# WHITE PAPER

## Overall Scope of the Licensed Water Rights Held by Intrepid Potash – New Mexico, LLC

**May 9, 2018**

**Affidavit Exhibit 1**

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# EXECUTIVE SUMMARY

## A. Overview.

As discussed fully in this White Paper, Intrepid Potash-New Mexico, LLC ("Intrepid')[1] is the owner of approximately 19,000 acre-feet of licensed water rights with points of diversion from the Pecos River and some supplemental wells all located south of Carlsbad, New Mexico. In good faith reliance on the validity of its licensed water rights, Intrepid entered into lease and sale contracts with several oil and gas operators for the use of a portion of Intrepid's water. By doing so, Intrepid is diversifying its operations to better withstand fluctuations in the potash market and support another key industry in southeastern New Mexico through the beneficial use of Intrepid's water rights.

The Office of the New Mexico State Engineer ("OSE") suggested in January 2018, that Intrepid's predecessor in interest may have forfeited its water rights in excess of 5,800 acre-feet for non-use during the period between 1956 and 1965. The OSE encouraged Intrepid to provide additional evidence in support of its licensed water rights. Intrepid has researched this issue and is pleased to provide the information in this White Paper that demonstrates that such a forfeiture did not take place.

Intrepid filed a water lease application in April 2018, to expand the place and purpose of use of 2,500 acre-feet of Intrepid's water rights and add an additional point of diversion. The OSE has not acted upon the application and has not issued a temporary authorization to proceed on the 2,500 acre-foot application. This presents a very difficult situation for Intrepid because it has existing contractual obligations to its major customers for the use of the 2,500 acre-feet of water.

As to the suggestion by the OSE of forfeiture during the period of 1956 to 1965, Intrepid did not forfeit its water rights because there was insufficient water available for Intrepid to divert that amount from the Pecos River. This shortage was caused by three different events that combined to reduce the flows: (1) drought, (2) groundwater pumping in the Roswell Basin, and (3) the City of Carlsbad's wellfield pumping. It is clear that there is documented and observed use by Intrepid of its rights at the time Intrepid obtained the rights and when it received its licenses. However, during that time period when there was insufficient water in the river it was impossible for Intrepid to use all of its rights.

Furthermore, Intrepid presents additional evidence in this White Paper that neither the New Mexico Interstate Stream Commission ("ISC") nor the OSE considered these water rights forfeited. These agencies evaluated Intrepid's licensed water rights, accepted them as valid and the ISC entered into a lease with Intrepid for the use of 19,823 acre-feet these rights in 1995. This lease was in the form of a Cooperative Water Conservation Agreement, attached hereto as Exhibit 1. This agreement was part of a larger conservation initiative directed by the State of

[1] Intrepid's predecessors include U.S. Potash, also known as U.S. Borax & Chemical Company, and Mississippi Potash, Inc., also known as Mississippi Chemical. References to Intrepid during the period of operation of one of these predecessors is intended to refer to actions by the appropriate predecessor.

New Mexico aimed at ensuring New Mexico met its obligation for water delivery to Texas under the Pecos River Compact.

The history of the evolution of the lease of Intrepid's water rights is clear. From the very inception of the program in July 1991, the State sought to place Intrepid's water rights into the conservation program to ensure that these rights would not be pumped at the time when the State was seeking to increase its Pecos River water delivery to Texas. *See* Motion of the New Mexico Interstate Stream Commission, attached hereto as Exhibit 2, and Public Notice Request for Offers to Sell, Lease or Assign Water Rights to the New Mexico Interstate Stream Commission, attached hereto as Exhibit 3. An internal memorandum, attached hereto as Exhibit 4, that summarizes the initiative was submitted to the ISC near the time of the lease with Intrepid. The affidavit of William Miller, the author of that memorandum, is attached hereto as Exhibit 5. Also attached hereto as Exhibit 6, is the affidavit of former State Engineer Thomas Turney. Mr. Turney points out that the conservation program into which these water rights were leased required approval of the State Engineer, who has the authority to determine the extent and validity of a water right. Furthermore, Mr. Turney notes that the ISC, including the State Engineer, authorized the ISC Chairman to enter into a Conservation Program lease with Mississippi Potash, Inc. *See* the June 24, 1994 Minutes of the ISC, attached hereto as Exhibit 7.

According to the June 24, 1994, ISC Minutes, authorization was requested, and granted, to enter into a lease with Mississippi Potash for approximately 34,000 acre-feet. (Exhibit 7) **"By entering into the proposed agreement, the Commission could be assured that Mississippi Potash would not resume the use of the water right which if resumed would negatively impact the effects of rights acquired elsewhere."** (Exhibit 7) All of the above support the proposition that the State agencies with jurisdiction relied upon and accepted the validity of Intrepid's water rights in 1995.

The ISC was charged with accepting rights into the conservation program and entering into leases or purchase agreements that: 1) quickly increase flows at the state line, 2) result in cost-effective deliveries of water to the state line, 3) have a demonstrated history of use, and 4) have a priority date prior to 1947. The Intrepid water rights met these criteria because leasing Intrepid's water rights prevented Intrepid from pumping under its licenses and ensured that the benefits of retirement of the other rights resulted in increased flows at the State line.

**B. Proposed Collaboration.**

Intrepid is seeking resolution of two important issues. One, it is vital to Intrepid that the OSE lift the 5,800 acre-feet maximum communicated in January 2018 and issue temporary authorization on Intrepid's 2,500 acre-foot lease application. This will allow Intrepid to meet a portion of its contractual obligations for delivery of water for oil and gas development. Second, and equally important, and perhaps more longer term, is resolution of the quantity of Intrepid's water rights available for its use.

Intrepid and its experts are confident that this White Paper creates, at a minimum, a *prima facie* case that Intrepid holds more than the 5,800 acre-feet maximum communicated in

January 2018; indeed, they are of the view that at a minimum this right is 10,000 acre-feet. Therefore, Intrepid asks that the OSE lift the 5,800 acre-feet restriction and work with Intrepid to finalize an exact amount to be included in an amended License. Because Intrepid and its experts believe that this White Paper creates a *prima facie* case, there are currently sufficient water rights held by Intrepid to allow continued delivery of its water under the existing leases.

Indeed, Intrepid is willing to limit its water use to 10,000 acre-feet in 2018 as a demonstration of good faith while engaging in a long-term program with the OSE and the ISC. It is vital to involve both the ISC and the OSE. The outcome of the collaborative effort would be development of a technical solution that will allow the State to meet its Pecos River Compact obligations, while also allowing Intrepid to use its water rights. The ISC is amenable to seeking a solution through collaboration. The OSE has also suggested such a coordinated effort would be a good policy direction.

