

Appendix E

Pecos River Settlement Agreement



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.

¹ All further specific statutory references are to NMSA 1978.

E. The Pecos Valley Artesian Conservancy District (“**PVACD**”) is an artesian conservancy district organized under the laws of the state of New Mexico, NMSA 1978 Article 73, Chapter 1. PVACD is a party to the Adjudication.

F. As a condition precedent to the expenditure of funds by the ISC appropriated pursuant to § 72-1-2.4, the ISC is required to enter into contracts with the governing bodies of the CID, PVACD and the Fort Sumner Irrigation District (“**FSID**”) that specify the actions the parties agree will be taken or avoided to ensure that the expenditures by the ISC authorized under § 72-1-2.4 will be effective toward permanent compliance with New Mexico’s obligations under the Pecos River Compact and the Pecos River Decree. § 72-1-2.4 (C). This Settlement Agreement and an agreement by and between the ISC and the FSID are intended by the Parties to satisfy said condition precedent.

G. As a further condition precedent to the expenditure of funds by the ISC appropriated pursuant to § 72-1-2.4, the surface water claims in the Adjudication by or within the CID are required to be settled or adjudicated. § 72-1-2.4 (D) (1) (c). Concurrently with the execution of this Settlement Agreement, the Parties have executed a Joint Motion to be filed with the Adjudication Court seeking approval of the proposed Partial Final Decree, which Partial Final Decree incorporates the terms and provisions of this Settlement Agreement (the “**Joint Motion**”). Said Partial Final Decree and this Settlement Agreement are intended by the Parties to satisfy said condition precedent.

H. The ISC has undertaken computer modeling of the anticipated effects of the operations contemplated in this Agreement, which modeling has been reviewed and approved by the Parties. The results of this modeling, and the assumptions upon which such modeling is based, are summarized in the report entitled “New Mexico Interstate Stream Commission, Pecos River Adjudication Settlement Negotiations: Model Evaluation of Proposed Settlement Terms, Final Report, prepared by John Carron, Ph.D., Hydrosphere Resource Consultants, Inc., March 10, 2003.”

TERMS OF AGREEMENT

THE PARTIES AGREE AS FOLLOWS:

1. **Implementation of Settlement.** Immediately upon the final execution of this Settlement Agreement by all Parties, the Parties shall file with the Adjudication Court the Joint Motion and shall thereafter promptly initiate and diligently prosecute efforts to comply with their obligations set forth in Paragraph 2 below.

2. **Conditions Precedent.** Except for the provisions of Paragraph 13 below, the obligations of CID, the United States, PVACD, the ISC and the state of New Mexico under this Settlement Agreement, and the force and effect of the Partial Final Decree entered in the Project (Offer) Phase of the Carlsbad Irrigation District Sub-Section in *State of New Mexico ex. rel. State Engineer v. L.T. Lewis, et. al., Nos. 20294 and 22600* (“the **PFD**”), shall be contingent upon either the satisfaction or waiver by express agreement of the following conditions precedent (the “**Conditions Precedent**”), on or before December 31, 2004:

(A) **Entry of a PFD.** The Adjudication Court shall have entered a PFD containing the same terms as contained in the form of PFD to which this Settlement Agreement is attached. As an independent obligation under this Agreement, in order to effectuate the satisfaction of this Condition Precedent, the Parties shall in good faith seek to have as many of the objectors in the Project (Offer) Phase of the Adjudication as possible execute pleadings entitled Withdrawal of Objection to Stipulated Offer and Consent to Entry of Partial Final Decree (the “**Withdrawal**”) that withdraw their objections heretofore filed in the Adjudication if the Adjudication Court enters a PFD containing the same terms as contained in the form of PFD to which this Settlement Agreement is attached. Said Withdrawals shall further provide that upon entry of a PFD containing the same terms as contained in the form of PFD attached to said Withdrawals, the parties to said Withdrawals shall not present any claim or objection in the Membership Phase of the Carlsbad Irrigation District Sub-Section (the “**Membership Phase**”) or any *inter se* phase of the Adjudication that is inconsistent with the PFD and this Settlement Agreement. The purpose of the foregoing procedure will be to create as limited a group of remaining objectors in the Project (Offer) Phase of the Adjudication as is feasible. The Parties will then request that the Adjudication Court enter an order directed to those who have not withdrawn their objections to show cause why the PFD, as submitted, should not be made final and binding upon all parties.

(B) **Implementation of Consensus Plan.** The ISC shall have implemented the terms of the authorizations contained in §72-1-2.4 (D)-(G) inclusive, as the same may be amended, to the extent of acquiring at least 4,500 acres of land on the assessment rolls of CID that are entitled to the delivery of Project water, and 7,500 acres of irrigation water rights in the Roswell Artesian Basin (“**RAB**”). The ISC shall have constructed, leased or purchased wells sufficient to undertake the augmentation pumping plan outlined in Paragraph 9 below, to a minimum capacity of 15,750 acre-feet of water per year.

(C) **Federal Contracts and Environmental Compliance.**

(1) The United States, acting through the Department of Interior, Bureau of Reclamation (the “**Bureau of Reclamation**”), and CID shall have extended the Carlsbad Project New Mexico Contract for the Conversion of Carlsbad Project Water from Irrigation to Miscellaneous Purposes and Uses Other than Irrigation, Contract No. 9-WC-40-R6140, dated February 9, 1999, or enter into a new contract to achieve the same purpose, for an additional 5-year period with one automatic 5-year extension (the “**Umbrella Agreement**”). Said extension or new contract shall in addition allow the ISC to lease some or all of the water allotted to lands owned by it to itself or to a separate entity approved by it, without the need to include Forbearance Payments (as defined in the Umbrella Agreement). The Bureau of Reclamation shall have completed all necessary environmental compliance related to the Umbrella Agreement, including compliance under the National Environmental Policy Act and the Endangered Species Act.

