



Curtailment Mitigation Possible Tools



Temporary Water Use Changes

- ❖ Relatively straightforward, not data intensive
- ❖ State Engineer prevents injury to other water users
- ❖ Often only half the water may be changed to the new use

Wyoming Statutes §41-3-110

- ❖ Change the use of all or portion of a valid water right, for 2 years (renewable)
 - Generally, a change in use, not just a new location for same kind of use
 - Most common is irrigation to industrial use; irrigation to municipal has occurred
- ❖ No injury to other appropriators
- ❖ No loss or abandonment for owner of right; right automatically reverts to owner when use ends
- ❖ State Engineer approval required: apply to SEO
- ❖ Divert only the past consumptive use. Return flow to be left in stream, and therefore NOT changed to new use, is assumed to be 50% of original right unless shown otherwise
- ❖ Advance approval possible; when put to use, must use all the right if use any

Temporary Change: Direct flow water

Examples:

Irrigation to municipal:

There have been some temporary water use agreements to move direct flow irrigation water temporarily to the use of small municipalities, during drought, in the past 20 years. Two examples are the town of Dayton and the town of Baggs.

Irrigation to industrial:

These temporary water use agreements are more common. What follows are the forms and orders for moving direct flow irrigation water temporarily to industrial uses.

- Application/agreement
- State Engineer order approving the transfer

WATER AGREEMENT - SURFACE WATER

For Temporary Use of Water

THIS AGREEMENT, made and entered into this 22nd day of July

2020, by and between Kandis Fritz

of Carbon County Road & Bridge Department hereinafter referred to as
(name of company if applicable)

the Temporary Water "USER" and John Sam Connolly
(water right holder's name)

Q Creek Land and Livestock Company, LLC hereinafter referred to as "APPROPRIATOR."
(name of company if applicable)

WITNESSETH:

1. Upon receiving authority from the State Engineer, State of Wyoming, Appropriator shall deliver to the User, a total amount of 1,500,000 gal.
(number of gallons)
gallons of water per water year from the following described appropriation:

P920.0E
(Permit Number)

Wertheim Ditch No. 1
(Name of Ditch or Reservoir)

9/23/1902
(Priority)

Troublesome Creek
(Source of Supply)

2.71 cfs (approx. 1,200 gpm)
(Amount of Appropriation)

T24N R81W Sec. 16 NWNE
(Location of Record Point of Diversion of
Ditch or Outlet of Reservoir under this
Appropriation)

100%
(Portion of this Appropriation held by Water Appropriator)

T24N R81W Sec. 21 SWSE & Sec. 34 SENW
(Location of User's Point of Diversion)

2. The water to be supplied by Appropriator to the User shall be supplied at a maximum rate of 400 gpm
(gallons per minute)
with total daily diversion of 30,000 gpd
(gallons per day)

and said water shall be used for (Indicate where the water will be used and for what purpose and describe method and point of withdrawal, etc.):

The water would be used along Carbon County Road 291 (Hanna Leo Draw Road), Carbon County Road 270 (Medicine Bow Road), and Hanna Draw Road for the purposes of moisture conditioning earthwork, soil stabilization, and dust control for road maintenance operations. The method of withdrawal would be by fuel-powered, portable pump diverting directly from Troublesome Creek or Medicine Bow River and the points of withdrawal would be at the crossings of Troublesome Creek by Rd. 291 and the Medicine Bow River by the Hanna Draw Rd. These locations are within T24N R81W Sec. 21 & Sec. 34 approximately 2.5-miles and 4.5-miles downstream of the permitted POD. By review of the ePermit PLSS Tool no other water rights are anticipated to be affected.

OFFICE USE ONLY

This Agreement was received July 28, 2020

Fee paid \$ 50.00 cc approval 09491G

3. It is understood and agreed by the Appropriator that in order to satisfy the consumptive use-return flow formula set forth in Wyoming law, as it applies to **direct flow appropriation**, it will be necessary for the Appropriator to forego the use of up to double the amount of water diverted under this Agreement as specified in paragraphs 1 and 2, unless an adjustment is made in this requirement by the State Engineer. Additionally, water can only be used during the historic irrigation period.

4. Throughout the term of this Agreement, the User agrees that day to day water withdrawals hereunder shall be in such nearly even quantities as possible to the end that waste thereof shall not be created either by the User or by the Appropriator.

5. The User agrees to furnish one (1) copy of a sketch map, labeled as "Exhibit B" or any other map necessary for transmittal with this Agreement showing the **User's proposed point of use**, as well as location of the **point of diversion**, water right involved, and the **temporary water user's point of diversion**, if different from the appropriation point of diversion. The items to be depicted on said map shall be shown with reasonable accuracy within the proper legal subdivision, section, township and range. It is preferable that the temporary water user's point of diversion be from the facility under the original appropriation when possible.

6. This Agreement shall be in existence and binding upon the parties hereto for a term of 1.5-years (July, 2020 - December, 2021) from and after the date of approval by the State Engineer or until such time as the total amount of water contracted for has been supplied, whichever occurs first, but in no event shall exceed a period of two years from the date of approval by the State Engineer.
(length of time)

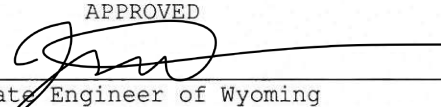
This Agreement is made pursuant to Wyoming Statute 41-3-110 authorizing the temporary acquisition of adjudicated or valid unadjudicated water rights for highway, railroad construction or repair, drilling operations or other temporary purposes by purchase, gift or lease by the User and providing for the method of said acquisition.

