

WATER AND NATURAL RESOURCES COMMITTEE

PECOS RIVER SETTLEMENT LESSONS & UPDATE

November 8, 2019, 9:00 a.m.

State Capitol, Room 307, Santa Fe, New Mexico

The Intrepid Case:

An Opportunity to Build on the

Framework of the 2003 Settlement

and Ensure Pecos River Compact Deliveries

Without Priority Calls

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Intrepid Potash-New Mexico, LLC

- Intrepid and its predecessors in interest have been an important economic driver for Eddy County and southeastern New Mexico over the roughly 90-year history of potash mining in the area
- Potash is a strategic mineral resource, essential to the economic and national security of the United States
- New Mexico is the top producer of potash in the United States
- Due to declines in global potash prices, Intrepid has had to diversify its operations.
- Part of its resiliency plan includes supporting oil and gas development in the region through leases and sales of water to facilitate oil and gas production

Intrepid Potash-New Mexico, LLC

- Intrepid provides over 300 full-time jobs
- Average annual salary of \$112,000
- Generates approximately 930 additional non-basic sector jobs in the community

Intrepid Potash-New Mexico, LLC

- In making the business decision to lease and sell water, Intrepid relied on the State Engineer's licensing of the water rights and the OSE's continued validation of the water rights.
- Intrepid entered into water lease and sale contracts with oil and gas producers in good faith reliance on the full quantity of its licensed water rights.
- Intrepid is committed to working with the State Engineer, the Interstate Stream Commission, and others to develop a long-term technical solution to preserve New Mexico's ability to meet the delivery requirements of the Pecos River Compact, while preserving Intrepid's ability to put the full quantity of its water rights to beneficial use.

Intrepid's Licensed Water Rights

Water Right	License Date	Quantity in Acre-feet	Priority Date
SP-1942	August 29, 1933	10,859.500	February 2, 1931
SP-302	July 26, 1937	1,879.125	March 26, 1883
SP-302	June 4, 1956	2,479.125	March 26, 1883
SP-302	October 7, 1958	281.250	March 26, 1883
SP-2045	March 2, 1949	3,619.800	June 8, 1934
SP-1955 & SP-1856 Combined	August 28, 1950	566.400	July 1, 1929
SP-1955 & SP-1856 Combined	August 28, 1950	150.800	May 22, 1931
Total		19,836.000	

WATER DIVERTED AT INTREPID'S POINT OF DIVERSION IS USABLE ONLY BY INTREPID

- Water in the Pecos River in southeastern New Mexico is naturally brackish, with high concentrations of Total Dissolved Solids (TDS) and high salinity levels measured as Electrical Conductivity (EC) deciSiemens per metre (dS/m).
- The level of salinity increases as it moves downstream, passes by Harroun Dam, and makes its way toward Malaga Bend, where it becomes extremely saline at levels ten times the normal amounts of salinity contained in fresh water.
- The salinity of the water at Intrepid's point of diversion at Harroun Dam is over 6.5 EC dS/m, making the water diverted unusable for municipal use or irrigation, whereas most key New Mexico crops tolerate an EC under 4 dS/m. However, this salinity level can be tolerated by Intrepid's industrial and commercial uses.
- Therefore, the diversions by Intrepid are not denying any usable water to any other user within New Mexico between Harroun Dam and the accounting point for delivery of water to Texas.

DIVERSIONS BY INTREPID PROVIDE A BRIDGE TO USE OF “PRODUCED WATER”

- The level of salinity at Harroun Dam is far in excess of the levels of salinity of deep well water currently allowed by state law to be used in the oil and gas industry in New Mexico
- The water diverted at Harroun Dam, while of such a quality that it is not usable for other purposes, is not as degraded as the “produced water” generated by the oil and gas industry
- Intrepid understands that it is the will of the Legislature to make a transition to the use of produced water and Intrepid supports this effort. However, making the transition will require development of infrastructure, blending and other technological advances to make a complete transition to exclusive use of produced water and to discontinue the use of fresh water for this purpose
- Because the salinity content of water diverted by Intrepid at Harroun Dam is so high as to make it unusable for other purposes, the continuation of the diversion of this otherwise unusable water will serve as a bridge as the State makes the transition from the use of fresh water being used elsewhere in the Basin to the use of produced water

