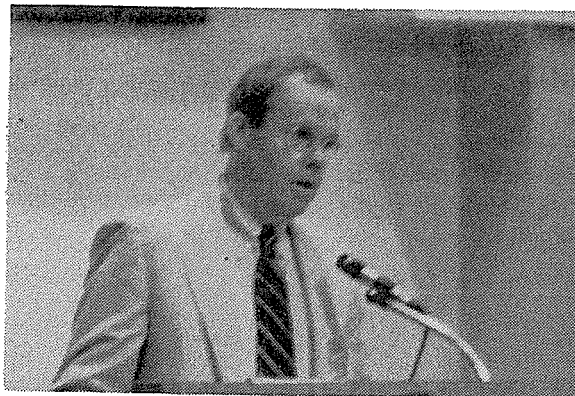


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## UPDATE ON THE PECOS RIVER ADJUDICATION

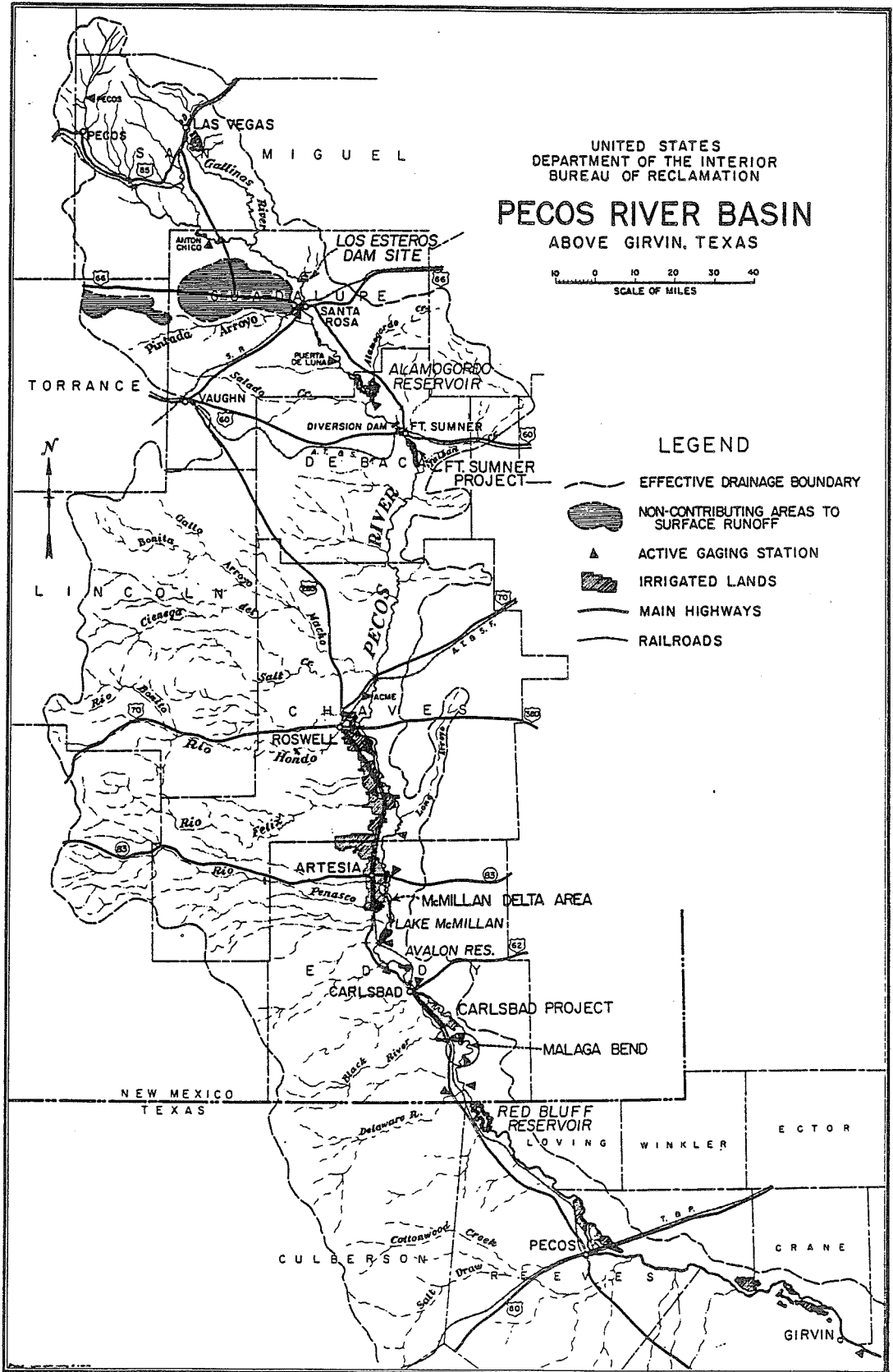
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The Pecos River adjudication suit is one of the most important water right cases in New Mexico. It has been pending in the Chaves County District Court for 33 years and is the oldest and longest pending water case in New Mexico. Eighteen New Mexico Supreme Court opinions have been issued on appeals in the case and four appeals are now pending in the New Mexico Court of Appeals. Ultimately, the court will adjudicate the water right claims of over 6,000 defendants for the irrigation of approximately 190,000 acres. Cases recently filed in other western states have more claimants, but few cases equal the Pecos River adjudication suit in the difficult questions that have been or will have to be decided. To describe the status of this case, it is necessary to give some information on water supply and use in the Pecos River Basin and the proceedings in the case from its filing in 1956 to the present.