USER:

Signature Kandis Fritz
Title Coordinator, Carbon County Road & Bridge
Printed Name Kandis Fritz
Mailing Address PO Box 487, Rawlins, WY 82301
Phone 307-321-4395 cell
Phone 307-324-9555 business
Phone _____ home
e-mail kandisfritz@carbonwy.com

Signature X  7/26/20
Title Authorized Signatory - Q
Printed Name John Sam Connolly
Mailing Address 200 S. 23rd Ave Suite D9 Bozeman, MT 59718
Phone 406-522-0752 cell
Phone — business
Phone — home
e-mail dan@kroenkeranches.com

APPROVED


for State Engineer of Wyoming

8/3/2020

Date

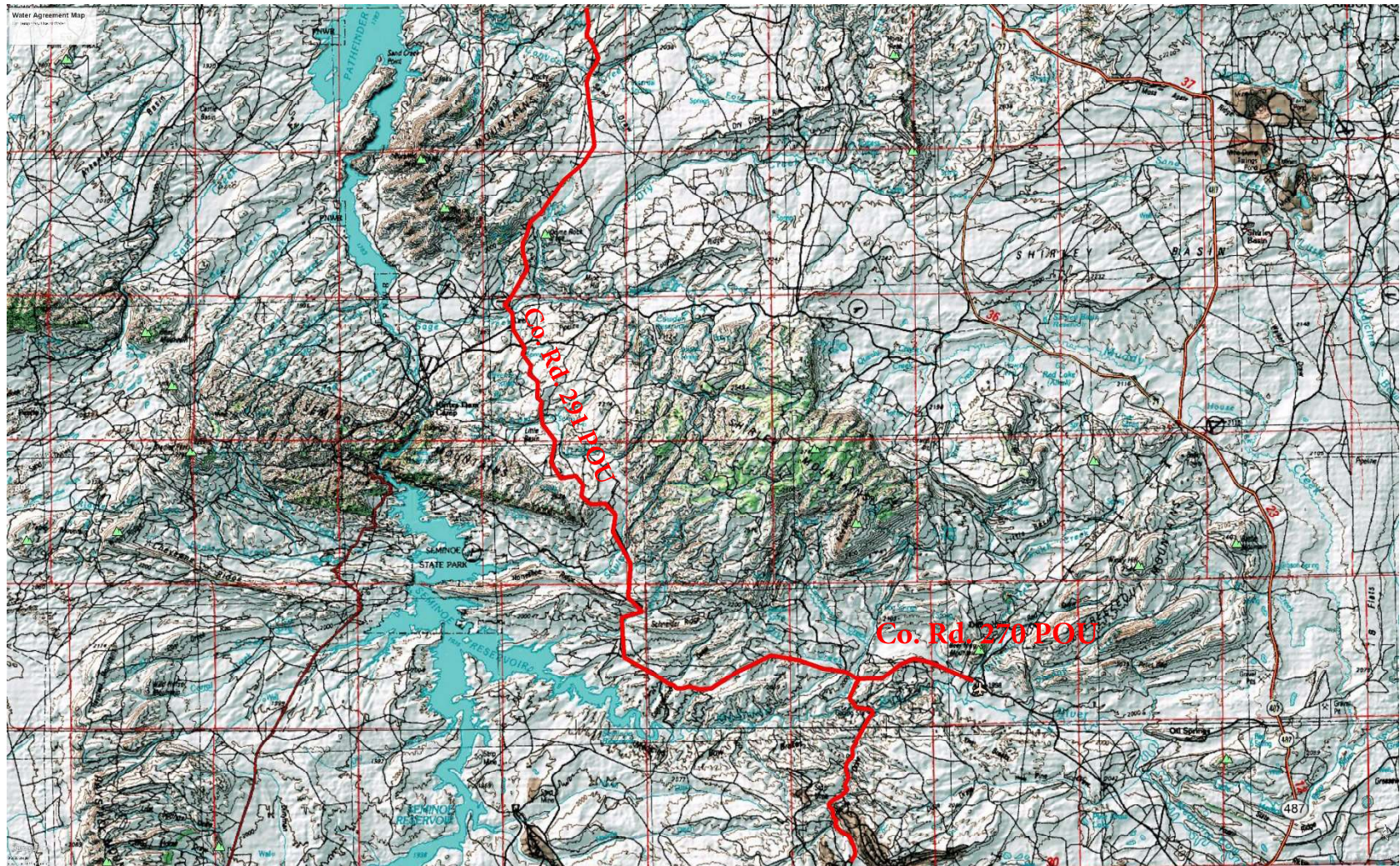


Exhibit B

ORDER NO. 20-81

Carbon County Road & Bridge Department (hereinafter “User”) having made application to acquire a temporary water right, and having filed a Water Agreement for Temporary Use of Water (hereinafter “Agreement”), by and between User and **Q Creek Land and Livestock Company LLC (hereinafter “Appropriator”)** for the purchase and use of surface water (hereinafter “water”) from **the Enl. Wertheim No 1 Ditch, Permit No. 920.0E**, supplied from the Troublesome Creek, with a record point of diversion located in the NW¼NE¼ of Section 16, T24N, R81W,

