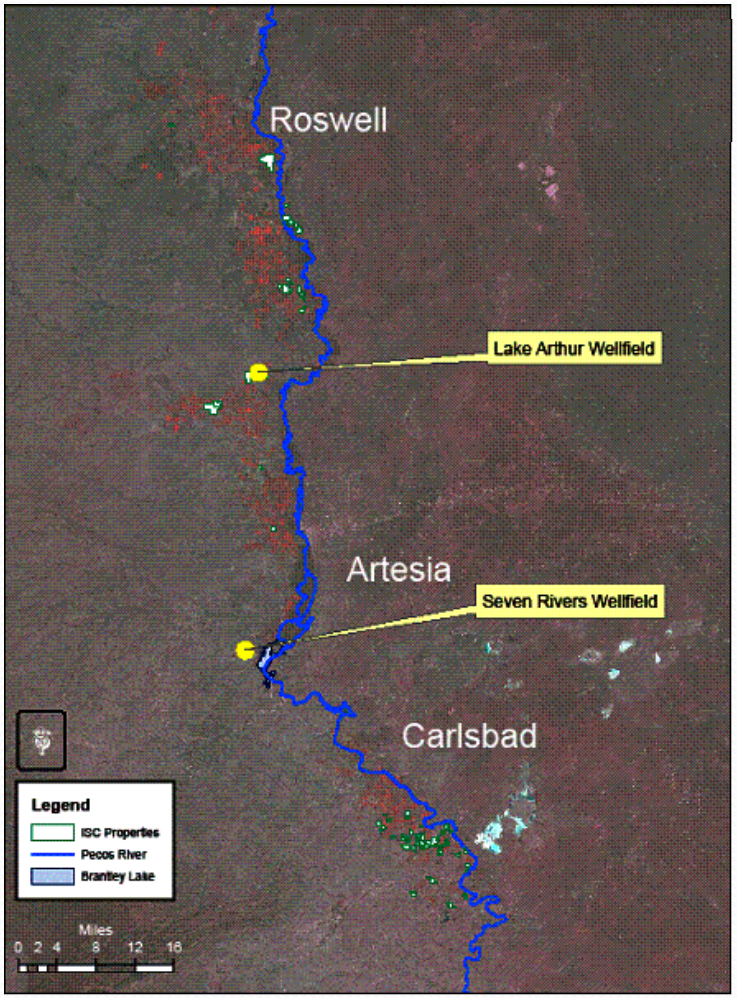
Settlement Implementation

- Water Acquisition & Retirement
  - 4,500 acres in CID
  - 7,500 acres in PVACD
  - Surface water reallocated for CID farmers and for state line delivery