### PECOS RIVER WATER SUPPLY

The Pecos River is the second longest river in New Mexico. It is 435 miles long and has a drain-

age area of 20,000 square miles. (PRJI:1) Rainfall in the basin ranges from 34 inches in the headwaters to 11 inches near the state line. (PRJI:12) Approximately 4 percent of the precipitation becomes stream run-off. The Pecos River Basin is divided into three areas: The upper basin from the headwaters to Sumner Dam (formerly Alamogordo), the middle basin from Sumner Dam to the New Mexico-Texas state line, and the lower basin from the state line to the Pecos River's confluence with the Rio Grande (see map of the Pecos River Basin). In the upper basin, 30 percent of the flow below Sumner Dam is made up of thunderstorm runoff. (Slingerland) In the middle basin, flood inflow constitutes 60 percent of stream flow. (PRJI:12) The flow of the Pecos River is extremely variable. The main river flow available for irrigation is largely made up of erratic flood inflow and, in the absence of these inflows, the river's base flow is lost and reestablished many times in the length of the stream. (PRJI:12) During the period 1950 through 1983, precipitation in the Pecos River Basin declined approximately 25 percent and the flows have become less predictable and more variable.



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Water quality deteriorates as the water flows downstream. The salinity of water at Santa Rosa is less than 1 ton per acre-foot of water. At the state line, it is 7 tons per acre-foot. The brine aquifer at Malaga Bend, just above the state line, discharges 170 to 210 tons of salt per acre-foot of water and contributes 120,000 tons of salt per year to the Texas water supply. The quality of water at the state line is not good except in years with high flood flows. At Girvin, Texas, below the irrigated area in Texas, the river carries 15 tons of salt per acre-foot. (PRJI:15--16; Sen.Doc. 109:4.)

### PECOS RIVER WATER USE

In the upper basin, approximately 14,700 acres were irrigated in 1940. (PRJI:17; Sen.Doc. 109:2.) The only significant new water use after United States sovereignty was the Storrie Project on the Gallinas River. This project was initiated in 1909 and irrigates approximately 4,900 acres. The use of water in the upper basin has declined since 1940. Only about 9,000 acres were irrigated in 1988. (PRJI:1; PRC:79; Grigg)

In the middle basin, the first significant irrigation project on the mainstream Pecos River involved the construction of canals in 1887 and 1888 to irrigate lands at Carlsbad. At the time the United States Bureau of Reclamation acquired ownership of the Carlsbad Project in 1906, there were approximately 13,000 irrigated acres. The project acreage increased to 25,000 acres in 1926. The canal system is administered by the Carlsbad Irrigation District. The Ft. Sumner Project also takes water from the Pecos River mainstream. Its canal system was constructed in 1906 and irrigates approximately 6,500 acres within the Ft. Sumner Irrigation District. (PRJI:2; PRC:98.)