(2) The Bureau of Reclamation, CID and the ISC shall have entered into a separate long-term miscellaneous purposes contract pursuant to the authorities granted under the Act of June 17, 1902 (32 Stat. 388), as amended in particular by the Act of February 25, 1920 (41 Stat. 451), that will contain substantially and materially the same terms as the Umbrella Agreement, and which shall be sufficient to allow the ISC to utilize water allotted to lands owned by it or leased by the ISC from other members of CID, or other Project water as described in this Agreement, for release from facilities serving the Carlsbad Project to the New Mexico-Texas state line for the purpose of compliance with the Pecos River Compact and any United States Supreme Court Decree, or any court order, River Master compliance plan, or state administrative regulation or order relating thereto, in the manner set forth in this Agreement (the “**Miscellaneous Purposes Contract**”). The Bureau of Reclamation shall have completed all necessary environmental compliance related to the Miscellaneous Purposes Contract, including compliance under the National Environmental Policy Act and the Endangered Species Act.

(3) The Bureau of Reclamation shall have completed all compliance under the National Environmental Policy Act and the Endangered Species Act with regard to Carlsbad Project operations. The ISC shall use its best efforts, consistent with its authorities as joint lead agency and its available funding, to facilitate completion of such environmental compliance.

On or before September 30, 2004, the Parties shall confer in good faith to determine whether: (i) the Conditions Precedent have been satisfied, in which event the Parties shall file with the Adjudication Court on or before December 31, 2004, a joint declaration that the Conditions Precedent have been satisfied; or (ii) the Conditions Precedent have not been and will not be satisfied, but satisfaction will be waived by the Parties, in which event the Parties shall file with the Adjudication Court on or before December 31, 2004, a joint declaration that the unsatisfied Conditions Precedent have been expressly waived by the Parties; or (iii) the Conditions Precedent have not been satisfied, but may in the future be so satisfied, in which event the Parties shall file with the Adjudication Court a joint motion seeking an extension to a date certain of the date by which a joint declaration shall be filed with the Adjudication Court by the Parties. In the event that the Parties do not file on or before December 31, 2004, a joint declaration or joint motion with the Adjudication Court as provided herein, then this Settlement Agreement and the PFD shall be void *ab initio*, shall have no further force or effect, and all Parties hereto shall be relieved from all obligations, claims and defenses with respect hereto.

3. **Additional Studies and Modeling.** In furtherance of greater accuracy and additional benefit to the Parties and to the economy of the Pecos River region in New Mexico, the ISC anticipates undertaking, in consultation with the Parties, such studies, including but not limited to computer modeling, as will result in enhanced river operations, the avoidance of priority calls, and increased beneficial use of water in the state of New Mexico consistent with legal obligations. To the extent necessary to achieve such goals, the Parties may, but are not obligated to, in good faith modify the terms of this Agreement.

4. **Supplemental Well Pumping.**

(A) Groundwater diversions from each supplemental well within CID shall not exceed a quantity of water equal to a combined maximum Farm Delivery Requirement (“**FDR**”) of 3.697 acre-feet per acre per year as determined by the State Engineer, minus surface water allotments by CID to the same land as is served by such supplemental well (regardless of whether water under such allotments is actually delivered to said land). The State Engineer shall compute and limit each individual supplemental well owner’s maximum allowable supplemental well diversion based on the surface water allotment computed for the supplemental well owner’s proportional amount of Carlsbad Project acres, without consideration of surface water allotment leasing and/or temporary moves of surface water allotments.

(B) In the Membership Phase, the State shall include in offers of judgment made to those CID members owning supplemental wells (the “**Supplemental Well Owner(s)**”) serving acreage within the CID that are entitled to receive water delivered by the CID, a provision whereby each such Supplemental Well Owner will execute an assignment (the “**CID Allotment Assignment**”) in favor of the ISC for the purpose of expediting the administration of water rights. The purpose of the CID Allotment Assignment shall be to prevent excess depletions to the annual surface water supply of the Pecos River. The CID Allotment Assignment shall be exercised in accordance with regulations to be adopted by the State Engineer addressing diversions from supplemental wells in excess of the amounts allowed by the terms of this Settlement Agreement, which shall be included by the State Engineer in the permits governing the diversion and use of water from such wells. The ISC shall exercise the CID Allotment Assignment in those instances in which a CID member’s combined surface and supplemental groundwater diversions exceed an FDR of 3.697 acre-feet per acre per year. The CID Allotment Assignment shall provide that the ISC is entitled to request the CID to transfer from the Supplemental Well Owner’s current or future CID allotment(s) to the ISC, a quantity of water equal to the quantity by which the sum of supplemental well diversions by said Supplemental Well Owner plus surface water allotments by CID for the lands served by the supplemental well(s) owned by said Supplemental Well Owner exceed 3.697 acre-feet per acre per year of land owned and irrigated by said Supplemental Well Owner. The point of measurement for such diversions shall be at the farm headgate for surface water allotments by the CID and at the wellhead for groundwater diversions. The CID shall effectuate such transfers upon receipt of an application(s) from the ISC. All such surface water allotments transferred to the ISC hereunder shall be added to the ISC’s surface water allotment and shall be utilized as set forth in this Agreement. Notwithstanding the failure or refusal of Supplemental Well Owner to execute a CID Allotment Assignment, the ISC and the State Engineer shall have all powers accorded by law to regulate diversions from Supplemental Wells and to enforce remedies for over diversions.