Resolution of these issues is vital to the OSE's interest in ensuring compliance with the applicable rules for water distribution. But it is also important to Intrepid and the economic viability of the region. Intrepid has contracted sales and leases of its water in reliance on its vested licensed water rights. If limited, this will cause Intrepid, its customers, and the entire region to suffer economically. Intrepid also fully understands the importance of compliance with the Pecos River Compact.

Intrepid stands ready to work with the OSE and ISC to develop a long-term plan to preserve New Mexico's ability to meet the delivery requirements of the Pecos River Compact, while preserving Intrepid's continued ability to put all of its valid water rights to beneficial use. To this end, Intrepid has engaged experts to assist in a collaborative effort to evaluate methods for minimizing impacts of its diversions on the Pecos River Compact by evaluating the accounting and related options that are available.

## BACKGROUND

This White Paper is intended to begin a discussion regarding the overall scope of the licensed water rights held by Intrepid. It is not a definitive analysis and is put together to begin the discussion, not to end it. It is hoped that this White Paper will be useful in demonstrating the strength and parameters of Intrepid's licensed water rights. It is also hoped that it will begin productive conversations with the OSE and the ISC regarding the quantity of Intrepid's valid water rights and how it can partner with the State of New Mexico in its use of those water rights for economic development without jeopardizing New Mexico's Pecos River Compact deliveries to Texas.

A timeline summarizing key events that illustrate the continued validity of Intrepid's water rights is attached hereto as Exhibit 8. The timeline begins in 1931, when U.S. Potash Company began placing these water rights to beneficial use in its refinery and continues through the lease of these water rights from 1995 to 2001, by the State of New Mexico. At that time, New Mexico leased these water rights and placed them in a conservation program so that they would not be used during the term of the lease.

The White Paper begins with a summary of the information on file in the records of the OSE. This is not intended to be a compilation of all of the records, but rather is intended to provide information that demonstrates that the water rights, which were ultimately licensed by the New Mexico State Engineer were placed to beneficial use when water has been available. This OSE file record information is accompanied by a hydrograph (Exhibit 9) that reflects how the potash refinery water users were affected by use of junior wells upstream in the same way that the State of Texas was affected—the available surface water supply decreased dramatically after 1947, ultimately resulting in the Supreme Court decree in *Texas v. New Mexico* that committed New Mexico to implement measures to reinstate flows at the border.

The second section briefly discusses the law of forfeiture and abandonment in New Mexico and focuses on the principle that it is in the public interest of New Mexico to keep water in beneficial use. It points out **that forfeiture does not occur if it is not possible to divert water because of an absence of supply, nor is forfeiture possible after June 1, 1965 without prior notice by the New Mexico State Engineer.**

This White Paper also demonstrates that these water rights were considered valid water rights by the ISC and the State Engineer and were leased by the State of New Mexico in 1995 as a part of a conservation program. That program authorized the ISC to ascertain the validity of Pecos surface water rights. The New Mexico Legislature, based upon an evaluation by the ISC authorized the ISC to lease and/or purchase these rights if it concluded they were valid and would aid the State in complying with the Pecos River Compact. The delegation of the authority to the ISC to determine the validity of water rights and to purchase and/or lease them was expressly authorized by the New Mexico State Engineer.[2] As is discussed fully below, the ISC

[2] The Special Projects Division of the OSE was formed in mid-1993 to carry out special projects as directed by the State Engineer. New Mexico State Engineer Office, Annual Report-Fiscal Year 1995-July 1, 1994 to June 30, 1995 at 49 (Nov. 1995). The Special Projects Division included three bureaus, Hydrology, Special Projects and Water Use

entered into a lease with an option to purchase Intrepid's water rights, with the then owner of the rights. Because these rights could have otherwise been subject to forfeiture while unused in the conservation program, the Legislature amended the forfeiture statute to preclude their forfeiture while in the program, thus fully protecting the ISC from the loss of these rights. Finally, the White Paper points out that there is no proof, by clear and convincing evidence that these rights were intentionally abandoned.

## PART I

## SUMMARY OF THE DEVELOPMENT AND USE OF INTREPID'S WATER RIGHTS

This review provides some of the evidence available that documents the efforts undertaken by U.S. Potash Company ("USP", aka U.S. Borax & Chemical Corp.), and its successors, to develop, and whenever possible, beneficially use the water rights perfected by it and used at its refinery located approximately 15 miles southeast of Carlsbad, Eddy County, New Mexico for water rights under OSE file numbers SP-302, 1942, 2045, 1856 & 1955 Combined and C-791 ("Water Rights"). The information presented herein is a partial summary of information obtained primarily from the records of the OSE, District II office located in Roswell. To a lesser extent, information was also found in USP records passed down to Intrepid, the current owner of the refinery site and the Water Rights.

The record that follows demonstrates that after 1947 and up to June 1965, upstream diversions and groundwater pumping reduced available supply for use of these Water Rights, thus **making it impossible to place the full amount into beneficial use.**

### A. Water Rights Development and Maintenance.

The processing of potash ore requires large quantities of water, both in terms of volume (acre-feet, "af") and process rates of flow (cubic feet/second, "cfs"). Specifically, at the USP refinery, Pecos River water was used not only in the refining process, but large quantities of river water were also consumptively used for power generation, process cooling and waste disposal. The timeline of USP's development of its Water Rights is set out below. While many of the water rights predate 1907, and all of them predate the Pecos River Compact, this table presents a summary since the 1930s.

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& Reports. *Id.* The Division was responsible for carrying out hydrological analyses and water resources investigations as requested by the State Engineer, ISC, and the Legal Service Division. *Id.* In fiscal year 1995, the year of New Mexico's lease of Intrepid's water rights, the Division evaluated several Pecos River Basin lease and purchase offers. *Id.* In that same year the Division also prepared hydrologic analyses for administration of the Pecos River Compact. *Id.* The Special Projects Division, which had been directed by Peter Kraai, was dismantled shortly before the end of the fiscal year ending in June 1996. New Mexico State Engineer Office Interstate Stream Commission, 1996 Annual Report-July 1, 1995 to June 30, 1996 at 12 (1996). Many of its functions were assumed by the Technical Division of the OSE. *Id*.