In the Roswell basin, the first irrigation uses were made in the 1870s and 1880s with ditches constructed to divert water from spring-fed streams tributary to the Pecos River. The first artesian well was drilled in 1891. (PRJI:2; PRC:98.) It has been estimated that the contribution to the surface water of the river from the artesian area prior to the drilling of wells was 325 cubic feet per second for about 235,000 acre-feet per year. (Sen.Doc. 109:3.) In 1931, the state engineer declared the Roswell artesian basin and closed it to future water appropriations and in 1937, the Roswell shallow basin was closed to future appropriations. In 1940, approximately 100,000 acres were irrigated with ground water in the Roswell basin. By 1946, ground water

discharge from the Roswell basin declined to approximately 50,000 acre-feet per year. (PRJI:15.) In 1950, the state engineer estimated that almost 10 percent of the irrigated acreage in the basin was watered illegally. (Bliss)

### ADJUDICATION PROCEEDINGS

In 1956, the state of New Mexico, acting through the state engineer, and the Pecos Valley Artesian Conservancy District filed a petition with the Chaves County District Court to determine and define water rights in the Roswell basin and to enjoin all illegal use of water. The petition also alleged that there were large quantities of water being diverted over and above the amounts required for properly irrigating the defendants' lands. This adjudication suit is commonly referred to as the Lewis case because the first-named defendant in the petition is L.T. Lewis.

In 1958, the state and the district filed a second petition requesting the court to adjudicate the surface and underground water rights of lands irrigated from the Hagerman Canal. In 1965, the court granted the request of the state and the district to consolidate the Lewis case and the Hagerman Canal case. The motion in support of this request stated that a common adjudication of all water rights to divert from the same source is essential in order to have a common administration of rights.

Before the two cases were consolidated, the court had adjudicated in the Lewis and Hagerman Canal cases 130,460 acres with ground-water rights, including 14,500 acres of rights supplemented by surface water. Water rights for 1,724 irrigation wells were adjudicated. Approximately 12,200 acres were dried up through the adjudication. (Hennighausen) Of the 9,026 acres of rights under the Hagerman Canal, about 5,000 acres were also served by individual wells. There were also about 2,600 acres with ground-water rights not served by the canal.

In 1966, the court entered a Partial Final Judgment and Decree. The decree confirmed and approved all orders adjudicating individual water rights. It also ordered the water users to install water meters on their wells and to make annual reports to the water master of the total amount of water diverted from each well. The decree provided that the annual duty of water, that is, the amount of water delivered to the farm on a per acre basis, could be exceeded in any one year provided that the total amount of water diverted during any period of five consecutive years did not exceed five times the

annual duty. The decree ordered the state engineer to appoint a water master, subject to court approval, and it ordered the district to reimburse the state engineer for water master expenses.

Prior to the entry of the Partial Final Judgment and Decree, the court denied two significant motions. The first motion requested the court to modify the reports of the special master so that no specific duty of water be designated. This motion was denied, and no appeal was taken. The second motion requested the court to reopen the adjudication orders so that evidence could be offered to show that the priorities of ground-water rights relate back in time to earlier surface water appropriations. The motion to reopen priorities was denied and an appeal was filed. The New Mexico Supreme Court ruled that the water right claimants should have been given an opportunity to establish the applicability of the relation back doctrine in showing priorities based upon the original appropriation of water from the same source as their wells. The court stated that the application of different standards in determining the relative priorities is "patently unfair and improper." (1967 Opinion)

Three years after the entry of the Partial Final Judgment and Decree, the Pecos Valley Artesian Conservancy District, acting in a representative capacity for all water right owners in the Roswell basin, requested the court to permit it to present evidence to establish a proper duty of water. It claimed in the motion that the 3 acre-foot duty was not adequate for successful farming operations in the basin and that the farmers have historically used in excess of 3 acre-feet. In the district's amended motion, it alleged that the adjudicated duty of water failed to consider and provide for carriage losses from the well to the place of beneficial use on the land.

In 1970, after an eleven-day trial, the district court found that the duty of water should be determined by the amount of water delivered on the land and that there should be added to the duty an amount of water to compensate for carriage loss from the well to the point of delivery on the land. The court found that the average carriage loss was 15 percent. On appeal, the New Mexico Supreme Court affirmed the district court's decision. (1973 Opinion)

In 1973, the state and the district requested permission from the court to file a consolidated petition for the adjudication of water rights in the Hondo River system. The petition alleged that the Hondo River is a major source of water for the recharge of the Roswell basin and that new appro-

priations from the Hondo River will adversely affect the water rights that have been adjudicated in the Roswell Basin. After the court granted the request in 1974, the state and the district obtained a temporary restraining order against the United States preventing it from diverting water from the Rio Ruidoso, a tributary of the Hondo River, for use on the Mescalero Apache Reservation. The United States asked the court to dismiss it as a party to the Hondo River adjudication proceedings based on its sovereign immunity from suit. The United States was dismissed, and the state and the district appealed.