5. **ISC Water Right Acquisition, Sale Back and Lease Back.** The ISC will use its best efforts to request from, and to utilize moneys appropriated by, the New Mexico Legislature pursuant to §72-1-2.4 to purchase land in accordance with the proportions set forth in said authorizing legislation as the same may be amended, as follows:

(A) Up to 6000 acres of land on the assessment rolls of CID that are entitled to delivery of Project water;

(B) Up to 1,000 acres of irrigation water rights between the Acme gage to and including the FSID;

(C) Up to 11,000 acres of irrigation water rights in the RAB, of which approximately 3,000 acres shall be water rights in the shallow aquifers and approximately 8,000 acres shall be water rights in the artesian aquifers.

(D) The ISC, CID and PVACD will work in good faith to seek legislative amendment to §72-1-2.4 that will allow the ISC to purchase water rights outside of the CID, including within PVACD and/or between Avalon and the New Mexico-Texas state line, pursuant to this Paragraph 5, without the necessity of purchasing the land to which the water rights are appurtenant (the “**Dried Up Acreage**”), under the following conditions:

(1) The right to be purchased is a valid existing water right and provisions are included in such purchase to prevent any further use of water on the Dried Up Acreage except in accordance with law by subsequent transfer to the Dried Up Acreage of a duly-adjudicated water right; provided, however, that the ISC shall withhold from the transfer or shall obtain from another source, a quantity of water sufficient for irrigation, not to exceed one irrigation season, in the minimum amount necessary to establish cover vegetation on the Dried Up Acreage, and shall be responsible to establish such cover vegetation, to prevent erosion until irrigation water rights are once again available to said Dried Up Acreage; and,

(2) §72-12-1 groundwater well permits for use on the Dried Up Acreage are specifically prohibited through a covenant running with the land.

(E) If the ISC determines that it may make any water rights acquired by the ISC available for beneficial use, by sale or leases longer than one year, without compromising Pecos River Compact compliance goals established in this Agreement, then the ISC shall first make the rights available to the original owner for the original use at the original place of use from the original point of diversion, giving preference to acreage with a history of continuous irrigation use, and thereafter to other purchasers or lessees in the same general area as the original use.

(F) Whenever the sum accumulated over time of the annual Overages as defined in Article I (A) (3) of the Pecos River Decree, as determined pursuant to Article III (B) (1) of the Pecos River Decree by the River Master appointed by the U.S. Supreme Court pursuant to the Pecos River Decree (the “**River Master**”) (which sum accumulated over time shall be referred to herein as the “**Accumulated Overage**”) is greater than 115,000 acre-feet, and if there is a sufficient quantity of water in storage in facilities serving the Carlsbad Project to allow the ISC to reasonably predict that augmentation pumping likely will not be required in the next succeeding year, the ISC will reasonably

consider and in good faith implement a program for leasing, on an annual basis, CID water rights to users located within CID; Roswell Artesian Basin water rights to users located within the RAB; FSID water rights to users located within FSID; and/or CID, RAB or FSID water rights (with the consent of whichever of CID, PVACD or FSID has jurisdiction over the area from which the water rights will be leased, which consent shall not unreasonably be withheld) to the Bureau of Reclamation or other federal agency for the purpose of compliance with the Endangered Species Act. The ISC shall offer water rights for leasing under such program in the proportion that the acreage purchased in CID, RAB and FSID bears to the total acreage purchased, for such periods of time as said water rights are temporarily not required for satisfaction of conditions of this Settlement Agreement, so as to stimulate economic activity from use of said water rights in CID, RAB and FSID and as a means by which ISC may recoup, to some extent, the cost of augmentation pumping from the RAB. The ISC shall establish a policy to give a preference for re-irrigating historically irrigated lands. Water rights leased by the ISC shall be transferred and used in accordance with state law.

6. **Status of ISC Owned CID Surface Water Delivery Rights.** By virtue of the purchase and ownership of land on the assessment rolls of CID, the ISC shall become a member of CID, and shall be entitled to all the rights and benefits, and shall be subject to all the obligations, assessments, rules and regulations, of membership in CID, on the same basis as all other members of CID. The CID, consistent with applicable federal and state law, shall allot water on a *pro rata* basis to 25,055 acres of land on the assessment rolls of CID. CID shall deliver through the Carlsbad Project to Avalon Reservoir all water allotted by CID to lands owned by the ISC (the “**ISC Allotment**”), and shall make such water available to the ISC pursuant to the terms of this Agreement. CID shall account for and shall deliver water under the ISC Allotment dependant upon the water supply available to CID and the amount of Accumulated Overage, in the following manner:

(A) On or before January 31 of each year, the ISC shall estimate the Accumulated Overage as of December 31 of the previous calendar year. Such estimate shall be based upon the Accumulated Overage determined by the River Master as of July 1 of the previous calendar year, extrapolated to December 31 based upon the Manual as defined in Article I (A) (2) of the Pecos River Decree. For the sole purpose of determining the disposition of the ISC Allotment and governing Carlsbad Project operations pursuant to this Paragraph 6, the ISC’s estimate shall be binding upon the Parties, and shall be referred to herein as the “**Calculated Overage**”. The ISC shall consult to the extent reasonably requested with the Bureau of Reclamation, CID and PVACD in its determination of the Calculated Overage.