**Table 1. Water Rights Development Milestones**

| Year | Activity |
|---|---|
| **1931** | **SP-1942**: Notice of Intention (February) and application (November) to appropriate 15 cfs by diversion and 800 af by storage. Continuous use throughout the year for "manufacturing, milling and reduction purposes." |
| | USP acquires 1878.75 af of SP-302 rights appurtenant to 501.1 acres (Harroun, aka Valley Farms). This is a portion of the "first right" on the lower Pecos River. |
| **1932** | **SP-1942:** OSE approves permit with standard conditions. |
| **1933** | **SP-1942:** Proof of beneficial use ("PBU") was filed. OSE inspection found 21.76 cfs diverted and 17.17 cfs returned to river (Consumptive use ("CU") = 4.59 cfs). Report states that "It is understood in this application that the company desires to claim continuous flow of 15.0 second feet and desires the right to use such water without any return to the stream." PBU states that the "entire appropriated amount of water has been and is now being used" |
| | **SP-1942: License issued** to appropriate 15 cfs water continuous flow of the Pecos River to be used for manufacturing, milling and reduction purposes. Priority date of 2/2/31. |
| **1934** | **SP-2045:** Application filed in June for new appropriation of 25 cfs for industrial purposes. Application was approved in September with provision that 20 cfs be returned to the river. |
| | **SP-302:** Application filed in August to change method of use of 1879.125 af, or 2.59 cfs continual use, irrigation rights appurtenant to 501.1 acres. Approved by OSE in November. |
| **1936** | **SP-302:** PBU filed claiming full use of 2.59 cfs for manufacturing, milling and reduction, and steam power. |
| **1937** | **SP-302: Amended License issued** consistent with permit, priority date of 3/26/1883. |
| **1939** | **SP-302:** USP acquires an additional 761.1 acres with appurtenant irrigation water rights. Total acreage acquired = 1,262.2 acres. |
| **1940** | **SP-302:** Application filed in July to transfer irrigation water rights appurtenant to 282.3 acres for industrial use. Application states that since approval of the first SP-302 transfer, its need for additional water for industrial purposes has increased. Application also states: "Of the quantities of water used by applicant in its refining processes, by far the greater portion of the water used is used solely for cooling purposes, and is returned to the stream...but the water which is sought to divert by this application will be actually used in the refining process and in discharging waste from said plant, and will not be returned to the stream system." Application was approved in November. Balance of 478.8 acres ("ac") acquired by USP remain under irrigation. |
| **1943** | **SP-2045**: **PBU filed**. |
| **1947** | **SP-1856 & SP-1955:** Applications filed in July to change to industrial use 566.4 af and 150.8 af, respectively of licensed irrigation rights. Applications approved in November. |
| **1949** | **SP-2045: License issued** for appropriation of 25 cfs for industrial use at the USP refinery provided that 20 cfs be returned to river. Priority 6/8/34. |
| | **SP-1856 & SP-1955: PBU filed** for combined continuous diversionary right of 0.99 |

| Year | Activity |
|---|---|
| | cfs for industrial purposes, further described as full consumptive use at the refinery site. |
| **1950** | **SP-1856 & SP-1955: Combined license issued,** in the amount of 717.2 af (0.99 cfs), for industrial purposes at the USP refinery, with 7/1/29 and 5/22/31 priority dates, respectively. |
| **1953** | **SP-302:** Application filed in November and approved in December to transfer 1420.5 af appurtenant to 378.8 acres (acquired in 1939) to industrial purposes. Balance of 100 ac owned by USP will remain under irrigation. Note fast-track permit approval. |
| **1956** | **SP-302: PBU filed** stating 1.96 cfs diverted and fully consumed in 1954 for refining purposes under the subject permit. |
| | **SP-302: License issued**, consolidating by reference the entire 1,162.2 acres acquired from Harroun farms and subsequently converted to consumptive industrial use, while leaving the balance of 100 ac under irrigation. |
| **1957** | **SP-302:** Application filed to change balance of 100 ac of irrigation into industrial use at the refinery. The application states the entirety of the amount diverted will be consumptively used for refining purposes. OSE approves transfer of 281.25 af for industrial purposes. |
| **1958** | **SP-302:** Final inspection report and PBU filed stating that 0.39 cfs diverted under permit **"in addition to that quantity heretofore licensed"** under Permit SP-302. |
| | **SP-302**: **License issued** for the 281.25 af for industrial purposes. |

As early as 1957, USP and its successors, U.S. Borax and Mississippi Chemical Corporation began undertaking significant measures to maintain its water rights in good standing by placing all of its rights in beneficial use, including *inter alia,* obtaining OSE approval for supplemental wells and leasing of water rights to the benefit of other industrial users and the State of New Mexico, and applications for extension of time which were granted by the OSE. Some of these efforts are summarized in Table 2 below.

**Table 2. Water Rights Beneficial Use Activities**

| Year | Activity |
|---|---|
| **1957-1959** | **C-791:** OSE approves applications to make well C-791 supplemental to all of the surface rights licensed under files SP-302, 1942, 1856 & 1955. OSE approves permit in July 1959 with no stated diversionary limits. |
| **1962** | **C-791: Proof of completion of works (**"PCW") submitted, stating: This well is to supplement existing rights under Licenses 302, 1856, 1942 and 1955 for industrial purposes. |
| **1964** | **C-791:** Application filed November 4, to change location of C-791 with exploratory well C-1271 which will be renumbered C-791. PCW filed on November 9. Public notice attached to the Affidavit of Publication states that the purpose is for supplementing surface rights of the Pecos River in the amounts of 6518.625 af under Licenses SP-302, 717.2 af under License SP-1856 & 1955 Combined and 15 cfs under License SP-1942. |
| **1965** | **C-791:** OSE approves the application on May 5, with no stated pumping limits. |

| Year | Activity |
|---|---|
| **1979<br>1980<br>1981** | **OSE File 302, 1856, 1942, 1955, 2045:** Multiple Applications for Extension of Time reviewed and approved by the OSE. Staff memoranda of recommendation state: "Water rights under subject file numbers were recorded in the form of a decree, licensed and permitted. **No rights have been lost through nonuse**." |
| **1991 - 2001** | **Cooperative Water Conservation Agreement:** Negotiations begun in 1991 culminate in an Agreement with the NM Interstate Stream Commission (ISC) to lease to the State all but 150 af of the Water Rights, inclusive of Licenses **302, 1856, 1942, 1955 and 2045.** The ISC also has the first option to purchase all of the Water Rights which are further described as "all the above rights are supplemented by groundwater from well C791 . . . , by permit issued July 1957." |

## B. Geo-hydrologic Conditions Limiting Use of the Licensed Water Rights.

The sources of Pecos River flow below the City of Carlsbad are: 1) leakage from Lake Avalon, 2) discharge from Carlsbad Springs (limestone aquifer), 3) irrigation returns via the shallow, alluvial aquifer,[3] and obviously, 4) flows downstream on the main stem of the Pecos River as a result of snow melt in certain years and from flood events.

