



Best Practices to Protect Yourself Before Entering Temporary Water Use Agreements: Part 1 of 2

By Brian C. Shuck

Ordinarily, a water right is obtained by filing an application for a permit with the Wyoming State Engineer's Office (SEO). However, under some circumstances, an existing water right can be used temporarily by another user for other purposes and at different locations by filing a Temporary Water Use Agreement (TWUA) with the SEO. Some of the most common uses of TWUA's are oil and gas uses and road construction, although there are a handful of other uses enumerated in the statutes.

The SEO's job is to ensure the statutory requirements are met in each TWUA. However, it is not the SEO's job to protect water right holders from the things that could go wrong when another party is temporarily using their water rights. It is the duty of each water right holder entering into a TWUA to protect himself. Although the SEO does not require it and cannot give legal advice, the best practice is to utilize a two-step approach. First, you should enter into a separate agreement with the oil and gas company or other water user (hereinafter "end user") to cover all the other issues that can arise. Second, after the separate agreement has

been signed, you should file a TWUA with the SEO.

In the right circumstances, allowing the temporary use of your water rights for a fee sounds attractive. However, it is important to protect yourself, your land, and your water rights in the process. Here are some of the issues you should consider.

First, in whose name will the TWUA be filed? Do you want the end user to be the holder of the TWUA or do you want to be the holder of the TWUA? If the end user is the holder of the TWUA, he is in control and you have no way of ensuring the process is handled correctly and you give up your ability to protect yourself on other issues through a separate agreement.

Second, how do you ensure payment? The SEO's TWUA does not protect farmers or ranchers with respect to ensuring payment. Therefore, we have developed a separate agreement ensuring farmers and ranchers get paid and addressing numerous other issues.

Third, do you want to give the end user an exclusive deal? In effect, the SEO's TWUA creates an exclusive agreement to temporarily use your water rights if the end user is the holder of the TWUA. It is best to avoid giving an exclusive right to any temporary end user. However, there are alternatives. For example, if the landowner enters into an agreement with himself under the TWUA, then he can work out arrangements with more than one end user.

Further, who cleans up environmental contamination? One might assume that, when a water pump truck is pumping water from your ditch or wellhead, that water only flows one direction. The reality is that

contaminated water from the pump truck can flow out of the truck and into your ditch or your groundwater well. The SEO started requiring back flow prevention devices on all groundwater wells involved in a TWUA a few years ago. However, this does not answer the question of who must clean up the mess if your land or water is contaminated in the process. Therefore, the best approach is to have a separate agreement that addresses these liability issues.

In addition, avoid giving up your right to use water to end users who use less water than expected. The SEO has taken the position that landowners must forego using water on the acres specified in the TWUA if even one gallon of water is pumped from the groundwater well. Therefore, the landowner may enter into a TWUA and hereby give up his right to farm certain acres for an entire season thinking that the end user will be using significant quantities of water at X cents per barrel, just to find out the end user did not use enough water to justify giving up their right to irrigate those acres or otherwise use the water. Under this example, the water user gave up his right to farm certain acres for the year and did not generate enough income from the TWUA to justify giving up the right to farm. The SEO's TWUA does not protect the landowner in circumstances such as these. For this reason, the best practice is to have a separate agreement that addresses this issue. Further, although easier said than done, coordinate with end users to accurately estimate the amount of water use so you can dry up only the number of acres necessary to generate the amount of water the end user will actually use.

The remaining issues you should address in a separate agreement will be discussed in next week's edition.

Brian Shuck is a Cheyenne attorney with offices located 3 blocks from the State Engineer's Office. He has represented numerous Ag producers in Wyoming and Montana and has represented clients across Wyoming in entering into TWUA's and employing the two-step approach. Earlier in his practice, Mr. Shuck represented the State of Wyoming in the Big Horn River Adjudication and represented the State Engineer's Office related to interstate compacts, endangered species, federal agency overreaching, and other water and natural resource issues involving numerous Western States and federal agencies.

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