THE STATE ENGINEER FINDS AS FOLLOWS:

That User wishes to use the above-mentioned water for dust control for road maintenance purposes (hereinafter “use”), in Carbon County, WY; and

That, in connection with said use, it is necessary that User have considerable water available to it; and

That the most practicable source of said water is from the **Enl. Wertheim No 1 Ditch, Permit No. 920.0E**, supplied from the Troublesome Creek, with a record point of diversion located in the NW¼NE¼ of Section 16, T24N, R81W, a priority date of September 23, 1902, an appropriation of 2.71 cfs, and the right of which is adjudicated and held in the name of the Appropriator for irrigation purposes only; and

That User wishes to divert the temporarily transferred water at points of diversion located in the SW¼SE¼ of Section 21 and the SE¼NW¼ of Section 34, T24N, R81W; and

That User and Appropriator have made and entered into the Agreement, dated **July 22, 2020**, relating to the use and purchase of water in the amount of approximately **3,000,000 gallons or 9.2 acre-feet**, to be diverted at a rate not to exceed **400 gallons per minute or 30,000 gallons per day**; and

That the water right acquired by User under the Agreement has been historically, consumptively used by Appropriator; and

That, upon review of information, data and materials in the State Engineer’s records, no other appropriator will be injured by the temporary transfer described in the Agreement; and

That the Agreement is marked “Exhibit A”, and attached hereto, and a sketch map showing the proposed point of diversion and area of use is marked “Exhibit B” and attached hereto, both of which are incorporated herein by this reference.

IT IS, THEREFORE, ORDERED:

That, subject to the provisions of this Order, the Agreement is hereby ratified and approved, and the User is authorized to purchase and use said water, as provided for in the Agreement, **through December 31, 2021** or until said use is complete, whichever comes first, at which time said water shall be automatically reinvested to its former use, all as provided by Wyoming Statute §41-3-110; and

That in accordance with the Agreement, User shall keep Appropriator and Superintendent of Division I, informed of its daily diversions; and

That in accordance with the Agreement, User shall keep daily records of its water use under the Agreement; and

That said records and tabulation of the total amount of water used shall be submitted to Brian Pugsley, Division I Superintendent, 510 W. 27th Avenue, Torrington, WY 82240, Phone: 307-532-2248, Email: brian.pugsley@wyo.gov with a copy to the State Engineer's Office, Herschler Building, 2W, Cheyenne, WY 82002, Phone: 307-777-6475, Email: sandra.lorentz@wyo.gov, and to Rod Oliver, Hydrographer/Commissioner, 277 Dutton Creek Road, Laramie, WY 82070, Phone: 307-760-4167, Email: rod.oliver@wyo.gov, and to Ashley Carter, Office Support Specialist, 510 West 27th Avenue, Torrington, WY 82240, Phone: 307-532-2248, Email: ashley.carter@wyo.gov; and

That the records shall be submitted no later than the 10th of each month following the month the water was used; and

That the records shall be submitted whether water is diverted or not, showing the daily use of water under this Order; and

That the records shall be used as necessary for water administration and water accounting purposes; and

That failure, on the part of User, to file the records will be grounds for denial of use of water under this Order; and

That the User shall inform the Water Commissioner of the date it wishes to begin diverting water, and the diversion of water will be done at all times under the supervision of the Water Commissioner; and

That prior to the use of any water under this Agreement, a meter acceptable to the State Engineer must be installed on the discharge pipe at the User's point of diversion; and

That an amount of water equal to that being diverted for temporary purposes shall remain in the source of supply (Troublesome Creek) to account for return flow requirements; and

That the maximum rate of diversion shall be **400 gallons per minute or 30,000 gallons per day**; and

That the total amount of water used under the Agreement must not exceed **3,000,000 gallons or 9.2 acre-feet**; and

That not more than **1,500,000 gallons or 4.6 acre-feet** be used in any one water year; and

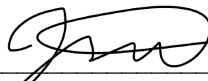
That the water will be diverted by User at points of diversion located in the **SW¼SE¼ of Section 21 and the SE¼NW¼ of Section 34, T24N, R81W**; and

That User shall only use water transferred under the Agreement in Carbon County, Wyoming; and

That this Order is issued on the condition that State Engineer Personnel be provided free and unencumbered access to the Appropriator's and User's point(s) of diversion(s) and point(s) of use to perform their duties as described by law; and

That the State Engineer Personnel may request and must be provided a copy of the Agreement and this Order as part of the performance of their duties; and

ORDERED THIS 3RD DAY OF AUGUST, 2020.



for STATE ENGINEER

August 3, 2020
Order Number 20-81

Temporary Change: Reservoir water

Examples on following pages:

- Application/agreement
- State Engineer order

WATER AGREEMENT - SURFACE WATER

For Temporary Use of Water

THIS AGREEMENT, made and entered into this 1st day of May
2020, by and between EOG Resources, Inc
of 1103 Old Town Lane, Suite 201, Cheyenne, Wy 82009 hereinafter referred to as
(name of company if applicable)
the Temporary Water "USER" and Water Management Company, LLC
(water right holder's name)
hereinafter referred to as "APPROPRIATOR."
(name of company if applicable)
WITNESSETH:

1. Upon receiving authority from the State Engineer, State of Wyoming,
Appropriator shall deliver to the User, a total amount of 65,167,200
(number of gallons)
gallons of water per water year from the following described appropriation:

<u>Permit No. 3984R & Enl. 4402R</u> (Permit Number)	<u>W.H.R Reservoir</u> (Name of Ditch or Reservoir)
<u>9/25/1924 & 10/8/1929</u> (Priority)	<u>SESE, Sec 2, T13N,R66W</u> (Source of Supply)
<u>440 ACFT</u> (Amount of Appropriation)	<u>Sec 4 T13N R65W</u> <u>Sec 5 T13N R65W</u> <u>Sec 6 T13N R65W</u> (Location of Record Point of Diversion of Ditch or Outlet of Reservoir under this Appropriation)
<u>100%</u> (Portion of this Appropriation held by Water Appropriator)	<u>See Exhibit B-1</u> (Location of User's Point of Diversion)

2. The water to be supplied by Appropriator to the User shall be
supplied at a maximum rate of 4000
(gallons per minute)
with total daily diversion of 5,760,000
(gallons per day)
and said water shall be used for (Indicate where the water will be used and
for what purpose and describe method and point of withdrawal, etc.):
Oil & Gas Development, Road Construction, and Dust Abatement in Laramie County, Wyoming.

OFFICE USE ONLY

This Agreement was received May 4, 2020
Fee paid \$ 50.00 cash

3. It is understood and agreed by the Appropriator that in order to satisfy the consumptive use-return flow formula set forth in Wyoming law, as it applies to **direct flow appropriation**, it will be necessary for the Appropriator to forego the use of up to double the amount of water diverted under this Agreement as specified in paragraphs 1 and 2, unless an adjustment is made in this requirement by the State Engineer. Additionally, water can only be used during the historic irrigation period.

4. Throughout the term of this Agreement, the User agrees that day to day water withdrawals hereunder shall be in such nearly even quantities as possible to the end that waste thereof shall not be created either by the User or by the Appropriator.

5. The User agrees to furnish one (1) copy of a sketch map, labeled as "Exhibit B" or any other map necessary for transmittal with this Agreement showing the **User's proposed point of use**, as well as location of the **point of diversion**, water right involved, and the **temporary water user's point of diversion**, if different from the appropriation point of diversion. The items to be depicted on said map shall be shown with reasonable accuracy within the proper legal subdivision, section, township and range. It is preferable that the temporary water user's point of diversion be from the facility under the original appropriation when possible.

6. This Agreement shall be in existence and binding upon the parties hereto for a term of 1 Year from and after the date of approval by the State Engineer or until such time as the total amount of water contracted for has been supplied, whichever occurs first, but in no event shall exceed a period of two years from the date of approval by the State Engineer.
(length of time)

This Agreement is made pursuant to Wyoming Statute 41-3-110 authorizing the temporary acquisition of adjudicated or valid unadjudicated water rights for highway, railroad construction or repair, drilling operations or other temporary purposes by purchase, gift or lease by the User and providing for the method of said acquisition.

Signature


CSR:

Title

Water Resources - Foreman

Printed Name

Mike Willcox

Mailing Address

1103 Old Town Lane, Suite 201, Cheyenne, WY 82009

Phone

(307) 365-4716

cell

Phone

(307) 823-6219

business

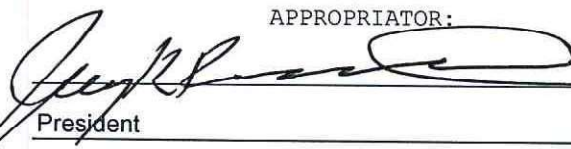
Phone

home

e-mail

MICHAEL_WILLCOX@EOGRESOURCES.COM

Signature


APPROPRIATOR:

Title

President

Printed Name

Jay Burnett

Mailing Address

Cheyenne, WY 82001

Phone

(307) 831-9902

cell

Phone

business


Phone

home

e-mail

JBURNETT@RTCONNECT.NET

APPROVED


For State Engineer of Wyoming

5/5/2020

Date

INSTRUCTIONS

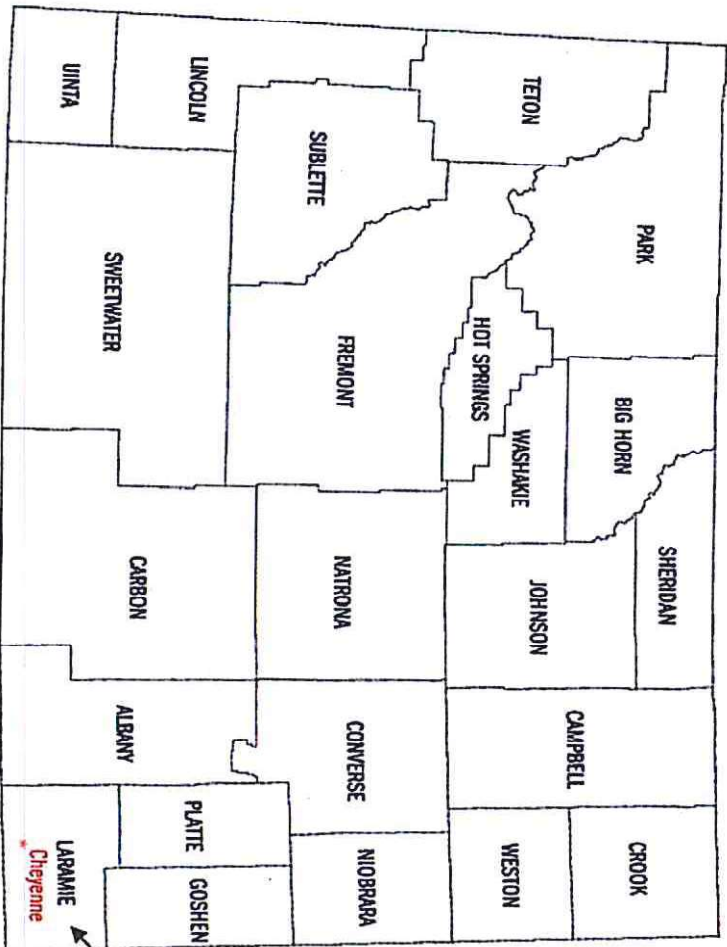
1. This form is to be used for Agreements involving adjudicated and valid unadjudicated **surface water rights**.
2. All locations required to be given under this agreement shall be described by legal subdivision, section, township and range.
3. The sketch map furnished should show the location of the ditch, pipeline or reservoir, the location of the source of supply of the appropriation involved and the location of the point of diversion, the location of the area of use and brief narrative giving a general description of the proposed temporary use.
4. Any out of state use must be addressed separately; please contact the State Engineer's Office for details.
5. One (1) fully executed Agreement shall be forwarded to the State Engineer's Office. Upon approval by the State Engineer, a fully executed copy will be returned to the parties to the Agreement.
6. Required size of sketch map is 8½ x 11", 8½ x 14" or multiples thereof.
7. A fee of Fifty (\$50.00) dollars must accompany each application.
8. Where irrigation rights are involved in any agreement, the right to divert water is limited to the historic irrigation period and when any type of right is involved, water can be used only when that right is in priority.

(This Agreement can only be honored during the historic irrigation period; therefore, if water is to be used in the non-irrigation period, an application for direct flow for temporary use would be in order.)

THESE LIMITATIONS TO APPLY TO AGREEMENTS USING DIRECT FLOW WATER FOR IRRIGATION PURPOSES.

Please mail completed forms, along with the \$50 filing fee to:

State Engineer's Office
Attn: Surface Water
2nd floor, West Wing
Herschler Building
122 West 25th Street
Cheyenne, WY 82002



Area of Use
Laramie County, Wyoming

Exhibit B-2

ORDER NO. 20-62

EOG Resources, Inc. (hereinafter “User”) having made application to acquire a temporary water right, and having filed a Water Agreement for Temporary Use of Water (hereinafter “Agreement”), by and between User and **Water Management Company, LLC (hereinafter “Appropriator”)**, for the purchase and use of surface water (hereinafter “water”) from the **W.H.R. Reservoir, Permit No. 3984.0R, and the Enlargement of the W.H.R. Reservoir, Permit No. 4402.0R**, supplied by Crow Creek, tributary of South Platte River, both with a record point of diversion located in the **SE¼SE¼ of Section 2, T13N, R66W**,

THE STATE ENGINEER FINDS AS FOLLOWS:

That User wishes to use the above-mentioned water for oil and gas operations, road construction and dust abatement purposes, (hereinafter “use”) in Laramie County, Wyoming as depicted on the attached map marked “Exhibit B-2”; and

That, in connection with said use, it is necessary that User have considerable water available to it; and

That the most practicable source of said water is from the **W.H.R. Reservoir, Permit No. 3984.0R, and the Enlargement of the W.H.R. Reservoir, Permit No. 4402.0R**, both with a record point of diversion located in the SE¼SE¼ of Section 2, T13N, R66W, with priority dates of September 25, 1924 and October 8, 1929 respectively, combined appropriations of 878.04 acre-feet, and the rights of which are adjudicated and held in the name of the Appropriator for irrigation purposes only; and

That User wishes to divert the water at multiple points of diversion as depicted on the attached map marked “Exhibit B-1”; and

That User and Appropriator have made and entered into the Agreement, dated **May 1, 2020** relating to the use and purchase of water in the amount of approximately **65,167,200 gallons or 200.0 acre-feet** to be diverted at a rate not to exceed **4,000 gallons per minute or 5,760,000 gallons per day**; and

That the water right acquired by User under the Agreement has been historically, consumptively used by Appropriator; and

That, upon review of information, data and materials in the State Engineer’s records, no other appropriator will be injured by the temporary transfer described in the Agreement; and

That the Agreement is marked “Exhibit A”, and attached hereto, and sketch maps showing the proposed point of diversion and places of use are marked “Exhibit B-1” and “Exhibit B-2”, and attached hereto, all of which are incorporated herein by this reference; and

IT IS, THEREFORE, ORDERED:

That, subject to the provisions of this Order, the Agreement is hereby ratified and approved, and the User is authorized to purchase and use said water, as provided for in the Agreement, **through September 30, 2020**, or until said use is complete, whichever comes first, at which time said water shall be automatically reinvested to its former use, all as provided by Wyoming Statute §41-3-110; and