The New Mexico Supreme Court ruled that the federal reserved water rights for the Mescalero Apache Reservation were held in trust by the United States as legal owner for the Indian beneficiaries. The court held that the state district court had jurisdiction to adjudicate the United States' reserved rights based on the 1952 McCarran Amendment. (1976 Opinion)

The Mescalero Apache Tribe intervened in the case in 1977. The district court heard evidence on the tribe's water right claims in 1986 and 1987 and entered a final judgment on the tribe's rights in July 1989. The court adjudicated to the tribe a right to divert 2,322 acre-feet per year for existing uses and future needs for domestic, recreational, and other nonagricultural uses on the reservation. The priorities for its rights are based on the dates of executive order reservations for the tribe. The earliest priority is 1873. The United States and the tribe have appealed the court's judgment. They have also challenged non-Indian claims for priorities before 1873.

In 1976, the Carlsbad Irrigation District requested the state engineer to administer the waters of the Pecos River pursuant to the doctrine of prior appropriation. Counsel for the state engineer concluded that the only way to facilitate priority administration of the Pecos River was to adjudicate in one case the interrelated rights to the use of surface and underground waters. The state therefore requested permission to file a supplemental complaint to adjudicate all water rights within the Pecos River Basin. The request was granted in 1978.

In 1982, the court granted the state's amended motion for interim decree on priorities affecting the Carlsbad Project. The court ordered that water users with priorities junior to January 1, 1947, may be enjoined under the constitutional provision that priority of appropriation shall give the better right. (N.M. Const. Art. XVI §2) The court issued this order subject to: (1) the right of each user to con-

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test *inter se* the rights adjudicated for the Carlsbad Project and (2) the right of each user to establish in law or equity that his use of water should not be terminated to satisfy the senior right or rights for the Carlsbad Project.

The state offered evidence in support of the amended motion showing that as of 1982, the natural discharge of water from the Roswell basin to the Pecos River averaged a little less than 30 cubic feet per second for about 20,000 acre-feet per year and that the base flow of the Pecos River under the 1947 condition averaged 46,700 acre-feet per year. (Transcript (Tr.):69, 74) There was 19,100 acres with irrigation water rights in the Roswell basin with ground-water priorities after 1946. Within the Pecos River Basin, there was an estimated 26,900 acres with priorities after 1946. (Tr.94) Testimony was offered that it would be reasonable to cut off rights having priorities later than 1946 in order to begin to satisfy the senior rights for the Carlsbad Project with a margin of error. (Tr.109)

The district appealed the court's order. The district claimed that the procedure adopted by the court would violate due process because there can be no administration of junior rights as against senior rights until the court enters a comprehensive decree fixing all priorities. The New Mexico Supreme Court upheld the district court's order and ruled that there is nothing in the adjudication statute that precludes administration of water rights prior to the filing of a final decree. (1983 Opinion)

In order to administer water rights in the Pecos River Basin in accordance with the doctrine of prior appropriation, the state is serving owners of ground-water rights having priorities after 1946 with orders to show cause. The orders provide owners with an opportunity to establish an earlier priority date by relating their ground-water right to a prior surface water appropriation. The district court has entered final orders adjudicating post-1946 priorities for approximately 3,000 acres within the Roswell basin. There are two appeals pending in the New Mexico Court of Appeals from final orders. The principal issue addressed by the district court in these show cause proceedings is whether the water right owner must and can show that the appropriation of ground water recaptured water that had been a source of supply for a prior surface water appropriation, and that the surface water supply was diminished due to pumping of the contributing aquifer by junior appropriators.

## CONCLUSION

In the Pecos River adjudication suit, significant legal and hydrological questions have been decided or are being tried by the New Mexico district and appellate courts. The answers to these questions will have far-reaching effects for the rest of New Mexico in the adjudication of Indian and non-Indian water rights and the enforcement of prior rights in hydrologically related surface and ground-water systems.

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