The flows in the Pecos River near Carlsbad can be reduced by two different kinds of hydrologic events, both having to do with ground water pumping. First, pumping from wells tapping the reef aquifer or the valley fill in the Carlsbad Basin can reduce flows. Second, pumping from wells in the Pecos River valley upstream from the Carlsbad area, particularly in the Roswell Basin, dramatically reduced the flow of the Pecos River in the Carlsbad area. This flow reduction resulted in the Supreme Court case of *Texas v. New Mexico*.[4] Finally, some authors note that although the decline in discharge from Carlsbad Springs correlates with the increase in pumping from wells, it also correlates with the reduction in recharge due to drought.[5] The discharge of groundwater from the springs can also be suppressed by an increase in the levels of water stored in Tansill Reservoir (now known as Carlsbad Lake), into which the springs discharge.

As shown on the attached figure (Exhibit 9), the combined effects of drought and groundwater diversions by appropriators with priority dates junior to those of USP resulted in a dramatic and unabated reduction in surface water flow at USP's point of diversion on the Pecos River. Continuous over-diversion by the City of Carlsbad between 1947 and 1961, in particular, was found by the State Engineer to have impaired, and "would in the future impair the rights of existing users,"[6] including USP. Not surprisingly, the reduced flow in the Pecos River at USP's point of diversion not only impacted the quantity of water available to support production levels in the refinery, but also the quality of water resulting in higher concentrations of algae, protozoa,

[3]John Erickson, Analysis of Water Supply in Pecos River at Harroun Dam (1963).

[4] Bjorklund and Motts, Geology and Water Resources of the Carlsbad Area, Eddy County, N.M. USGS report, 261 (1959).

[5] *Id*. at 184.

[6] Steve Reynolds, Decisions, Findings and Order in the Matter of the Applications of the City of Carlsbad, C-76-S-4, et al, Finding 13 (July 11, 1961).

fine mud and silt in the incoming river water, thereby requiring higher levels of treatment. All of the above made it difficult, if not impossible, to apply to beneficial use the full amount of the licensed Water Rights.

### C. Actions Taken by USP and its Successors to Compensate for Low Flow and Reduced Quality Conditions.

USP responded vigorously to address both the issues of permanent decline in quantity and quality of the water it was entitled to divert under its licensed Water Rights. As shown in Table 3, these activities were intended to both recover supply and challenge the activities of other appropriators.

**Table 3. Actions Taken to Protect Supply and Water Rights**

| Year | Activity |
|---|---|
| **1949** | USP obtains OSE approval to drill multiple exploratory wells. Wells were drilled, and logs submitted to OSE. However, none of the wells showed significant production potential. |
| **1957** | Letter from USP to OSE objecting to Valley Land Co. temporarily storing its irrigation water ~ 6 miles upstream of the Harroun Diversion at Six Mile Dam which cited "extreme shortage of water in the river" as basis for doing so. |
| **1960 -1965** | U.S. Borax protests multiple applications by the City of Carlsbad (OSE file C-76 et al.) to add new wells and new appropriations of groundwater. The 1960 letter of protest identifies U.S. Borax licenses No. 302, 1856, 1942, 1955 and 2045. U.S. Borax retains the services of former State Engineer John Erickson who generates a number of detailed analyses of the hydrology of Carlsbad Springs and impacts from groundwater development. |
| **1965** | Internal OSE memo memorializing phone call from U.S. Borax demanding that more water be released from Tansill dam (i.e. to increase discharge from Carlsbad Springs) "to satisfy their prior right." Suit for damages against the operator of the dam was threatened. |
| | Stipulated agreement between U.S. Borax and City of Carlsbad allowing City to proceed with transfer of SP-302 rights into municipal wells but no water can be stored in surface reservoirs for recreational purposes. U.S. Borax consultant's recommendation that transferrable consumptive use should be limited to 2450 af per year ("afy") was adopted by OSE in its 1965 permit SP 302 & C-484 into C-76 et al. |

In summary, the evidence is overwhelming that when water was available of the quantity and quality that could be used under the licensed Water Rights, it was utilized by USP. However, the record also shows that upstream diversions reduced available supply for use of these Water Rights, thus making it impossible to place the full amount into beneficial use during certain periods.

**D. Validation of Intrepid's Water Rights by Approval of the State Engineer and the Interstate Stream Commission of the 1995 Conservation Lease.**

Texas was affected in the same way that USP was affected by the upstream diversions and the excess diversions of the City of Carlsbad. As you recall, after a full evaluation by Dr. Murthy, the expert from Texas, Special Master Charles Meyers, appointed to determine the facts vis a vis Texas' Complaint, ruled in favor of Texas. He found that the Pecos River Compact would not allow New Mexico to divert, by man's activities, more water than was being diverted under the conditions in 1947. Dr. Murthy evaluated flows available on the Pecos before the 1948 Compact signing and flows after 1947 to the date of the filing of the Supreme Court case by Texas. He then accounted for evaporation, transpiration, deep percolation as carriage loss, and concluded that all of these losses taken together could not explain the decrease in deliveries at the border to Texas. For this reason, he concluded these additional losses were attributable to "man's activities." The "man's activities" were explained as all of the upstream junior wells in the Roswell Basin that had been allowed under New Mexico water law.

This ruling was affirmed in part by the United States Supreme Court which entered a decree and then appointed a water master. Extensive efforts were made by New Mexico and Texas hydrologists that resulted in a new manual for river operations and development of flood flow gauges that could demonstrate the amount needed to be delivered at the border with Texas on an annual basis. Compliance was developed on a three-year rolling average.

Of course, development of stream gauges and development of a manual could not bring New Mexico into compliance. New Mexico knew that continuing the status quo would not produce more water at the border. And shutting down wells far up river in Roswell by enforcing priorities would not generate water at the border for many years. Therefore, the New Mexico Legislature began a program of authorizing financial appropriations to be used for the lease and/or purchase of valid water rights that would demonstrate New Mexico's good faith efforts to bring New Mexico's flows at the border in compliance with the amended Supreme Court Decree ("Amended Decree").