That, in accordance with the Agreement, User shall keep daily records, for each point of diversion, of its water use under the Agreement; and

That in accordance with the Agreement, User shall keep Appropriator and Superintendent, Division I, informed of its daily diversions; and

That said records and tabulation of the total amount of water used shall be submitted weekly to Brian Pugsley, Division I Superintendent, 510 West 27th Avenue, Torrington, WY 82240, Phone: 307-532-2248, FAX 307-532-5558, Email: brian.pugsley@wyo.gov with a copy to the State Engineer's Office, Herschler Building, 2W, Cheyenne, WY 82002, Phone: 307-777-6475, Email: sandra.lorentz@wyo.gov, and to Adam Skadsen, Hydrographer/Commissioner, 710 Garfield, Room 114, Laramie, WY 82070, Phone 307-742-0023, Email: adam.skadsen@wyo.gov; and to Ashley Carter, Office Support Specialist, 510 W 27th Ave, Torrington, WY 82240, Phone: 307-532-2248, Email: ashley.carter@wyo.gov; and

That the records shall be submitted no later than the 10th of each month; and

That the records shall be submitted whether water is diverted or not, showing the daily use of water under this Order; and

That the records shall be used as necessary for water administration and water accounting purposes; and

That failure, on the part of User, to file the records will be grounds for denial of use of water under this Order; and

That the User shall inform the Water Commissioner of the date it wishes to begin diverting water, and the diversion of water will be done at all times under the supervision of the Water Commissioner; and

That prior to the use of any water under this Agreement, a meter acceptable to the State Engineer must be installed on the discharge pipe at the User's points of diversion; and

That the Appropriator's right to refill the W.H.R. Reservoir and the Enlargement of the W.H.R. Reservoir by the amount of depletion prior to September 30, 2020, cannot be exercised until after October 1, 2020; and

That the maximum rate of diversion shall be **4,000 gallons per minute or 5,760,000 gallons per day**; and

That the total amount of water used under the Agreement must not exceed **65,167,200 gallons or 200.0**; and

That water will be **diverted by User at multiple points of diversion in Laramie County, WY, as depicted on the attached map marked “Exhibit B-1”**; and

That User shall only use water transferred under the Agreement at the place designated on the map attached hereto as “Exhibit B-2”; and

That this Order is issued on the condition that State Engineer Personnel be provided free and unencumbered access to the User’s point(s) of diversion(s) and point(s) of use to perform their duties as described by law; and

That the State Engineer Personnel may request and must be provided a copy of the Agreement and this Order as part of the performance of their duties; and

ORDERED THIS 5TH DAY OF MAY, 2020.



for STATE ENGINEER

May 5, 2020
Order Number 20-62

Permanent Water Right Changes:

Changing to a new *use*, or a new *place of use*

- ❖ Data intensive: proof of historic consumptive use. A consumptive use study may be required
- ❖ Board of Control scrutiny for injury to other water users: hearings, public controversy possible
- ❖ Original water right typically reduced in transfer (due to return flow, other considerations)

Wyoming Statutes §41-3-104

- ❖ Petition to Board of Control
- ❖ No increase in:
 - Amount of water historically diverted
 - Historic rate of diversion
 - Historic amount of water consumed
- ❖ No decrease in historic return flow
- ❖ No injury to other lawful water users
- ❖ Board also reviews economic impacts of the proposed change
 - Loss to community where water was historically used
 - Offset from new use
 - Potential of other water sources available to new use
- ❖ Determine if other sources of water are available for the new use

Current law does not appear to provide for advance approval of permanent water right changes.

What is required, and the outcome, varies greatly – depending on the facts of the proposed change:

- ❖ Change to new *place of use* alone (as, irrigation to new irrigation location) typically requires proof of historic consumptive use, not necessarily a consumptive use study
 - Inadequate historic use can result in further cutback of transferable amount, and/or need to use the water more thoroughly at original site before seeking transfer
- ❖ Change to a new *use* typically requires technical consumptive use study
 - Inadequacy of historic consumptive use at original location raises problems noted above
- ❖ These changes typically could also require a change in point of diversion and means of conveyance
- ❖ Distance of move increases likelihood of:
 - Protests from other water users
 - Further cuts in amount of water moved, due to calculated conveyance loss for the water moving in the stream to different site (in long-distance move downstream)

Examples:

- ❖ Relatively standard change to new [place of use](#), to change from flood to pivot irrigation, within an irrigation district, 2019
 - Water right owner hoped to move water rights to cover 1 and ½ pivots, but the Board of Control approved the change for only enough water to cover 1 pivot. The board found on inspection that some historic use of the water was spotty, and recommended more thorough irrigation in those locations before more water could be moved to create the additional ½ pivot.
 - Division I, change in place of use within Goshen Irrigation District, 2019
- ❖ Relatively standard change to new use, from irrigation to municipal as the city grew out over former ranch land
 - Always requires technical consumptive use study
 - Can involve protests from other water right holders, public hearing
 - Division III, City of Lander
 - Requested amount to be changed was cut by slightly over 25% (0.19 cfs request reduced to 0.14 cfs granted)
 - See following excerpts from report to the court overseeing the Big Horn decree: the report details CU study and public hearing

- Attached: An informative case exploring nuances of the many considerations involved changing a water right to a new use is *Basin Electric*, Wyoming Supreme Court, 1978

STATE OF WYOMING)
) SS
COUNTY OF WASHAKIE)

IN THE DISTRICT COURT

FIFTH JUDICIAL DISTRICT

IN RE THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER IN)
THE BIG HORN RIVER SYSTEM AND)
ALL OTHER SOURCES, STATE OF)
WYOMING.)