Use of Intrepid's Licensed Water Rights for Oil & Gas Development

- Intrepid and various co-applicants filed eight water-use lease applications (SP-302 and SP-1942)
- Temporarily change the place of use, the purpose of use, and the point of diversion of the leased water rights
- Pending in the Office of the State Engineer ("OSE") Hearings Unit
- The State Engineer granted preliminary approval for use of 5,700 acre-feet out of the requested 7,883 acre-feet
- The Interstate Stream Commission ("ISC"), Pecos Valley Artisan Conservancy District, and the Carlsbad Irrigation District protested the applications

No State Engineer Actions Forfeiting or Invalidating Intrepid's Licensed Water Rights

- Intrepid's water rights have not been forfeited or abandoned
- The State Engineer has continually recognized the validity of the water rights by licensure, supplemental well permits, and extensions of time
- Rights are not lost when circumstances beyond control cause periods of nonuse—insufficient water in the River, economic conditions (including bankruptcy of a predecessor)

ISC Validation of Intrepid's Licensed Water Rights: ISC Conservation Lease

- Significantly, the ISC leased Intrepid's water rights to aid the State in providing water to the stateline following the Supreme Court's decisions in *Texas v. New Mexico* that New Mexico was in violation of the Pecos River Compact
- The ISC lease was for 7 years between January 11, 1995 and December 31, 2001
- Under Legislative mandate, the State Engineer could not have leased abandoned or forfeited water rights
- Water rights in the ISC's Pecos River Conservation Program were exempt from forfeiture for non-use while in the program

State Engineer and Adjudication Validation Actions

	OSE File Number	Date of Request	Type of Validity Actions	Type of review	Date of OSE Approval
1	SP-302	January 1, 1909	Application for Appropriation for Irrigation	OSE validated the water rights prior to approval.	October 22, 1909
2	SP-302	Date Unknown	PBU- Request for License	Review of Beneficial Use	December 12, 1924
3	SP-302	Date Unknown	PBU- Request for License	Review of Beneficial Use	January 4, 1927
4	SP-302	Date Unknown	PBU- Request for License	Review of Beneficial Use	November 21, 1928
5	SP-302	N/A	Livingston Adjudication	Establish validity, priority & Amount	July 17, 1931
6	SP-1942	November 2, 1931	Application for Appropriation for Industrial Uses	OSE validated the water rights prior to approval.	April 15, 1932
7	SP-1942	June 19, 1933	PBU - Request for License	Review of Constructed Works, Beneficial Use	August 29, 1933
8	SP-302	August 30, 1934	Change the place of use and purpose of use to industrial use	OSE validated the water rights prior to approval.	November 19, 1934
9	SP-302	December 28, 1936	PBU - Request for License	Review of Beneficial Use	On July 26, 1937
10	SP-302	August 23, 1940	Change the place of use and purpose of use to industrial use	OSE validated the water rights prior to approval.	November 16, 1940
11	SP-302	August 3, 1942	Application to Change Place of Use	OSE validated the water rights prior to approval.	October 19, 1942

State Engineer and Adjudication Validation Actions

	OSE File Number	Date of Request	Type of Validity Actions	Type of review	Date of OSE Approval
12	SP-302	September 10, 1949	Request for Supplemental Wells	OSE validated the water rights prior to approval.	September 14, 1949
13	SP-302	November 27, 1953	Change the place of use and purpose of use to industrial use	General, NOP, Impairment Analysis	December 30, 1953
14	SP-302	December 8, 1942	PBU - Request for License	OSE validated the water rights prior to approval.	June 4, 1956
15	SP-302	November 6, 1943	PBU - Request for License	Review of Beneficial Use	June 4, 1956
16	SP-302	February 28, 1956	PBU - Request for License	OSE validated the water rights prior to approval.	June 4, 1956
17	SP-302	September 23, 1957	Change the place of use and purpose of use to industrial use	OSE validated the water rights prior to approval.	December 9, 1957
18	SP-302 and SP-1942	July 19, 1957	Application for a supplemental well	OSE validated the water rights prior to approval.	September 13, 1957
19	SP-302	May 19, 1958	PBU - Request for License	Review of Beneficial Use	On October 7, 1958
20	SP-302 and SP-1942	November 4, 1964	Request to change location of Supplemental Well	OSE validated the water rights prior to approval.	May 7, 1965
21	SP-302 and SP-1942	December 18, 1970	Application to add use to Supplemental Well	OSE validated the water rights prior to approval.	February 19, 1971
22	SP-302	October 27, 1982	Application to change place of use.	OSE validated the water rights prior to approval.	December 31, 1986