**This water conservation program made it possible for the ISC to lease or purchase existing valid rights that were being used at the time and also to lease or purchase valid rights much earlier than those in the Roswell Basin that were not in use but could be put into beneficial use and retire those water rights so that they would not be placed into use in the future. In a 1991 Public Notice, requesting lease or purchase offers from water rights holders, attached hereto as Exhibit 3, among other criteria, the ISC specifically solicitated water rights that "are used, have been used in recent years, or could be used so as to have a material impact on deliveries of surface water at the state line."[7]**

In its findings authorizing this state water conservation program, the Legislature recognized the "potential water crisis" resulting from the Amended Decree and the "recent

[7] ISC, Public Notice Request for Offers to Sell, Lease or Assign Water Rights to the New Mexico Interstate Stream Commission (1991).

droughts and demands on this water system."[8] The Legislature recognized the "state's obligations extend not only to Texas but also to the citizens of New Mexico and their future generations to ensure adequate water supply. If unfulfilled, the obligations of the state to Texas could cost the state millions of dollars in lost revenues, employment and economic productivity."[9] Therefore, the Legislature appropriated millions of dollars and authorized the ISC to "purchase, and retire and place in a state water conservation program administered by the interstate stream commission, 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."[10]

To carry out the Legislature's mandate, the ISC adopted the New Mexico Interstate Stream Commission Water Resource Conservation Project: Pecos River Portion, on July 24, 1991 ("Conservation Program"), attached hereto as Attachment 4 to Exhibit 4. The basic concept was to change the purpose of use of the water rights from industrial or agriculture to conservation and to, in effect, change the point of diversion to the state line.[11]

The Conservation Program was undertaken to "conserve the waters of the State by obtaining water rights and placing them in the project so the flows of the Pecos River will be available for those uses of the greatest benefit to and serving the public welfare of the State."[12] Water rights placed in the program are those that would "most effectively aid the State in complying with the Pecos River Compact."[13] Obviously, the most effective use of State resources was the lease or purchase of valid water rights from whatever source.

The Conservation Program included both purchases and leases of water rights. As noted above, the ISC did not wish to risk the possibility that valid rights it purchased would be subject to forfeiture for non-use. Nor, would any entity transfer its valid rights into the Conservation Program only to find that its valid rights had been lost due to non-use upon expiration of the lease. Accordingly, the water rights transferred into the Conservation Program pursuant to the procedures authorized by the New Mexico State Engineer, were legislatively protected from forfeiture while they remained in the Conservation Program.[14]

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[8] NMSA 1978, § 72-1-2.2(A).
[9] NMSA 1978, § 72-1-2.2(C).
[10] NMSA 1978, § 72-1-2.2(D). The Supreme Court had made clear that New Mexico was not allowed to increase depletions in New Mexico by man's activities in excess of the stream flow conditions in 1947. Intrepid's licensed rights were developed prior to 1947 and retirement of those rights would have the effect of using retirement of senior rights to allow junior wells in Roswell to continue to pump.
[11] This program was not entirely novel. Similarly, in the middle Rio Grande Basin, when pumping causes effects on a stream, it is common for the State Engineer to require and permit existing pre-1907 water rights to be retired at their current place of use and be transferred to offset junior well pumping effects on stream flow that, if left unchecked, could impair delivery obligations under the Rio Grande Compact.
[12] ISC, New Mexico Interstate Stream Commission Water Resource Conservation Project: Pecos River Portion, § 1 (adopted July 24, 1991, approved Oct. 31, 1991).
[13] ISC, New Mexico Interstate Stream Commission Water Resource Conservation Project: Pecos River Portion, § 5 (adopted July 24, 1991, approved Oct. 31, 1991).
[14] NMSA 1978, § 72-5-28(G) (relating to surface water); NMSA 1978, § 72-12-8(D) (relating to groundwater); ISC, New Mexico Interstate Stream Commission Water Resource Conservation Project: Pecos River Portion, § 2(b) (adopted July 24, 1991, approved Oct. 31, 1991).

The ISC followed the legislative directive to lease or purchase water rights that would most quickly help the state comply with the Amended Decree and based its decisions to purchase or lease individual water rights on the following criteria:[15]

1. "Will quickly increase stateline flows. Efforts were focused on acquiring surface and shallow groundwater rights close to the river. River pumper water rights near Hagerman were purchased and surface water rights near Carlsbad were leased."

2. "Will result in cost-effective deliveries of to the state line in terms of dollars per acre-foot."

. . .

3. "Have [a] demonstrated history of use." Pecos River water master diversion records for the period 1971-1990 (20 years) were reviewed. This process was used specifically to "evaluate historic use and to estimate future accretions to the flow of the Pecos River." Water rights without a valid history of use were not included.

. . .

4. "Water right priority date. No water rights were acquired with priority dates later than 1946, in order to ensure that all water rights held by the Commission pre-date the Pecos River Compact."

. . .

5. "All water rights purchases and leases were presented to the Commission for their consideration and approval at regular Commission meetings."[16]

**The ISC realized from the inception of the program that not only was it useful to generate flows at the border with Texas through retirement of currently diverted rights, but part of a permanent solution would be to locate valid pre-Pecos River Compact rights capable of use, but not currently in use and transfer those rights into the Conservation Program and pay the owner to not place those rights into beneficial use while the State was making up its deficit by retiring irrigation rights in the short term.** This plan is reflected in the ISC's 1991 Public Notice, attached hereto as Exhibit 3, that advertised for offers of water rights that "are used, **have been used in recent years, or could be used so as to have a material impact on deliveries of surface water at the state line**."[17] *See also* Affidavit of William J. Miller, attached hereto as Exhibit 5.

Intrepid's Water Rights were the perfect candidate for this type of transfer. Mississippi Potash, Inc. held licensed rights with very early priority dates that it, and its successor, Intrepid, could begin to place into use. In 1991, by motion, attached hereto as Exhibit 2, the ISC authorized the Chairman to enter into cooperative agreements with Mississippi Chemical and

[15] Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission 9-10 (Oct. 25, 1995).
[16] Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission 9-10 (Oct. 25, 1995).
[17] ISC, Public Notice Request for Offers to Sell, Lease or Assign Water Rights to the New Mexico Interstate Stream Commission (1991).

other water rights' holders.[18] The water rights considered for the Conservation Program were "abstracted and a tabulation of historic diversions were made, and other sources of information, i.e., power records and aerial photographs were consulted to verify historic use."[19] Ultimately, the State and Mississippi Potash, Inc. agreed on lease terms and on June 24, 1994, the ISC, including the State Engineer, authorized the ISC Chairman to enter into a Conservation Program lease with Mississippi Potash, Inc.[20] According to the June 24, 1994, ISC Minutes, authorization was requested, and granted, to enter into a lease with Mississippi Potash for approximately 34,000 acre-feet. (Exhibit 7) **"By entering into the proposed agreement, the Commission could be assured that Mississippi Potash would not resume the use of the water right which if resumed would negatively impact the effects of rights acquired elsewhere."**[21] (Exhibit 7) The ISC "determined that these water rights met all of the criteria established by the Commission for inclusion in the Conservation Program."[22] (Exhibit 5)

