

Helpful Hints for Change of Place of Use Petitions Before the Wyoming Board of Control

By Brian C. Shuck

Under Wyoming law, water right holders can only change the place of use of a direct flow or groundwater irrigation water right by filing a change petition with the Wyoming Board of Control (BOC). The petition can only be granted for that portion they can show has been historically beneficially used. Further, the BOC may only approve the petition if the change does not injure other water right holders. Therefore, filing a successful change petition can be a challenge.

In consultations over the years with various staff in the State Engineer's Office (SEO), BOC, and Attorney General's Office, I have developed a list of helpful hints to avoid many mistakes the BOC repeatedly encounters in petitions for changes of place of use. Some of these hints are outlined below.

Start by Working with Your Water Commissioner/Superintendent.

- First, work with the Water Commissioner or Superintendent to determine the probability of success, whether neighboring water users will be injured, and what issues may arise.
- The Water Commissioner may be able to tell you if the water has been historically used, how much historically has been used, the type of use, and what changes are feasible on the ground.

Do Your Homework – Do the Water Rights Search First.

- Have a thorough water rights search performed – what family members told you about the water rights may not be consistent with what is in the SEO paper records. Actual irrigation practices can evolve over time and may deviate from the mapping. You may find the facts are not as you believed or different petitions need to be filed.
- Although you can do some searches online, those of us who perform water rights searches for a living are not ready to rely heavily on it. In the future, the SEO website may become a more reliable tool. For now, it is wiser to have a search performed using the SEO's paper records in Cheyenne.
- Copy and analyze all Order Records and Certificate Records noted on permits and other documents.
- Research the land to be dried up for supplemental supplies, secondary permits, and water users using the same means of conveyance.
- Identify the water rights for intervening water users as well as the current owners of intervening water uses.
- Research the lands to be affected by the change to determine if the land already has water rights, the change cannot be administered, or the proposed change cannot be operated on the ground.

Determine Whether An Injury Would Occur.

- After you have identified intervenors and other water users who may be injured, attempt to mitigate all potential legitimate injuries.

- If you cannot avoid the injury, stop there and save your time and money.

Be Proactive and Provide Proof of Historic Use.

- The BOC will want evidence the water historically has been beneficially used at the permitted location for the permitted use and they may ask for proof of such use for the last 5 years water was available. To prove this, look to Water Commissioner's records, Water Commissioner's field inspections, irrigation district delivery cards or records, canal or ditch company records, aerial photography, the electric company's records for any groundwater well pumps involved, or the affidavit of a disinterested neighbor.

Provide Proof of Petitioner's Authority to Sign.

- If the landowner is a corporation or LLC, produce the attestation by the corporation's Secretary on a resolution or minutes authorizing the President to file the petition.
- If the petitioner is a partnership, have all partners sign.
- If the petition involves marital property, it is best to have both spouses sign.

Get Consents.

- Get consents from intervening water users.
- Get consents from all other water users in the same ditch or canal.
- Get consents from anyone else who may claim an injury.
- Submit proof the person signing the consent owns the land, such as a certified copy of the deed.
- You must attempt to get consents and fail before the BOC will refer the case for a hearing.

Ensure the Mapping is Correct.

- Do not assume a surveyor/engineer knows exactly what is required to prepare the type of map required to accompany a change petition. The BOC Regulations are detailed and require numerous items on petition maps. I always carefully review the BOC Regulations with the mapmaker outlining what is required on the map and then review the drafts of the map carefully to make sure it includes everything.
- If a client proposes to change from flood irrigation to a pivot irrigation system, the water use mapping will change from rectangles to circles and semi-circles. Make sure the map shows where the new circle will be and the same number of acres is being irrigated.
- If you have 2 or more priority dates under the same center pivot, show which lands each water right will be attached to as concentric circles or in pie pieces so the pivot can be regulated when a call is placed on the river and part of the pivot needs to be regulated off.
- Make sure the acreage math adds up.
- Show flumes where the diversion works must cross a river, drainage, or other diversion system.
- Be careful not to map lands where it is physically impossible to use the water.
- Be specific as to the locations where water will be used. Remember, water rights records are as detailed as other real property records.

- Show the diversion works, the river's course, and land on which the water is currently used the way it exists on the ground, not the way it once appeared on original permit maps or subsequent maps.
- Before you file the petition, review preliminary maps with BOC staff to ensure the map is right.

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 successfully petitioned to move the place of use for a client's water rights approximately 30 miles. Early 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.