(B) The State Engineer shall determine, in good faith consultation with CID, the Bureau of Reclamation and PVACD, the total water supply available to the Carlsbad Project at any one time (the “**Project Water Supply**”). The Project Water Supply shall be an estimate of the amount of water available to CID for delivery at the Avalon Dam gate into the CID main canal, and shall equal the quantity of water allotted and delivered to CID members (including the ISC) within the current year, plus the quantity of water then in active storage in all facilities serving the Carlsbad Project and available for release, less storage evaporation losses and conveyance losses associated with the release

of water from storage and delivery to Avalon Reservoir. Groundwater pumped by the Augmentation Wells between November 1 and December 31 pursuant to Paragraph 9 below, which is not passed through facilities serving the Carlsbad Project pursuant to Paragraph 11 (A) or 13 (E) below, shall be accounted as part of the Project Water Supply in the next succeeding calendar year.

(C) In any year in which the Calculated Overage is less than 50,000 acre-feet, the ISC shall not take delivery of water under any allotments made to it by CID from the first 50,000 acre-foot increment of the Project Water Supply. CID shall re-allot any ISC Allotment from the first 50,000 acre-foot increment of Project Water Supply in that year to other CID members; provided, however, that the total allotments and re-allotments of water for each CID member hereunder shall not exceed a quantity of water that will yield an FDR of 3.697 acre-feet per acre per year, and the total Project acreage irrigated within CID in that year shall not exceed 25,055 acres minus the quantity of acres then owned by the ISC. If the Project Water Supply is equal to or greater than 50,000 acre-feet at any time in that same year, CID shall deliver from facilities serving the Carlsbad Project and release at Avalon Dam to the Pecos River for delivery to the New Mexico-Texas state line under the Miscellaneous Purposes Contract a quantity of water equal to the Project Water Supply in excess of 50,000 acre-feet, up to the quantity of water determined by the following formula:

$$\frac{50,000 \text{ acre feet}}{(25,055 \text{ acres} - \text{Total acres in CID owned by ISC}) \times 1.35 \text{ carriage loss}} \times$$

$$\text{Total acres in CID owned by ISC} \times 1.176 \text{ carriage loss} = \text{Delivery}$$

When the total release from the Carlsbad Project at Avalon Dam to the Pecos River for delivery to the New Mexico-Texas state line in that year reaches the quantity of water determined by the above formula, CID may resume storing water in facilities serving the Carlsbad Project and may make such additional allotments as it may determine. CID shall deliver from facilities serving the Carlsbad Project and release at Avalon Dam to the Pecos River for delivery to the New Mexico-Texas state line under the Miscellaneous Purposes Contract, all such additional allotments made to ISC-owned lands in that year, plus a quantity of water equal to 17.6% of such ISC Allotment. CID shall deliver from facilities serving the Carlsbad Project and release to the Pecos River at Avalon Dam the full quantity of water specified herein at the earliest possible time consistent with efficient water management practices so as to complete the release of the full quantity of water specified herein to the Pecos River at Avalon Dam by December 25. CID shall begin deliveries from facilities serving the Carlsbad Project and releases to the Pecos River at Avalon Dam no later than November 1, and shall complete all deliveries and releases by December 25. Delivery of water directly into the Pecos River below Avalon Dam by CID necessitated by Avalon Reservoir contents exceeding the top of the permitted conservation elevation at the time of the spill, or by the conservation storage in all of the reservoirs in the Pecos River Basin serving the Carlsbad Project exceeding 176,500 acre-feet, shall not be credited to CID against the CID delivery requirement to the ISC under this Agreement. Such delivery of water directly into the Pecos River below Avalon Dam by CID shall be considered an involuntary spill.

(D) In any year in which the Calculated Overage is equal to or greater than 50,000 acre-feet but less than or equal to 115,000 acre-feet, the ISC shall not take delivery of water under any allotments made to it by CID from the first 90,000 acre-foot increment of Project Water Supply. CID shall re-allot any ISC Allotment from the first 90,000 acre-foot increment of Project Water Supply in that year to other CID members; provided, however, that the total allotments and re-allotments of water for each CID member hereunder shall not exceed a quantity of water that will yield an FDR of 3.697 acre-feet per acre per year, and total Project acreage irrigated within CID in that year shall not exceed 25,055 acres minus the quantity of acres then owned by the ISC. If the Project Water Supply is equal to or greater than 90,000 acre-feet at any time in that same year, CID shall deliver from facilities serving the Carlsbad Project, and release at Avalon Dam to the Pecos River for delivery to the New Mexico-Texas state line under the Miscellaneous Purposes Contract a quantity of water equal to the Project Water Supply in excess of 90,000 acre-feet, up to the quantity of water determined by the following formula:

$$\frac{90,000 \text{ acre feet}}{(25,055 \text{ acres} - \text{Total acres in CID owned by ISC}) \times 1.35 \text{ carriage loss}} \times$$

$$\text{Total acres in CID owned by ISC} \times 1.176 \text{ carriage loss} = \text{Delivery}$$

When the total release from the Carlsbad Project at Avalon Dam to the Pecos River for delivery to the New Mexico-Texas state line in that year reaches the quantity of water determined by the above formula, CID may resume storing water in facilities serving the Carlsbad Project and may make such additional allotments as it may determine. CID shall deliver from facilities serving the Carlsbad Project and release at Avalon Dam to the Pecos River for delivery to the New Mexico-Texas state line under the Miscellaneous Purposes Contract, all such additional allotments made to ISC-owned lands in that year, plus a quantity of water equal to 17.6% of such ISC Allotment. CID shall deliver from facilities serving the Carlsbad Project and release to the Pecos River at Avalon Dam the full quantity of water specified herein at the earliest possible time consistent with efficient water management practices so as to complete the release of the full quantity of water specified herein to the Pecos River at Avalon Dam by December 25. CID shall begin deliveries from facilities serving the Carlsbad Project and releases to the Pecos River at Avalon Dam no later than November 1, and shall complete all deliveries and releases by December 25. Delivery of water directly into the Pecos River below Avalon Dam by CID necessitated by Avalon Reservoir contents exceeding the top of the permitted conservation elevation at the time of the spill, or by the conservation storage in all of the reservoirs in the Pecos River Basin serving the Carlsbad Project exceeding 176,500 acre-feet, shall not be credited to CID against the CID delivery requirement to the ISC under this Agreement. Such delivery of water directly into the Pecos River below Avalon Dam by CID shall be considered an involuntary spill.