Consistent with this policy, in January 1995, Mississippi Potash, Inc. granted the ISC the right to transfer all of its rights into the Conservation Program, except for 150 af of surface water it retained to meet a prior obligation.[23] **The ISC quantified the amount of the conserved right at 19,823 acre-feet for both surface and groundwater rights.[24] The ISC reserved a right of first refusal to purchase these rights.[25] This lease made up a significant portion of the water rights leased as part of New Mexico's long term efforts to meet its Pecos River delivery obligations to Texas.[26]** This lease, attached hereto as Exhibit 1, was for a term ending December 31, 2001.[27]

In October 1995, after entering into the Mississippi Potash lease in January, ISC staff reported to the New Mexico Interstate Stream Commission that on behalf of the ISC it had "entered into lease agreements with surface water rights owners near Carlsbad to produce an

[18] ISC, Motion of the New Mexico Interstate Stream Commission (July 24, 1994).
[19] Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission 11 (Oct. 25, 1995).
[20] ISC, Minutes of the New Mexico Interstate Stream Commission 7 (June 24, 1991).
[21] ISC, Minutes of the New Mexico Interstate Stream Commission 7 (June 24, 1991).
[22] Affidavit of William J. Miller (March 29, 2018).
[23] Cooperative Water Conservation Agreement Between Mississippi Potash Inc. and State of New Mexico (Jan. 11, 1995).
[24] Cooperative Water Conservation Agreement Between Mississippi Potash Inc. and State of New Mexico (Jan. 11, 1995); New Mexico Interstate Stream Commission Pecos River Water Right Lease Summary, in Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission, at Attachment 7 (Oct. 25, 1995).
[25] Cooperative Water Conservation Agreement Between Mississippi Potash Inc. and State of New Mexico (Jan. 11, 1995.
[26] *See* New Mexico Interstate Stream Commission Pecos River Water Right Lease Summary, in Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission, at Attachment 7 (Oct. 25, 1995).
[27] Cooperative Water Conservation Agreement Between Mississippi Potash Inc. and State of New Mexico (Jan. 11, 1995; *see also* New Mexico Interstate Stream Commission Pecos River Water Right Lease Summary, in Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission, at Attachment 7 (Oct. 25, 1995).

immediate increase in the flow at the state line." [28] (Exhibit 4) ISC staff noted this was "to help ensure that New Mexico does not accrue a net shortfall and to allow for the effects of purchases made upstream to become evident at the state line."[29]

All of the above illustrates that the State Engineer and the ISC, i.e., the State agencies with jurisdiction, relied upon and accepted the validity of Intrepid's Water Rights in 1995. Even though the Water Rights were not being used at the time, the State Engineer understood the Water Rights were valid licensed Water Rights that had not been forfeited nor abandoned. The ISC authorized a lease with Mississippi Potash so that these Water Rights would not be used while the State worked to build up its accrued credits for Pecos River Compact deliveries.

## PART II

## A BRIEF ANALYSIS OF THE LEGAL STATUS OF INTREPID'S WATER RIGHTS

Each of Intrepid's Water Rights is licensed by the New Mexico State Engineer, each has an authorized point of diversion on the Pecos River in the NW/4SE/4 Sec. 11, T. 23 S., R. 28 E., and each, except No. 1942, has an authorized place of use at the location of the now-demolished refinery built and operated by USP east of the River in NE/4 Sec. 13, T. 23 S., R. 28 E. These are set out below:

State Engineer License No. 302. Right to divert and use beneficially 4,639.5 acre-feet per year for "industrial use," with a priority of March 26, 1883.

State Engineer License Nos. 1856 and 1955 Combined. Right to divert and use beneficially 717.2 acre-feet per year for "industrial purposes," with a priority of July 1, 1929 (as to 566.4 acre-feet per year) and May 22, 1931 (as to 150.8 acre-feet per year).

State Engineer License No. 1942. Right to divert and use beneficially 15 "second feet of water continuous flow" for "manufacturing, milling and reduction purposes," with a priority of February 2, 1931, and no designated place of use.

State Engineer License No. 2045. Right to divert and use beneficially 25 "cubic feet of water per second … provided that 20 cubic feet per second … be returned to the Pecos River," for "industrial use," with a priority of June 8, 1934.

Intrepid's licenses (the "Licenses") were issued pursuant to Section 34 of the New Mexico Water Code of 1907 (the "Water Code"). Section 34 (now codified at NMSA 1978, Sec. 72-5-13) provides that after inspecting the works constructed pursuant to a permit previously issued by him, the State Engineer "shall issue a license to appropriate water to the extent and

[28] Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission 12 (Oct. 25, 1995).
[29] Memorandum from William J. Miller, Interstate Stream Engineer, ISC, on Review of Pecos River Water Resource Conservation Project to Members, New Mexico Interstate Stream Commission 12-13 (Oct. 25, 1995).

under the condition of the actual application thereof to beneficial use." The Licenses are of record in the State Engineer's Office.

### A. The Fact These are Licensed Rights is Critical to Their Validity and the Issuance of Licenses to Administer Water Rights Has Gained New Importance in Light of the Active Water Resources Program.

The central question that has been raised by the OSE is whether these licensed rights have been forfeited or abandoned in an amount in excess of 5,800 acre-feet. A review of the law in this area is set out below.

The role of the water rights license as opposed to an adjudicated water right has begun to be modified by recent New Mexico Supreme Court case law. In *Tri-State Generation and Transmission Association, Inc. v. D'Antonio*, the Supreme Court began to accede to the practical reality that it is appropriate for the OSE to administer water rights based upon Licenses and other documents.[30] The use of Licenses for this purpose has been part of the Active Water Resource Management Program ("AWRM") developed by the OSE in response to the reality that formal water rights adjudication programs are costly and time consuming. An AWRM-like process appears to be the optimum method for management in the Lower Rio Grande in the face of litigation by the State of Texas. Interestingly, the Special Master in the Animas River Adjudication recently ruled that there is no obligation to join licensed domestic and stock watering rights in the adjudication.[31] While he correctly concluded that rights based solely on declarations should be joined, he observed that administration by licenses could be superior to piecemeal litigation in adjudication suits.[32] He did this after serving as a Special Master in water rights adjudications for multiple years.

