



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

By Brian C. Shuck

In last week's edition, we discussed some key issues to address in a separate agreement when entering into a Temporary Water Use Agreement (TWUA). The best practice is to address the following additional issues in a separate agreement.

**First, what price can you command for use of the water?** In most instances, end users pay by the barrel. Prices will vary significantly depending on the area of Wyoming in which the land is located, the other available sources of water, the lack of access by public or private roads, and other issues. In some areas, 35-40¢ per barrel is not uncommon. However, in areas where water is more scarce, it is possible to command higher prices. Regardless, when arriving at a price, one must consider carefully the value of the water given up and use a separate agreement to ensure payment

**Also, who is responsible for dust suppression?** In most instances, water is delivered by pump trucks. Therefore, the more pump trucks, the dustier the roads become. The SEO's TWUA does not address dust suppression, but does recognize dust suppression as a beneficial use for which water may be used under the TWUA. The

best practice is to address the issue in a separate agreement.

**Further, who bears the expense of installing groundwater well metering and back flow prevention devices?** Although the SEO now requires meters and back flow prevention devices be placed on groundwater wells used for TWUAs, they do not provide who must incur that expense. Therefore, the best practice is to utilize a separate agreement requiring end users to install meters and back flow prevention devices. Further, the separate agreement should provide that meters and back flow prevention devices become the landowner's property and remain with the well after pumping under the TWUA has ceased.

**Also, from what location will water be pumped?** The best practice is to use a separate agreement requiring end users to provide a parking pad from which pump trucks load water. This prevents pump trucks from blocking roads and bridges while loading water and ensures pump truck drivers do not create new roads or drive across ditches or damage sensitive riparian areas. Further, the separate agreement should require end users to repair damage to roads.

**In addition, who is responsible if the land is damaged?** The SEO's TWUA does not protect landowners from damage by the end user. The best practice is to use a separate agreement that addresses damage to reservoirs, wells, troughs, ditch banks, dam banks, spillways, livestock, crops, fences, cattle guards and other improvements and requires them to repair them or provide the landowner with compensation in the event of damage. Further, the best practice is to use a separate agreement requiring end users to perform reclamation.

**Further, how do I enforce the terms?**

In most instances, the end user and the people loading water into the pump trucks are 2 separate entities. Therefore, you need to ensure pump truck companies and their drivers understand the terms of your separate agreement with the end user. The best practice is to require all pump truck drivers to carry a list of rules outlining the terms of the separate agreement in each truck's glove compartment to ensure pump truck drivers use only authorized roads, only park on the designated parking pad, do not access the land for any purpose other than loading water, close gates to ensure livestock does not get out, and numerous other issues addressed in your separate agreement.

**In addition, who is required to file periodic reports with the SEO?** Under the SEO's TWUA, the responsibility to file periodic reports with the SEO falls on the holder of the TWUA. However, the landowner may want to file the reports instead, particularly where end users have not been reliable in filing past reports.

**Finally, can you terminate the TWUA?** The SEO's TWUA form terminates automatically after 2 years or earlier if terminated by the SEO. However, it does not contain provisions outlining how an aggrieved water right holder can terminate the TWUA. The best practice is to include termination provisions in a separate agreement giving the water users the right to terminate before 2 years expires, if necessary.

This is a short summary of some issues you should address in a separate agreement before you enter into the SEO's TWUA. The issues each landowner must guard against differ based upon whether the proposed source is reservoir water, groundwater, or

direct flow surface water from a ditch and the unique characteristics of the land and ag operation. The best practice is to require a separate agreement to ensure you and your lands are adequately protected.

As an alternative to TWUAs, landowners with a stream running across their property may employ Temporary Water Haul Permits instead. In contrast to a TWUA, a Water Haul authorizes end users to pump water directly from the stream instead of from an existing water right source. Like TWUAs, the best practice is to utilize a separate agreement with Water Haul end users to address many of the issues discussed above. However, Water Hauls are a subject for another article as they are authorized under different statutes and require a different SEO filing.

*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.*

© Brian C. Shuck 2015