(E) In any year in which the Calculated Overage is greater than 115,000 acre-feet, CID shall re-allot the ISC Allotments to other CID members, until such time as the total allotments and re-allotments of water for each CID member hereunder shall equal a quantity of water that will yield an FDR of 3.697 acre-feet per acre per year, and total

Project acreage irrigated within CID in that year shall not exceed 25,055 acres minus the quantity of acres then owned by the ISC. If CID has allotted and re-allotted a total quantity of water that will yield a FDR of 3.697 acre-feet per year to 25,055 acres minus the quantity of acres then owned by the ISC, ISC shall determine whether it will make available under Paragraph 5 (F) above, any additional ISC Allotments in that year to lands within CID. In such event, the allotments and re-allotments to each member shall not exceed a quantity of water that will yield an FDR of 3.697 acre-feet per acre per year, and total Project acreage irrigated within CID shall not exceed 25,055 acres in that year.

7. **Transfers of Allotments Within CID.** Notwithstanding the FDR limitation of 3.697 acre-feet per acre per year of land within CID as set forth in this Settlement Agreement, nothing in this Agreement shall be deemed to limit the authority of CID pursuant to NMSA 1978 §73-10-16 to approve transfers of allotments from the acreage to which the allotment was originally made to other acreage within CID, and which may result in total water deliveries to the land to which the transfer is made in excess of an FDR of 3.697 acre-feet per acre per year; provided, however, that for purposes of determining the diversion limitation for any supplemental well on the land from which the allotment has been moved for stacking purposes, the allotment shall be charged to the acreage to which the allotment was originally made.

8. **Membership Phase.** With regard to the Membership Phase or any *inter se* phase of the Adjudication, the Parties agree as follows:

(A) The state of New Mexico shall utilize its best efforts to expedite the Membership Phase of the CID section of the Adjudication by initiating an informal negotiation process in the membership surface water rights phase. The State shall provide a copy of each offer of judgment to CID at the time of service upon a CID member. CID may provide technical assistance to any member served with an offer of judgment and, in the event it deems necessary, facilitate settlement of any dispute concerning the surface water rights elements of named owner, delivery ditch, and amount of irrigated land as set forth in the offer of judgment. The State Engineer and CID shall cooperate in the development of a common database for the reconciliation of the irrigated acreages in the offers of judgment with the CID Assessment Rolls. CID, at the end of each irrigation season, shall report to the State Engineer all permanent suspensions and transfers. CID shall also provide to the State Engineer a copy of its current assessment roll listing current members in order to maintain the common database.

(B) Upon entry of a PFD containing the same terms as contained in the PFD attached to the Joint Motion, no Party shall present any claim or objection in the Membership Phase or any *inter se* phase of the Adjudication that is inconsistent with the PFD and this Settlement Agreement; provided, however, that nothing herein shall prevent any Party from protesting any change in purpose and/or place of use based on grounds provided by applicable law in proceedings before the State Engineer or an appeal therefrom.

9. **Augmentation Pumping.** The ISC will utilize moneys appropriated by the Legislature to develop a well field or wells, or lease or purchase existing wells (the “**Augmentation Wells**”) located in the RAB and drilled into the Roswell Basin aquifers. The

purpose of the Augmentation Wells shall be to pump water to the Pecos River in order to augment the flow of the Pecos River. The ISC will utilize moneys appropriated by the Legislature to acquire water rights in the RAB and FSID as set forth in Paragraph 5 (B) and (C) above, for transfer to the Augmentation Wells pursuant to the statutes governing the acquisition and transfer of water rights and the rules and regulations and the administrative basin guidelines of the State Engineer. The ISC will consult with the PVACD in the purchase, lease or development of the Augmentation Wells, and shall make a reasonable effort to locate the Augmentation Wells so the operation thereof shall not cause impairment to any valid existing water rights. PVACD shall make available to the ISC such data and expertise as it has, in order to reduce the potential for impairment by, and maximize the effectiveness and reduce the capital and operational costs of, the Augmentation Wells. PVACD, CID and the United States shall not oppose any transfer of water rights to the Augmentation Wells deemed necessary by the ISC, unless based on the grounds of impairment of valid existing water rights or degradation of groundwater quality from salt water intrusion or encroachment, as provided by the applicable policies, guidelines, rules, and/or regulations of the State Engineer. Before any formal opposition to any such transfer, PVACD, CID and/or the United States shall consult with the ISC and the Parties shall attempt to resolve any issues that might exist without the necessity of formal opposition. Total diversions of water through the Augmentation Wells shall not exceed 2.1 acre-feet for each acre of irrigation water rights acquired by the ISC pursuant to Paragraph 5 (B) and (C), above, or held by the ISC pursuant to its Water Conservation Program, or loaned by PVACD to the ISC pursuant to Paragraph 11 (A) or 13 (D) below. The ISC shall undertake operation of the Augmentation Wells and delivery of water to the Pecos River based on the following criteria:

(A) The State Engineer shall determine, in good faith consultation with CID, the United States and PVACD, the Project Water Supply on March 1, May 1, June 1, July 15, September 1 and November 1 of each year. The quantity of water delivered from the Augmentation Wells to the Pecos River pursuant to this Paragraph 9 shall be based upon the Project Water Supply on each of the “**Target Dates**”, measured against a “**Target Supply**” for each of the Target Dates. The Target Supplies on each of the Target Dates shall be as follows:

