

# WYOMING LAWYER

June 2004 Vol. XXVII, No. 3

## Protecting and Defending **WYOMING'S** Natural Resources

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**Change of  
"Place of Use"  
Petitions Before  
the Wyoming  
Board of Control**

**By Brian C. Shuck**

**U**nder Wyoming's statutes and Constitution, two elementary rules make an administrative process necessary before a change in a water rights place of use can occur. First, under the prior appropriation system, the person with the earlier priority water right has the better right. Second, water rights are appurtenant (attached) to the land on which they are put to beneficial use. Wyo. Stat. Ann. § 41-3-101; see also Wyo. Const., Art. 8, § 3. As a result of these rules, a process for un-attaching appurtenant water rights, in a manner that does not do violence to the prior appropriation system and does not cause injury to other water users, was developed. This process employs the use of the no injury rule. Under the no injury rule, a water right holder can only change that portion of his water right that he can show has been historically put to beneficial use and may only do so if the change does not cause an injury to a neighboring water right holder.

The administrative procedure for changing the permitted place of use is outlined in the Wyoming Statutes. Wyo. Stat. Ann. § 41-3-104. The Board of Control's Regulations and Instructions further describe the petition process. See State Board of Control Regulations and Instructions, Part IV, Ch. 5, § 15. The information and examples of petitions contained in the Regulations and Instructions do not contain all the information you may need to put in your petition, but they are a good place to start. For example, if you are changing the place of use for irrigated land, you will want to attach documentation proving that the land has been irrigated in the past. As to change procedures for water rights attached to lands that have been submerged or taken by adverse possession, see Wyo. Stat. Ann. §§ 41-3-107 and -108.

Because every state administrative agency has its own needs, desires, and eccentricities, the statutes and administrative regulations do not and cannot provide you with all the information needed to successfully assist a client with a change of place of use petition. In consultation with the State Engineers Office, Board of Control staff, and Attorney General's Office, the following list of helpful hints has been developed to help petitioners avoid many of the mistakes the Board repeatedly encounters.

### Start by working with your Water Commissioner/Superintendent.

- If the case is one which may be adversarial to the Board of Control or State Engineers Office, consider whether contact with the commissioner or Superintendent may be an ethics violation.
- If it is not an ethics violation, then work with the commissioner or Superintendent to determine the petitions probability of success, whether neighboring water users will be injured, and explore what issues may arise.
- The Water Commissioner can often tell you if water has been historically used on that land, how much water has historically been used, the type of use, and what sorts of changes are feasible to administer on the ground.

### Do your homework - do the water rights search first.

- Walk the ground with your client. Maps will only tell you so much and actual irrigation practices often evolve over time and deviate from the mapping.
- Do the water rights search at the State Engineers Office rather than relying on the Board of Control staff to do it after the petition has been filed.
  - The State Engineers Office has tried to get away from performing water rights searches for the public and attorneys.
  - You may find the facts are not as your client believed.
  - You may find that a different petition needs to be filed.
  - You may find that the petition does not need to be filed at all.

- Although you can do some research on the new State Engineers Office website, not all documents have been scanned into the system yet and the website does not yet have the capability of allowing you to cross-reference documents easily. In the future, it will be a valuable tool. However, for now, it is not nearly as complete as searching in the State Engineers Office records.
- Look at and copy all ORs and CRs noted on the permits and other documents.
- Research the land to be dried up for:
  - supplemental supplies,
  - secondary permits, and
  - the names of water users using the same means of conveyance.
- Identify the current owners of all intervening water users.
- Research the land 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.

### Assess whether an injury would occur

- After you have identified the intervenors and other water users who may be injured, if a legitimate injury exists, attempt to mitigate the injury.
- If you cannot avoid the injury, stop there and save your time and your clients money.
- Injury must be a water-related injury suffered by an intervening water user. The following are not injuries:
  - More mosquitoes caused by new irrigation.
  - Not enough water in the stream below the new diversion to support fish as it runs through the neighbors land.

- Loss of volume in stream below new diversion so the stream is not as aesthetically pleasing.

### The docketing deadline - do not procrastinate.

- Petitions must be filed 30 days before the first day of the next Board of Control meeting.
- Because BOC meetings are only held four times a year, missing the filing deadline results in a three-month delay in getting the process started.
- If the case is going to be contested and will need to have a hearing, the BOC must put the petition on its agenda and refer the matter to hearing.
- BOC staff members have to research each petition before the BOC will hear it, so the 30-day window before the meeting is absolutely necessary.
- It is possible to have a late-filed petition placed on the agenda; however, whether a late-filed petition will be placed on the docket is in the Ex Officio Secretary's discretion and is rarely granted.

### Be proactive and provide proof of historic use.

- Unless the Superintendent knows for certain that the water has been used in the last year, at least one BOC member will typically want some evidence that the water has historically been used at the permitted location for the permitted use. To prove this, you might use:
  - Water Commissioners records;
  - The Water Commissioners field inspection;
  - Irrigation district delivery cards or records;
  - Canal or ditch company records;
  - Aerial photography; and/or
  - The affidavit of a disinterested neighbor.

### You must provide proof of the authority of petitioner to sign the petition.

- If the petitioner is a corporation or LLC, it must include an attestation by the Secretary of the corporation or a copy of the resolution or minutes of the company authorizing the President to file the petition with the petitioner.
- If the petition is a city/town, a resolution of the city council or town council authorizing the employee to sign the petition, even if it is the mayor.
- 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/canal.
- Get consents from anyone else who may claim an injury. In cases where the facts may warrant it, consider getting consents from:
  - Downstream junior water users who will suffer diminished return flow; or
  - Upstream junior water users who may be called out because a senior has moved into the area.
- Submit proof that the person signing the consent owns those lands - a certified copy of the deed.
- You must attempt to get consents and fail before the BOC will refer the case for a hearing.
- Do not argue to the BOC that you do not need consents because your letter re-

questing consent states that the failure to object within 30 days of this letter will be deemed consent to the petition and you did not receive any objections within 30 days. The BOC has rejected that approach.

### Make sure the mapping is correct.


- Do not assume your surveyor knows exactly what is required to prepare the map - send him a copy of the BOC Regulations and Instructions outlining what is required in a map. See Part IV, Ch. 5, § 5.
- If a client proposes to change from flood irrigation to a pivot irrigation system, the water use mapping will change from squares and 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 two 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 shut down.
- Make sure the math adds up.
- Show flumes on the map where the diversion works must cross a river, drainage, or other diversion system.
- Do not map lands on which it is physically impossible to use the water (i.e., the side of a steep hill).
- Be specific as to the location of lands on which water will be used. Remember that water rights records are as detail-oriented as any other real property records.
- Show the diversion works, the course of the river, and land on which water is used the way it currently exists on the ground, not the way it once appeared on the original petition map or a subsequent map.

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## ***Change of “Place of Use” Petitions Before the Wyoming Board of Control, continued from page 22***

- ❑ Send preliminary copies of maps to the BOC staff for review so you can make sure the map is right before you file the petition.
- ❑ The regulations contain significant amounts of information that are not contained in the statutes.



**Familiarize yourself  
with the Board of  
Control's regulations  
and instructions.**

- ❑ The regulations outline the procedure for preparing and filing the petition and the accompanying maps.
- ❑ See the BOCs Regulations and Instructions, Part IV, Ch. V, available on the Wyoming Secretary of States website.

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