State Engineer and Adjudication Validation Actions

	OSE File Number	Date of Request	Type of Validity Actions	Type of review	Date of OSE Approval
23	SP-302 and SP-1942	January 11, 1995	ISC leases all water from Intrepid	OSE and ISC review of validity of water rights and other specific Pecos River Compact requirements	January 11, 1995
24	SP-302 and SP-1942	March 30, 2000	Application for Supplemental Well	OSE validated the water rights prior to approval.	May 18, 2000
25	SP-302	February 28, 2017	Application Preliminary Authorization	OSE validated the water rights prior to approval.	March 10, 2017
26	SP-1942	May 24, 2017	Application Emergency Preliminary Authorization	OSE validated the water rights prior to approval.	June 28, 2017
27	SP-302	September 13, 2017	Application Preliminary Authorization	OSE validated the water rights prior to approval.	April 6, 2018
28	SP-302	June 23, 2017	Application Preliminary Authorization	OSE validated the water rights prior to approval.	July 3, 2017
29	SP-1942	December 15, 2017	Application Preliminary Authorization	OSE validated the water rights prior to approval.	June 8, 2018
30	SP-1942	December 21, 2017	Application Preliminary Authorization	OSE validated the water rights prior to approval.	June 8, 2018
31	SP-1942	April 18, 2018	Application Preliminary Authorization	OSE validated the water rights prior to approval.	June 8, 2018
32	SP-302	April 18, 2018	Application Preliminary Authorization	OSE validated the water rights prior to approval.	August 13, 2018

OSE Extensions of Time Precluding Forfeiture and Abandonment

Extension of Time Number	For Water Rights Numbers	Date Accepted by the OSE	Deadline Extended To	Notes from OSE EOT Memos
1	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	October 12, 1978	September 30, 1979	"no water rights have been lost through non-use"
2	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	September 19, 1979	September 30, 1980	"no water rights have been lost through non-use"
3	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	August 27, 1980	September 30, 1981	"no water rights have been lost through non-use"
4	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	September 2, 1981	September 30, 1982	"no water rights have been lost through non-use"
5	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	August 12, 1982	September 30, 1983	"no water rights have been lost through non-use"
6	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	December 6, 1983	September 30, 1984	Approval of EOT is recommended
7	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	September 25, 1984	September 30, 1985	Approval of EOT is recommended
8	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	September 27, 1985	September 30, 1986	Approval of EOT is recommended
9	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	October 1, 1986 - Per acceptance letter	September 30, 1987	Approval of EOT is recommended
10	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	February 4, 1988	December 31, 1988	Approval of EOT is recommended

OSE Extensions of Time

Precluding Forfeiture and Abandonment

Extension of Time Number	For Water Rights Numbers	Date Accepted by the OSE	Deadline Extended To	Notes from OSE EOT Memos
11	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	December 27, 1988	December 31, 1989	Approval of EOT is recommended
12	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	January 4, 1990	December 31, 1990	Approval of EOT is recommended
13	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	Unknown	December 31, 1991	Unknown - Document not available but referenced in a letter
14	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	January 26, 1995	December 31, 1995	"It appears that the applicant is making a diligent effort and that they have signed a cooperative water conservation agreement with the Interstate Stream Commission."
15	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	December 14, 1995	December 31, 1996	"It appears that the applicant is making a diligent effort and that they have signed a cooperative water conservation agreement with the Interstate Stream Commission."
16	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	December 17, 1996	December 31, 1999	
17	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	January 14, 2000	December 31, 2002	"It appears that the applicant is making a diligent effort and that they have signed a cooperative water conservation agreement with the Interstate Stream Commission."

OSE Extensions of Time

Precluding Forfeiture and Abandonment

Extension of Time Number	For Water Rights Numbers	Date Accepted by the OSE	Deadline Extended To	Notes from OSE EOT Memos
18	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	December 31, 2002	December 31, 2005	"It appears that the applicant is making a diligent effort and that they have signed a cooperative water conservation agreement with the Interstate Stream Commission. "
19	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	January 15, 2003	December 31, 2008	"Surface and supplemental groundwater points of diversion . . . indicate that Intrepid Mining is making a diligent effort to put the water to beneficial use."
20	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	January 19, 2006	December 21, 2011	"Surface and supplemental diversions indicate that Intrepid Potash NM LLC has made a diligent effort to put water to beneficial use."
21	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	January 14, 2009	December 31, 2014	"Surface and supplemental diversions indicate that Intrepid Potash NM LLC has made a diligent effort to put water to beneficial use."
22	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	February 28, 2012	December 31, 2017	"The OSE records for these water rights <u>do not</u> show any evidence that the applicant has been put on notice by the State Engineer that they are at risk of forfeiting any of their surface water rights due to nonuse including any non-use that may have occurred after June 1 st , 1965 under New Mexico Statute Annotated Number 72-5-28." (Emphasis included in the original document).
23	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	Not yet approved	Not yet approved	N/A