Target Date	Target Supply
March 1	50,000 acre-feet
May 1	60,000 acre-feet
June 1	65,000 acre-feet
July 15	75,000 acre-feet
September 1	90,000 acre-feet

(B) Water shall be delivered from the Augmentation Wells to the Pecos River commencing November 1 of each year as necessary to meet a Target Supply for CID of 50,000 acre-feet on March 1 of the next succeeding calendar year and shall continue until the Project Water Supply reaches 50,000 acre-feet. Groundwater pumped by the

Augmentation Wells between November 1 and December 31 pursuant to this Paragraph 9, which is not passed through facilities serving the Carlsbad Project pursuant to Paragraph 11 (A) or 13 (D) below, shall be accounted as part of the Project Water Supply in the next succeeding calendar year.

(C) If the Project Water Supply on March 1 is less than 60,000 acre-feet, water shall be delivered from the Augmentation Wells to the Pecos River as necessary to meet a Target Supply for CID of 60,000 acre-feet on May 1 of the same calendar year and shall continue until the Project Water Supply reaches 60,000 acre-feet.

(D) If the Project Water Supply on May 1 is less than 65,000 acre-feet, water shall be delivered from the Augmentation Wells to the Pecos River as necessary to meet a Target Supply for CID of 65,000 acre-feet on June 1 of the same calendar year and shall continue until the Project Water Supply reaches 65,000 acre-feet.

(E) If the Project Water Supply on June 1 is less than 75,000 acre-feet, water shall be delivered from the Augmentation Wells to the Pecos River as necessary to meet a Target Supply for CID of 75,000 acre-feet on July 15 of the same calendar year and shall continue until the Project Water Supply reaches 75,000 acre-feet.

(F) If the Project Water Supply on July 15 is less than 90,000 acre-feet, water shall be delivered from the Augmentation Wells to the Pecos River as necessary to meet a Target Supply for CID of 90,000 acre-feet on September 1 of the same calendar year and shall continue until the Project Water Supply reaches 90,000 acre-feet, or until October 31, whichever occurs first.

(G) The ISC shall not divert from the Augmentation Wells more than 100,000 acre-feet during each five-year accounting period used for RAB administration (for an average annual diversion of 20,000 acre-feet per year), and in no event more than 35,000 acre-feet in any one year of such accounting period. The State Engineer shall administer groundwater diverted from the Augmentation Wells to the Pecos River for delivery to Brantley and/or Avalon Reservoir as appropriate.

(H) In addition to the operations described above, the ISC may utilize the Augmentation Wells to deliver water to the Pecos River in a Pecos River Decree Shortfall Condition as set forth in Paragraphs 11 and 13 below.

(I) The ISC shall not operate the Augmentation Wells to augment Pecos River flows for the purpose of conserving species listed as threatened or endangered under the Endangered Species Act, except as may be wholly incidental to the primary purposes established in this Agreement.

10. Limitation on CID and United States Call Pursuant to the PFD. Notwithstanding the provisions of the PFD and the rights and priorities therein established, neither CID nor the United States shall place a call for administration of priorities or otherwise seek to curtail water uses in the RAB, and neither CID nor the United States shall store or divert water resulting from a call or curtailment exercised by others (including specifically but without limitation for the delivery of water to the New Mexico-Texas state line for purposes of

compliance with the Pecos River Compact or any United States Supreme Court Decree or court order relating thereto), except to the extent necessary to supply not more than 50,000 acre-feet in any one year at the Avalon Dam gate for delivery into the CID main canal. The following factors shall be utilized to calculate the amount of water necessary to supply not more than 50,000 acre-feet at the Avalon Dam gate into the CID main canal:

- (A) the quantity of water allotted and delivered to CID members within the current year;
- (B) the amount of water then in active storage in all facilities serving the Carlsbad Project and available for release;
- (C) any amount of water necessary to refill any minimum storage pools;
- (D) evaporation and conveyance losses; and
- (E) projected deliveries of water from the Augmentation Wells to the Pecos River pursuant to this Agreement.

Neither the CID nor the United States shall place a call for water into storage for carry-over into a subsequent irrigation season. Upon the exercise of a call by CID or the United States hereunder, the CID or the United States may request the State Engineer to initiate priority administration pursuant to law to curtail the use of water under water rights junior to the adjudicated rights of CID and/or the United States to the extent necessary to supply the amount of the call.

11. **Pecos River Decree Shortfall Condition.** In the event that the River Master determines in his Final Report setting forth the calculations required by Article III (B) (1) of the Pecos River Decree that a net shortfall exists (“**Shortfall**”), the Parties agree that the interests of the Pecos River Basin and the state of New Mexico will best be served by the implementation of voluntary measures to increase flows at the New Mexico-Texas state line. Therefore, in the event of a Shortfall, the ISC will use its best efforts to prepare a proposed plan pursuant to Article II (A) (2) of the Pecos River Decree that shall be based upon the following actions that will increase the amount of water at the New Mexico-Texas state line by March 31 of the calendar year following the accounting year in the amount of the Shortfall, in the following order of priority:

- (A) The ISC may operate the Augmentation Wells to deliver water to the Pecos River in an amount necessary to meet the Shortfall, subject to the limitations in any state permit under which the Augmentation Wells operate. The State Engineer shall administer the river to insure that the water delivered to the Pecos River from the Augmentation Wells is passed through Project facilities, subject to normal stream conveyance losses, for delivery to the New Mexico-Texas state line. CID and the United States agree to comply with and to not oppose such administration. Any water delivered to the Pecos River from the Augmentation Wells to meet a Shortfall shall be subject to the 100,000 acre-feet over five years and 35,000 acre-feet in any one-year limitations specified in Paragraph 9 (G) above. To the extent necessary for the ISC to meet the Shortfall, PVACD shall make available by loan without charge to the ISC for a

reasonable period of time necessary to meet the Shortfall, water rights held by PVACD in its retirement program for temporary transfer to the Augmentation Wells in an amount necessary for such purpose.