This deference to the importance of licenses is not new. For example, the case of *Public Service Co. v. Reynolds*, 68 N.M. 54, 358 P. 2d 621 (1960), supports an argument that the State Engineer, at least when he is considering an application for a permit to change the place or purpose of use or point of diversion of a licensed (or adjudicated) water right, is bound by determinations of beneficial use made by his predecessors when they issued the licenses:

> Counsel for appellee [the State Engineer] … argues that when an application to change a point of diversion is filed [with the State Engineer], the applicant has the burden of proving the nature and extent of all of its rights in order that appellee [the State Engineer] can determine that the change of point of diversion will not impair existing water rights. We cannot agree with appellee's contentions.[33]

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[30] *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232.

[31] Special Master's Report Recommending that the Court Grant the State of New Mexico's Motion to Exclude Domestic and Livestock Water Rights from the Adjudication, *State v. Rosette, Inc.*, No. D-623-CV 2005-0054 (filed March 9, 2018).

[32] Special Master's Report Recommending that the Court Grant the State of New Mexico's Motion to Exclude Domestic and Livestock Water Rights from the Adjudication, *State v. Rosette, Inc.*, No. D-623-CV 2005-0054 (filed March 9, 2018).

[33] *Public Service Co.*, 68 N.M. at 59.

*Harkey v. Smith*, 31 N.M. 521, 247 P. 550 (1926), also supports the argument that the State Engineer should give deference to licenses issued by his predecessor:

> [A]ll of these serious questions [concerning "the priority, amount, purpose, periods, and place of use"] leading so often to vexatious and disastrous litigation in regard to the appropriation of waters, both as to quantity and time, have been eliminated by this legislation [the Water Code]. Now the right of the water user is measured by the permit of the state engineer or the decree of the court. It is the nature of the grant [by the State Engineer or the court] which prevents all future controversy as to the extent an [sic] character of the right.[34]

**B. The 1931 Adjudication Decree.**

License No. 302 and Nos. 1856 and 1955 Combined (but not the other Water Rights discussed above) were "adjudicated" in a Final Decree entered on June 7, 1931 in *Livingston v. Neeson,* No. 5144 in the District Court of the Fifth Judicial District, Eddy County, New Mexico. The *Livingston* complaint was filed on February 26, 1931 to adjudicate rights to use "the waters flowing in the Pecos River below the Avalon Dam."[35] Avalon Dam is north of the diversion point for the Water Rights. The parties in *Livingston* stipulated to the priorities set forth in the Final Decree.[36] The Final Decree established that License No. 302 had the oldest priority (March 26, 1883) to use "waters flowing in the Pecos River water below the Avalon Dam,"[37] and that License No. 1856 and 1955 Combined had the ninth oldest priority (July 1, 1929 as to 566.4 acre-feet per year and May 22, 1931 as to 150.8 acre-feet per year).[38] The Final Decree also set forth, that in addition to having a first priority right to use waters of the Pecos River below Avalon Dam, License No. 302, "also has vested [rights] in the waters above said dam, and nothing contained in this decree shall effect [sic] priorities between said receiver [Neeson, who then held License No. 302] and the United States and the Carlsbad Project in the waters of the Pecos River."[39] The priority of water rights under License No. 302 above the Avalon Dam has not been adjudicated.

*W.S. Ranch Co. v. Kaiser Steel Corp.* held, relying on the *Public Service Co.* and *Harkey* decisions discussed above, that in considering an application to change the point of diversion and place and purpose of use of adjudicated water rights, such as those under License No. 302 and License No. 1856 and 1955 Combined, the State Engineer should accept determinations included in an adjudication decree, such as the Final Decree in *Livingston*:

> It is our considered judgment that the adjudication decree is proof of the nature and extent of the rights sought to be transferred. The adjudication court determined that the water had been applied to beneficial use, thus satisfying the

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[34] *Harkey*, 31 N.M. at 527. *See also*, *W.S. Ranch Co. v. Kaiser Steel Corp.*, 79 N.M. 65, 66-68, 439 P. 2d 714 (1968).
[35] Final Decree, ¶¶ I & VIII, *Livingston v. Neeson*, No. 5144.
[36] *See* Final Decree, ¶ XXV.
[37] Final Decree, ¶¶ 8 ½, X, XI.
[38] Final Decree, ¶ XX.
[39] Final Decree, ¶ 8 ½.

> constitutional and statutory requirements. The state engineer could not do else than accept the court's decree. Were it otherwise, the engineer could, in effect, overrule, amend of [sic] revise any adjudication decree. This, of course, would offend not only the constitution but our statutes and decisional law. … There being an adjudication decree, there was no necessity for Kaiser to offer proof of the nature and extent of the rights sought to be transferred other than as specified by the adjudication decree. … Thus, there was no error in accepting the adjudication decree as proof of the water rights sought to be transferred.[40]

Additionally, Section 23 of the Water Code (now codified at NMSA 1978, Sec. 72-4-19) states: "Such [adjudication] decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use … together with such other conditions as may be necessary to define the right and its priority."

The Final Decree in *Livingston* purports to be binding upon James T. Neeson, as receiver of the Valley Land Company, who then held License No. 302 and subsequently conveyed that license to USP, a predecessor in title to Intrepid; Valley Land Company's mortgagee; Carter and Moore, a partnership which then held License No. 1856 and 1955 Combined and subsequently conveyed that license to USP; Dickson Farms Company; Southwestern Public Service Company; "and all other persons, associations, water users, corporations or firms having any interest or claim in or to the water or the properties as described herein."[41] Among those the Final Decree did not purport to bind are the United States, the State of New Mexico, and those claiming rights to use the waters of the Pecos River flowing above Avalon Dam. Those not bound by the *Livingston* Final Decree, and their successors in title could challenge the decree in a subsequent legal proceeding; those bound, and their successors in title, could not.[42] The fact that these rights were evaluated in the context of an adjudication at that time is persuasive evidence of their validity.