CIVIL NO. 4993-86-0012

REPORT OF THE WYOMING STATE BOARD OF CONTROL

AMENDED PETITION FOR CHANGE OF)
USE FROM IRRIGATION TO)
MUNICIPAL USE AND CHANGE OF)
POINT OF DIVERSION AND MEANS)
OF CONVEYANCE OF A PORTION OF)
THE JAMES IRWIN APPROPRIATION,)
TERRITORIAL APPROPRIATION,)
DIVERTING FROM BIG OR MIDDLE)
FORK POPO AGIE RIVER,)
TRIBUTARY LITTLE WIND RIVER,)
TRIBUTARY BIG HORN RIVER,)
TRIBUTARY YELLOWSTONE RIVER,)
THROUGH THE CHALMERS AND FOGG)
DITCH, WITH PRIORITY OF 1888,)
TO BE CHANGED IN PART TO THE)
CITY OF LANDER PIPELINE.)

DOCKET NO. III-2009-3-6

M.R. Book 34, Page 218

Map G-6, Page 90

Amended C.R. 90, Page 158

O.R. 2, P. 32; NO C.R. OF RECORD; PROOF NO. 1345

The above-entitled matter was considered by the Wyoming State Board of Control on May 13, 2010. In accordance with this Court's amended Big Horn Adjudication - Phase III procedures and pursuant to the Board of Control's statutory authority, the following Findings of Fact, Conclusions of Law, and Recommended Interlocutory Decree are respectfully submitted to the District Court, Fifth Judicial District, State of Wyoming.

FINDINGS OF FACT

1. THAT the proceedings concerning the above-entitled matter were initiated by the City of Lander, acting through its Attorney, Kara Brighton, Hageman and Brighton, P.C. of 222 East 21st Street, Cheyenne, County of Laramie, State of Wyoming, by the filing of an Amended Petition for change of use and change of point of diversion and means of conveyance of a portion of the following described appropriation:

The James Irwin Appropriation, Territorial Appropriation, adjudicated under Proof No. 1345, in the amount of 0.24 c.f.s. for domestic and stock purposes and 1.71 c.f.s. for the irrigation of 119.89 acres, diverting from the Big or Middle Fork Popo Agie River, tributary Little Wind River, tributary Big Horn River, tributary Yellowstone River, through the Chalmers and Fogg Ditch, with priority of 1888, and of record in Order Record 2, page 32 describing the lands irrigated as follows:

Township 33 North, Range 100 West

Section 12:	SE $\frac{1}{4}$ SW $\frac{1}{4}$	40.00 acres
Section 13:	NW $\frac{1}{4}$ NE $\frac{1}{4}$	39.89
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	40.00
Total		119.89 acres (1.71 c.f.s.)

2. THAT the Petitioner has received an Authorization for Detachment of Water Right from the owner of 12.60 acres of new city lots and 1.30 acres of land to be developed as streets, curb and gutter for the Indian Lookout Fifth Subdivision located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 33 North, Range 100 West, and a Water Right Deed for 3.78 acres of land to be developed as streets in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 33 North, Range 100 West, as evidenced by Exhibit A which accompanied the Amended Petition. The map accompanying the Amended Petition indicated that of the 17.68 acres offered for change of use, 13.63 acres were found to be historically irrigated by the Petitioner.

3. THAT by and through its Amended Petition, the Petitioner requested a change of use from irrigation to municipal use of a portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, attaching to the following described lands:

Township 33 North, Range 100 West

Section 13:	NE $\frac{1}{4}$ NW $\frac{1}{4}$	13.63 acres
Total		13.63 acres (0.19 c.f.s.)

4. THAT by and through its Amended Petition, the Petitioners requested that the amount of water requested to be changed from the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, to municipal use is to be used within the city limits of Lander within an area of use described as follows:

Township 33 North, Range 99 West

Section 7:	SW $\frac{1}{4}$ NW $\frac{1}{4}$
	S $\frac{1}{2}$
Section 8:	NE $\frac{1}{4}$ NE $\frac{1}{4}$
	S $\frac{1}{2}$ N $\frac{1}{2}$
	N $\frac{1}{2}$ SW $\frac{1}{4}$
	S $\frac{1}{2}$ SW $\frac{1}{4}$
	SE $\frac{1}{4}$
Section 9:	NW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 17:	N $\frac{1}{2}$
	SW $\frac{1}{4}$
	E $\frac{1}{2}$ SE $\frac{1}{4}$
Section 18:	All
Section 19:	N $\frac{1}{2}$
	E $\frac{1}{2}$ SW $\frac{1}{4}$
	N $\frac{1}{2}$ SE $\frac{1}{4}$
	SW $\frac{1}{4}$ SE $\frac{1}{4}$
Section 20:	N $\frac{1}{2}$
	SW $\frac{1}{4}$
	N $\frac{1}{2}$ SE $\frac{1}{4}$