(B) The State Engineer and/or the ISC may develop a proposed plan pursuant to Article II (A) (2) of the Pecos River Decree.

12. **Water Master.** The state of New Mexico shall petition the District Court in and for the Fifth Judicial District to expand the duties of the Pecos River Water Master to include authority to:

(A) Order meters and records with respect to the diversion of water from the Augmentation Wells, and administer the delivery of water diverted from the Augmentation Wells to the Pecos River by preventing the subsequent diversion of such water from the Pecos River by any person, including taking all legal actions to enjoin such diversions as may be necessary;

(B) Administer deliveries of water from the Augmentation Wells to Avalon Reservoir, and deliveries of water from Avalon Reservoir to the New Mexico-Texas state line in compliance with this Settlement Agreement by preventing by injunction any diversion of such water from the Pecos River by any person; provided, however, that the Water Master shall have no authority over Carlsbad Project internal operations and deliveries of water to CID members;

(C) Order records from CID with respect to the deliveries of water from Project facilities to Avalon Reservoir and from Avalon Reservoir to and within the CID, in order to assure compliance with the terms of this Settlement Agreement; and

(D) Order meters and records for the diversion of water from supplemental wells within CID, and enforce by injunction the limitations on supplemental well pumping within CID as set forth in Paragraph 4 above.

13. **Interim Measures.**

(A) For purposes of this Paragraph 13, the "Interim Period" shall be defined as the period of time between the date of the entry of a PFD in accordance herewith, and the date of the satisfaction of the Conditions Precedent as evidenced by the filing of a joint declaration by the Parties, or December 31, 2004 (or such later date as the Parties may agree), whichever date is earlier.

(B) The agreement and cooperation of the Parties is required to assist the ISC in avoiding or satisfying a Shortfall during the Interim Period, in order to avoid the necessity of curtailing water use and priority administration by the state of New Mexico in order to meet the State's obligations under the Pecos River Decree.

(C) During the Interim Period, in the implementation of the measures outlined in Paragraphs 5 and 9 above, the first priority of the ISC shall be to begin development, purchase or lease of Augmentation Wells and to acquire and apply for transfer of water

rights to such Augmentation Wells so as to be better able to meet any anticipated or actual Shortfall. Such applications for the transfer of irrigation groundwater rights to new points of diversion, as necessary, to augment the surface flows of the Pecos River for the purposes set forth in Paragraph 9 above, shall be made in amounts of water equal to the consumptive irrigation requirement transferred from each irrigated acre. The ISC shall seek from the State Engineer, and the Parties shall support subject to reasonable assurance of non-impairment, approval of emergency authorization to begin diversions immediately upon the development, purchase, or lease of the Augmentation Wells if necessary to meet or avert a Shortfall. In the purchase, lease or development of Augmentation Wells, the Parties shall cooperate to jointly identify well locations and thereafter assist the ISC to facilitate the resolution of any protest to applications involving such identified well locations and transfer of irrigation groundwater rights.

(D) During the Interim Period, in the event of an anticipated or actual Shortfall as determined by the ISC, the ISC may operate the Augmentation Wells to deliver no more than 35,000 acre-feet of water in any one year to the Pecos River in an amount necessary to meet the anticipated or actual Shortfall, subject to the limitations in any state permit or emergency authorization under which the Augmentation Wells operate. PVACD shall make available by loan without charge to the ISC for a reasonable period of time necessary to meet or avert the Shortfall, water rights held by PVACD in its retirement program for temporary transfer to the Augmentation Wells in an amount necessary for such purpose.

(E) In the event of an anticipated Shortfall, and after September 1 of each year during the Interim Period, the State Engineer shall administer the water diverted from the Augmentation Wells and delivered to the Pecos River so as to insure that such water is passed through Project facilities, subject to normal stream conveyance losses, for delivery to the New Mexico-Texas state line. CID and the United States agree to comply with and to not oppose such administration.

(F) In the event of an actual Shortfall, the State Engineer shall administer the water diverted from the Augmentation Wells and delivered to the Pecos River so as to ensure that such water is passed through Project facilities, subject to normal stream conveyance losses, for delivery to the New Mexico-Texas state line. CID and the United States agree to comply with and to not oppose such administration.

(G) During the Interim Period, the second priority of the ISC to meet an anticipated or actual Shortfall shall be to implement a program to lease water within CID, similar to leasing programs previously undertaken by the ISC, CID and the Bureau of Reclamation. CID and the Bureau of Reclamation shall cooperate in the implementation of any such leasing program.

(H) During the Interim Period, neither CID nor the United States shall place a call for water on the Pecos River stream system, so long as the other provisions of this Paragraph 13 are effective and no Party is in breach hereof.

(I) During the Interim Period, in order to promote the successful implementation of the ISC Pecos River compliance plan through cooperation among the water users within the Pecos River stream system, neither the ISC nor the state of New Mexico shall include priority administration in any plan submitted to the River Master pursuant to Article II (A) (2) of the Pecos River Decree, nor shall the State Engineer otherwise seek to curtail the exercise of any water right in the Pecos River Basin, except pursuant to court order.