New Mexico's Law of Prior Appropriation Applies to Meeting New Mexico Deliveries Under the Pecos River Compact

- “In maintaining the flows at the New Mexico-Texas state line required by this Compact, **New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.**” Pecos River Compact, Article IX.
- The 2003 Settlement (between the State of New Mexico (ISC & OSE), PVACD, CID, & the U.S. Bureau of Reclamation) and the Adjudication Decree, in which the Settlement was incorporated, adjudicated the CID water rights and **allowed New Mexico to avoid priority calls by CID**

Intrepid's Licensed Water Rights Were Not Included in the 2003 Settlement

- Even though the ISC paid for and leased Intrepid's rights and converted them to instream Compact delivery use, Intrepid's rights were not factored into the models that form the basis of the 2003 Settlement Agreement

Status of Resolving the Question of the Validity of Intrepid's Water Rights

- By agreement, the OSE Hearings Unit matter is stayed pending an expedited *inter se* proceeding in the Adjudication Court
- By agreement, the Adjudication proceeding is stayed while the parties discuss Settlement

Status of Resolving the Question of the Validity of Intrepid's Water Rights

- Intrepid's Water Rights will be determined in the Adjudication Court, either by:
 - Negotiated settlement resulting in a proposed Consent Order being submitted to the Adjudication Court

or

- Trial beginning August 17, 2020, followed by the decision of the Adjudication Judge

Settlement Provides a Synergistic Approach

- Settlement offers benefits to Intrepid, the Protestants, and the State of New Mexico
- Quicker and less costly (avoids appeals)
- Provides economic benefit through use of Intrepid's rights, while keeping the Pecos River Compact deliveries whole without requiring a priority call (a portion of Intrepid's water rights are senior to CID's rights)
- Settlement options include various synergistic mechanisms, such as optimizing the use of groundwater, and overage credits under the Pecos River Compact.

Settlement Provides a Synergistic Approach

- Settlement takes into account possible effects on the Compact in advance and gives flexibility to develop solutions to address the consequences of the water right allowed, irrespective of its magnitude
- In contrast, using the litigation approach results in a determination of the quantity of a right
 - Requires ad hoc scrambling to adjust to the recently adjudicated water right
 - Promotes further attacks and appeals by either side as to the quantity of the right determined

Settlement Ideas: In Water Short Years

- In water short years, use groundwater to pump into the River, exactly as already contemplated by the ISC, with access and pumping costs being shared by water right holders who seek to temper the impacts of their diversions.
- In water short years, activate a drought insurance plan whereby Intrepid could enter into contractual relationships with other water users to defray impacts on the Compact.

Settlement Ideas: In Water Short Years

- In water short years, allow senior water right holders who seek to temper the impact of their pumping to utilize credits received for Compact over-deliveries in exchange for their commitment to pay back those credits in a time specific with water interest at some level that adds to the credit balance in the future years.
- In water short years, having senior water rights users who seek to temper the impact of their pumping reduce their demand by adjusting contracts with their customers accordingly.

Synergistic Benefits of Settlement

- A. Avoiding the consequences to the junior water right holders from a priority call by Intrepid to fill the water right demand heretofore not formally quantified as part of the valid water demand within New Mexico.
- B. The possible benefit of a settlement that could provide an adaptive approach, not an all-or-nothing approach.
- C. The benefits to New Mexico of continued support of a thriving oil and gas industry, without requiring retirement of junior water rights used in agriculture.

Synergistic Benefits of Settlement

- D. The importance and value of improving the efficiency of water use on the Pecos River System, avoiding litigation with the State of Texas, and development of a short-term water market that does not focus on permanent sale of water rights, but rather, on a program that focuses on changes in use only in water short years.

- E. The importance of treating groundwater in storage as a regulated reserve source of water for water short years, with the possibility of replenishment in high water flow years.