

# New Mexico Water Law

## Water Rights & Water Quality

27<sup>th</sup> Annual Conference

October 3-4, 2019

Santa Fe, New Mexico

## PECOS BASIN ISSUES

The Intrepid Case, the Compact, Short-Term Leases,  
and Alternative Forums

Charles T. DuMars, Esq.

Law & Resource Planning Associates, P.C.



# PRACTICAL REASONS

## WHY SETTLEMENT MAY BE PREFERABLE

When a surface water right impacts a delivery requirement under an interstate compact, it is better to enter into a settlement that protects both the water right holders and the deliveries under the interstate compact, than to receive a court order simply declaring the quantity of the water right. The former method provides knowledge of the amount of possible effects on the interstate compact in advance and gives flexibility to develop solutions to address the consequences of the water right allowed, irrespective of its magnitude. The litigation approach, once it determines a quantity of right, requires ad hoc scrambling to adjust to the recently adjudicated water right and promotes further attacks and appeals by either side as to the quantity of the right determined.

# HYDROLOGIC REASONS ON THE PECOS

## WHY SETTLEMENT MAY BE PREFERABLE

Flows in western rivers, and in the Pecos river specifically, are characterized by erratic water supplies. “Feast or famine” is the typical response on these rivers. In the case of the Pecos this is accentuated by the fact that there is not a predictable snow pack that can be measured; rather the flow depends upon rainfall and flood flows, and underground supplemental water proceeding up-gradient through the aquifer in response to hydraulic head produced from under flow from nearby mountains. In the case of the Pecos, the issues are even more complex because of the existence of upstream underground withdrawals near Roswell, New Mexico and the impacts of numerous wells under artesian pressure just above the accounting point for deliveries to Texas. A settlement could best protect these junior water user interests. A settlement solution that guarantees Pecos River Compact compliance but allows use of the full amount of the Intrepid water right is the optimal solution.

# A SYNERGISTIC APPROACH

Intrepid's senior water rights have heretofore been overlooked in the water rights adjudication. Once that right is adjudicated, the bluntest instrument that ensures the Intrepid water rights are served is a priority call. However, that method overlooks the opportunities for a synergistic approach. The right can be served and the Pecos River Compact kept intact without requiring a priority call using various synergistic mechanisms optimizing the use of groundwater, reservoir storage, and under-delivery credits under the Pecos River Compact.

# IN WATER SHORT YEARS

- In water short years, using groundwater to pump into the River, exactly as already contemplated by the ISC, with access and pumping costs being shared by senior water right holders who seek to temper the impacts of their pumping.
- In water short years, activating a drought insurance plan whereby Intrepid could make periodic payments to others having the right to divert water in exchange for their commitment to allow that water to be made available to the River to meet Compact requirements upon a request by senior water users who seek to temper the impacts of their pumping to do so.
- In water short years, allowing 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

- 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.

# IN HIGH WATER FLOW YEARS

- In high water flow years, having senior water rights users who seek to temper the impact of their pumping obtain storage rights in all reservoirs having extra space so that this stored water (minus evaporation) can be made available to offset Compact under-deliveries in future water short years.

# FACTORS TO BE WEIGHED

## IN CHOOSING BETWEEN SETTLEMENT AND LITIGATION

- 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.

# FACTORS TO BE WEIGHED

## IN CHOOSING BETWEEN SETTLEMENT AND LITIGATION

- 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.
- F. The importance of making maximum use of existing reservoir structures for the storage of water as a means to augment development of precious oil resources necessary to the nation as a whole.



# THE LITIGATION OPTION

The Judge, in *State of New Mexico v. Elephant Butte Irrigation District*, rejected abandonment after 35 years of non-use.

“The economic, financial, and logistical difficulties of CFP and the legal challenges of Frost and Gray excuse the long period of nonuse of the vested water rights.”\*

\*CONCLUSION OF LAW NO. 42

*State of New Mexico v. Elephant Butte Irrigation District*, Third Jud. Dist. No. CV-96-888, Outlying Areas Section Case Nos. 307-OA-9703126, 307-OA-9702237 & 307-OA-9702236 (December 28, 2017).

# THE LITIGATION OPTION

## Intrepid's Licensed Water Rights

Water Right	License Date	Licensed Amount of Water	Licensed Priority Date
SP-1942	August 29, 1933	10,859.500 afy	February 2, 1931
SP-302	July 26, 1937	1,879.125 afy	March 26, 1883
SP-302	June 4, 1956	2,479.125 afy	March 26, 1883
SP-302	October 7, 1958	281.250 afy	March 26, 1883
SP-2045	March 2, 1949	3,619.800 afy	June 8, 1934
SP-1955 & SP-1856 comb.	August 28, 1950	566.400 afy	July 1, 1929
SP-1955 & SP-1856 comb.	August 28, 1950	150.800 afy	May 22, 1931
<b>Total</b>		<b>19,836.000 afy</b>	

# 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	<b>"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."</b>
15	SP-302, SP-1942, SP-1856, SP-2045, SP-1955	December 14, 1995	December 31, 1996	<b>"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."</b>
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	<b>"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."</b>

# 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 <b>and that they have signed a cooperative water conservation agreement with the Interstate Stream Commission.</b> "
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 <sup>st</sup> , 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