### C. The Water Rights Were Not Lost by Failure to Apply Them to Beneficial Use.

In every Western state at the turn of the century, it became clear that entities might go out into the public domain under the Desert Lands Act of 1877, and attempt to "tie up" water rights by either filing a false claim and/or put water rights to use for a short period of time and "hoard" those rights as one might acquire stock in a phony corporation and wait for the price to rise. The hoarding of water rights to drive up the price was understandably considered an unacceptable outcome for Western development and good water management. As a result, statutes impose a penalty on water hoarders that would cause them to forfeit those rights if they were not applied to beneficial use for some period of time. These "forfeiture" statutes are common throughout the West. None of the policies supporting statutory forfeiture doctrine in New Mexico are applicable to the good faith actions taken by Intrepid's predecessors to place water to beneficial use since the 1870's. As discussed more fully below, the forfeiture doctrine as reflected in New Mexico statutes was designed to prevent hoarding of water rights by those who declined to place

[40] *W.S. Ranch Co.*, 79 N.M. at 66-68.
[41] Final Decree, Caption, ¶¶ II & III, and last two unnumbered paragraphs.
[42] *State ex rel. State Engineer v. Allman*, 78 N.M. 1, 427 P. 2d 886 (1967).

water to beneficial use when water was available or at a time when the water rights were not protected by enrollment in some policy program to regulate supply such as conservation programs.

### 1. Statutory Forfeiture.

The current forfeiture statute was amended in 1965, such that a failure to apply water to beneficial use "for a period of four years" will, except in specific enumerated circumstances, cause the "unused water" to "revert to the public and [to] … be regarded as unappropriated public water" *only if* "the failure … persists one year after notice and declaration of nonuser given by the state engineer."[43] The State Engineer has not given Intrepid or its predecessors in title such "notice and declaration of nonuser." Consequently, the Water Rights could not, since the 1965 amendment of the forfeiture statute, have been lost as a result of statutory forfeiture. It is possible, of course, that the State Engineer could in the future give Intrepid a "notice and declaration of nonuser." To date, however, the State Engineer has rarely, or never, given such a notice to anyone. Further, as discussed above, the rights were statutorily exempted from forfeiture entirely during the period that they were transferred into the Conservation Program to assist the State of New Mexico to comply with the Amended Decree in *Texas v. New Mexico*.

However, prior to the 1965 amendment of the forfeiture statute, "notice and declaration of nonuser" was not required for the statutory forfeiture of a water right. Prior to 1965, forfeiture occurred without action by the State Engineer, or anyone, if water was not applied to beneficial use "for a period of four years," if water was available to divert during that time period. The original refinery was operated, more or less, continuously from its completion in the late 1920s until after 1965. Moreover, as reflected in the above discussion, from 1948 up to 1965, Intrepid faced a problem comparable to that of the State of Texas. **Upstream diversions and local diversions by the City of Carlsbad, (which resulted in protests and threatened litigation by U.S. Borax to stop the City during this same period, *see* Table 3) made it impossible for Intrepid to divert the water because it was simply not available for Intrepid to use.**

### 2. Common Law Abandonment.

New Mexico water rights may be lost as a result of common law abandonment as well as by statutory forfeiture.[44] Intent to abandon is a required element under the doctrine of abandonment.[45] "To prove abandonment, the State Engineer must show that the owner relinquished the water rights with the *intention* to forsake such rights."[46] The definition of "abandonment" in the State Engineer's Surface Water Administration Rules and Regulations is consistent with these judicial statements: "Abandonment [is] [t]he loss of a water right based on the nonuse of water and the *intent* by the water right owner to permanently relinquish or forsake the right."[47]

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[43] NMSA 1978, Sec. 72-5-28(A) (as amended by N.M. Laws 1965, ch. 250, Sec. 1).
[44] *State ex rel. Reynolds v. South Springs Co.*, 80 N.M. 144, 147, 452 P. 2d 478, 480 (1969).
[45] *Village of Wagon Mound v. Mora Trust*, 133 N.M. 373, 388, 62 P. 3d 1255 (Ct. App. 2003).
[46] *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 332, 901 P. 2d 745 (Ct. App. 1995) (emphasis added).
[47] 19.26.2.7(A) NMAC (emphasis added).

Although a long period of nonuse raises "a strong presumption of abandonment" and "shifts the burden of proof to the holder of the right to show the reasons for nonuse,"[48] the owner of a water right may meet this burden by proving that he did not intend to abandon. When lack of water due to drought or other causes beyond the control of the owner causes nonuse, there is no abandonment.[49] Thus, the same explanation as to why water was not used under the forfeiture statute is applicable to a possible abandonment.

There is conclusive evidence that Intrepid's predecessors never *intended* to abandon the Water Rights. For example, they filed changes of ownership of the Water Rights with the State Engineer in 1968, 1969, and 1974 (and Intrepid filed changes in 2004); applied to the State Engineer in 1982 for and obtained a permit allowing up to 362 acre-feet per year of the Water Rights to be used by an unrelated company to process salt. Even though they were not required to do so for licensed rights, they applied to the State Engineer in 1992, 1993, 1996, 1999, and 2002 for, and obtained, extensions of time, pursuant to NMSA 1978, Sec. 72-5-14, for "perfecting" appropriations under the Water Rights to demonstrate they did not intend to abandon their water rights. An evaluation of the records of the State Engineer reflects that the OSE prepared letters and memoranda describing the Water Rights without suggesting that they had been abandoned in 1967, 1969, 1971, 1975, 1976, 1993, 1995, 1996, 2000, and 2003.

### D. Pecos River Compact Issues.

The above discussion in Part I described the transfer of all but 150 af of Intrepid's Water Rights into the Conservation Program, as approved by the New Mexico State Engineer to comply with the Amended Decree in *Texas v New Mexico*. Our discussion is based on the documentation we have available at this time.

## CONCLUSION

The goal of this White Paper is to present a *prima facie* case that Intrepid holds more than the 5,800 acre-feet maximum communicated by the OSE in January 2018 and therefore, Intrepid asks that the OSE lift the 5,800 acre-feet restriction and evaluate the issues based upon the contents of this White Paper and other materials contained with this document.

Intrepid further believes that this White Paper creates a *prima facie* case that there are sufficient water rights held by Intrepid to allow continued delivery of its water under the recently filed, but not published, 2,500 acre-foot application. Allowance of immediate pumping under that application would preserve the status quo until an agreement can be reached between the OSE and Intrepid as to the full quantity of the water rights. If an agreement is not possible, then allowance of the immediate pumping under the 2,500 acre-foot application would preserve the status quo until a hearing can be held on the issues that are or will be resolved by the New Mexico State Engineer administrative hearing process. Intrepid believes that the preferable solution is a collaborative one. This is precisely what is proposed by AWRM. Through the

[48] *South Springs Co.*, 80 N.M. at 148.
[49] *Chavez v. Gutierrez*, 54 N.M. 76, 82, 213 P. 2d 597 (1950).

collaborative process, Intrepid hopes to work with the OSE and ISC to develop mechanisms for use of the water under the Licenses so as to promote economic development in Southern New Mexico while not reducing the amount of water that New Mexico is obligated to deliver to Texas under the Pecos River Compact.