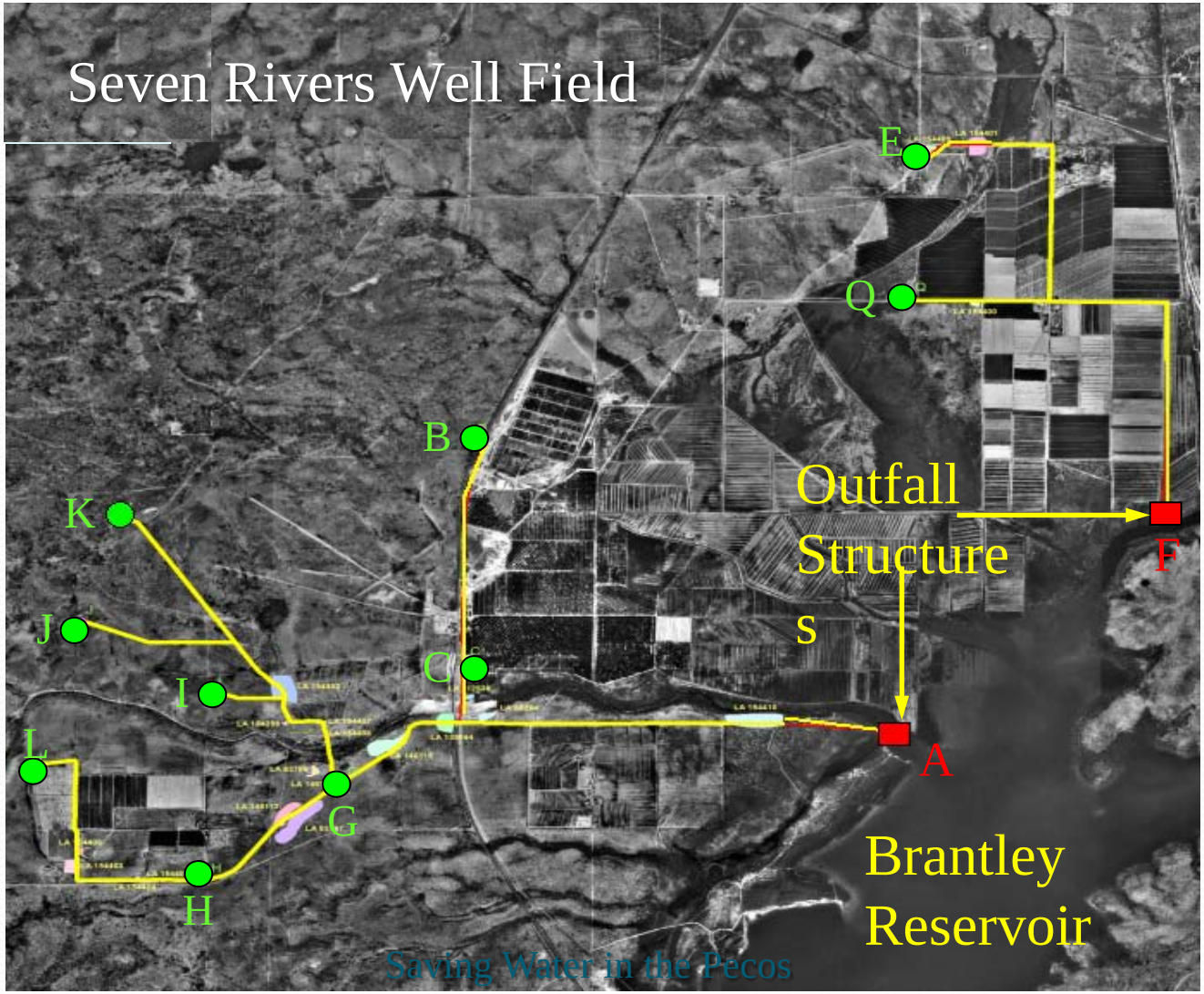


Settlement Implementation

- Augmentation Well Fields
  - 15,750 AF per year



Settlement Implementation



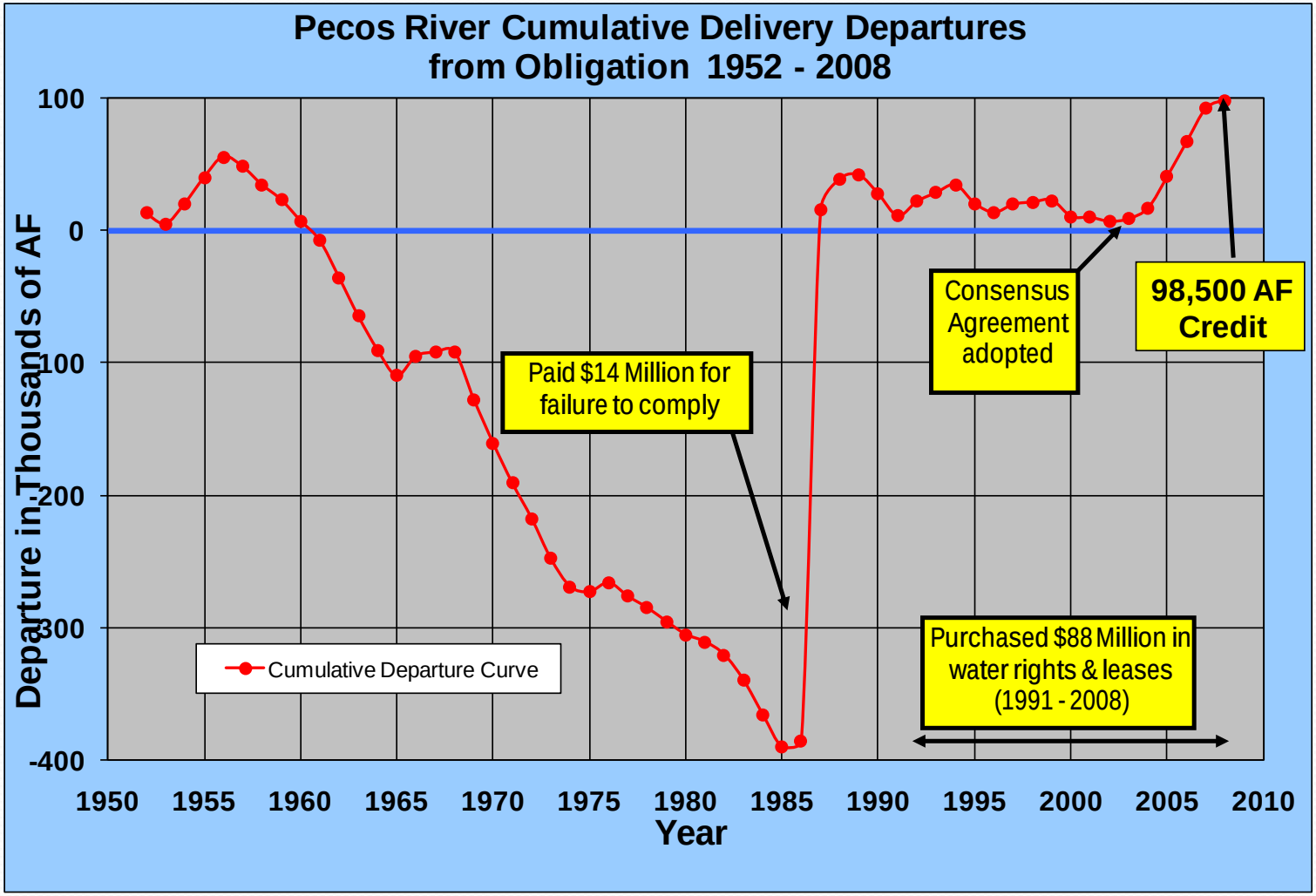
Settlement Benefits

- New Mexico/Compact
  - Add'l flows to Texas
  - Rapid water delivery mechanism if shortfall
- Jr. PVACD pumpers
  - protected from a priority call
- Sr. CID surface users
  - guaranteed min supply
- Pecos River Basin
  - Hydrologic balance

Settlement Summary

- On June 11, 2009 Pecos Settlement officially implemented
- NM taxpayers paid $100 Million
- Implementation requires ongoing active management by ISC, and significant annual expense ($700,000 yr. O&M)

Settlement Summary



Why the Settlement Worked?

- Market based solution with stakeholder buy-in and government $$$
- No tribal water rights in area
- ESA just an emerging issue at the time
- The flow of the Pecos River is +/- 100,000 AFY
  - +/-1,000,000 in the Rio Grande and
  - +/- 10,000,000 on the Colorado River

Why the Settlement Worked?

- The water rights were relatively affordable
  - Approx $2,000 per AF
  - Compared to $15,000 - $30,000 per AF in the Rio Grande
- NM was in a strong enough financial position to provide a bail-out
- Effective leadership brought and held the process together