(J) Notwithstanding the Conditions Precedent set forth above, the provisions of this Paragraph 13 will be valid and binding obligations of the Parties during the Interim Period. Upon expiration of the Interim Period, this Paragraph 13 shall cease to have any further force or effect, and the Parties shall be relieved of any further rights or obligation hereunder.

14. **Modification.** The Settlement Agreement may be modified only by written agreement of the Parties hereto. Any such modification shall be filed with the Adjudication Court.

15. **Settlement and Compromise.** The Parties acknowledge and agree that this Settlement Agreement is a compromise of disputed claims, and shall not be construed as an admission of any fact or theory of law in any other litigation. The Parties enter into this Settlement Agreement solely for the purpose of avoiding the expense and uncertainty of further litigation. The terms of the PFD and this Settlement shall not be construed as precedent in any other litigation.

16. **Termination.** In the event that this Settlement Agreement is terminated for any reason, including without limitation for failure of the Conditions Precedent, the PFD is not made final, and the litigation of the Project (Offer) Phase of the adjudication is resumed, then the terms of this Settlement Agreement, and all conduct or statements made in negotiations, documents, offers, submittals, and communications related thereto or in furtherance thereof, shall not be admissible as evidence in such litigation, pursuant to N.M.R.E. 408 and F.R.E. 408.

17. **Compliance.** The Parties agree that the PFD and this Settlement Agreement shall constitute compliance with the conditions specified in NMSA 1978 § 72-1-2.4 (2002 Cum. Supp.).

18. **Further Documents.** All Parties hereto agree to enter into and execute such other and further documents and instruments as may be reasonably necessary to carry out the terms and objectives of this Agreement.

19. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding among the Parties with respect to the subject matter hereof and all prior or contemporaneous agreements and understandings are merged into this Agreement.

20. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the Parties and their members, officers, directors, managers, agents, employees, attorneys, successors, assigns and transferees.

21. **Notice.** If notice is required or permitted under this Agreement, then notice of ten (10) days shall be given. Such notice shall be deemed received ten days after mailing if sent by first-class mail, postage prepaid addressed to the following Parties:

State of New Mexico:

John R. D'Antonio, P.E.
State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102

With copies mailed separately to the General Counsel, Office of the State Engineer and the Director, Interstate Stream Commission, at the address set forth above.

United States:

Area Manager
Bureau of Reclamation
555 Broadway NE
Suite 100
Albuquerque NM 87102

Carlsbad Irrigation District:

Tom Davis, Manager
Carlsbad Irrigation District
201 S. Canal St.
Carlsbad, NM 88220

With a copy to: Steven L. Hernandez, Hubert & Hernandez, P.A., P.O. Drawer 2857, Las Cruces, NM 88004-2857

Pecos Valley Artesian Conservancy District:

Dennis Karnes, Superintendent
Pecos Valley Artesian Conservancy District
P.O. Box 1346
Roswell, NM 88202-1346

With a copy to: A. J. Olsen, Legal Counsel to the to the Pecos Valley Artesian Conservancy District, P.O. Box 1415, Roswell, New Mexico 88202-1415.

Modifications to Parties or addresses as provided in this Paragraph 21 shall be made in writing and Parties shall be notified of such modifications pursuant to this Paragraph 21.

22. **Governing Law.** This Agreement shall be governed by and shall be construed in accordance with the substantive laws of the State of New Mexico and any applicable federal

law. Nothing in this Agreement shall be construed to constitute a waiver of sovereign immunity by the United States except as expressly set forth in 43 U.S.C. § 666 (1952).

23. **No Limitation on Enforcement of Law.** Nothing in this Agreement shall be construed to deprive CID, PVACD, or a federal or state official of authority to revise, amend, or promulgate regulations, or to enforce federal or state law.

24. **No Commitment of Unappropriated Funds.** Nothing in this Agreement shall be construed to commit a federal or state official or agency to expend funds not appropriated by Congress or the New Mexico Legislature and legally available for the purpose of the expenditure.

25. **No Effect on Federal Rights.** Nothing in this Agreement shall be construed to affect in any manner other federal rights other than as expressly set forth in this Agreement.

26. **Duplicate Originals.** The Parties each agree to execute multiple originals of this Agreement. Separate copies or counterparts of this Agreement may be executed by each Party, separately, and when each party has executed said copies thereof and delivered them to the other Party, such copies taken together shall be deemed to be a full and complete Agreement between the parties.

27. **Effective Date.** This Agreement shall become effective on the date upon which the final signature shall be obtained.

28. **Time of Essence.** Time is of the essence to all covenants and provisions set forth herein.

29. **Captions and Headings.** The captions and headings of the Paragraphs of this Agreement are for convenience only and are not to be used to interpret, define, limit, or enlarge the provisions hereof.

30. **Interpretation.** The Parties were represented by counsel and fully participated in negotiating and drafting this Agreement; this Agreement shall not be interpreted for or against any Party based on authorship.

UNITED STATES:
THOMAS L. SANSONETTI
Assistant Attorney General

Date: 3/25/03

/s/
David Gehlert
Trial Attorney
General Litigation Section

**U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION:**

Date: 3/25/03

/s/
Rick Gold
Regional Director
Upper Colorado Region

STATE OF NEW MEXICO:

Date: 3/25/03

/s/
Patricia A. Madrid
New Mexico Attorney General

Date: 3/25/03

/s/
John R. D'Antonio, Jr. P.E.
New Mexico State Engineer

Date: 3/25/03

/s/
DL Sanders, General Counsel
Special Assistant Attorney General
Office of the State Engineer

**NEW MEXICO INTERSTATE STREAM
COMMISSION:**

Date: 3/25/03

/s/
James Dunlap
Chair