Township 33 North, Range 100 West

Section 12: S $\frac{1}{2}$ NE $\frac{1}{4}$
SE $\frac{1}{4}$ SW $\frac{1}{4}$
SE $\frac{1}{4}$

Section 13: N $\frac{1}{2}$ N $\frac{1}{2}$
SE $\frac{1}{4}$ NE $\frac{1}{4}$
E $\frac{1}{2}$ SE $\frac{1}{4}$

Section 24: E $\frac{1}{2}$ NE $\frac{1}{4}$

5. THAT by and through its Amended Petition, the Petitioner also requested a change of point of diversion and means of conveyance of that portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, which was requested to be changed from irrigation to municipal use, from the Chalmers and Fogg Ditch. That appropriation's record point of diversion is described as South 20° 30' East, 1400 feet distant from the North Quarter Corner of Section 25, Township 33 North, Range 100 West, and situated in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, to the City of Lander Pipeline, diverting from the same source of supply approximately 3.5 miles upstream, at a point described as North 76° 53' East, 1067.2 feet distant from the South Quarter Corner of Section 4, Township 32 North, Range 100 West, and situated in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4 (Latitude 42° 46' 5.9" North, Longitude 108° 47' 10.1" West).

6. THAT by and through its Amended Petition, the Petitioner requested voluntary abandonment of a portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, as follows:

Township 33 North, Range 100 West

Section 13: NE $\frac{1}{4}$ NW $\frac{1}{4}$	3.08 acres
Total	3.08 acres (0.05 c.f.s.)

7. THAT Exhibit C, titled Diversion and Return Flow Study to Accompany Petition for Change of Use, Point of Diversion and Place of Use prepared July 2009 by Sage Civil Engineering accompanied the Amended Petition. In that attachment, the Petitioner stated the following facts which were not contested:

a. The historic consumptive use calculations are based upon Larry Pochop, et al. Consumptive Use and Consumptive Irrigation Requirements in Wyoming (1992). Two (2) numbers were used for the calculations. The Mean Consumptive Irrigation Requirement (CIR) which is reduced by precipitation was used to determine a growing season volume, while the Mean Consumptive Use (CU) for July was used to determine the diversion rate. The CIR is used to calculate the seasonal volume, because there is a high probability that the average precipitation will occur at some point during the growing season. The July CU was used for the diversion rate due to the fact that many weeks during July and August there may be little or no precipitation, and it is likely that little or no precipitation will occur for extended periods during these months, leading to a reduced quantification of irrigation water use and diversion. A review of the climate data from the National Oceanic and Atmospheric Administration (NOAA) statistics confirms that the minimum recorded precipitation for the month of July is 0.05 inches and a trace for August. Under these conditions the CU is essentially the same as the CIR for those periods.

b. The pasture grass CIR for Lander is 24.59 inches or 2.049 feet for the irrigation season and the average growing season for Lander is 188 days according to Larry Pochop, et al. Consumptive Use and Consumptive Irrigation Requirements in Wyoming (1992).

c. The seasonal volume of consumptive use in acre-feet can then be calculated by multiplying the CIR by the total number of irrigated acres. The 13.63 acres of historically irrigated land offered by the Petitioner would consume 27.93 acre-feet per year (13.63 acres x 2.049 feet), during the growing season.

d. The requested diversion rate was determined by the July CU of 7.78 inches. This equates to a daily CU of 0.251 acre inch/acre day (7.78 inches ÷ 31 days in July = 0.251 acre inch/acre day), which equates to 0.01054 cubic feet per second per acre (c.f.s./acre) of water (0.251 ÷ 12 inches per foot ÷ the conversion factor of 1.983 acre-feet per day). (Diversion and Return Flow Study to Accompany Petition for Change of Use, Point of Diversion and Place of Use, Petitioner Exhibit C).

8. THAT certain mapping requirements were waived by the State Board of Control at Petitioner's request and a properly prepared map accompanied the Amended Petition. (Transcript page 8).

9. THAT the Petitioner owns the City of Lander Pipeline.

10. THAT there are nine (9) record intervening points of diversion between the point of diversion of the Chalmers and Fogg Ditch and the point of diversion of the City of Lander Pipeline as evidenced by Exhibit D which accompanied the Amended Petition. Consents from all of the owners of these nine (9) intervening facilities were not obtained.

11. THAT the State Board of Control at its August 2009 meeting, its November 2009 meeting, and its February 2010 meeting voted to refer the Petition to hearing conditional upon receiving notification of consent from water right holders on the intervening points of diversion, map and petition edits and other clarifications.

12. THAT on February 4, 2010, due notice of the hearing was given in all respects as required by law. This included notice by certified mail, return receipt requested, to all non-consenting parties known to have an interest in the Amended Petition. Notice was also given by advertisement (legal notice) on February 7, 2010, in The Lander Journal.

13. THAT an Amended Petition, Docket No. III-2009-3-6 was received, along with amendments to two (2) other companion petitions, by the State Board of Control on February 26, 2010. The petition amendments were minor clerical corrections and did not involve any substantive changes that would require additional notice to objectors or non-consentors to the instant petition.

14. THAT a public hearing on all three (3) related amended petitions was held in Lander, Wyoming, on March 10, 2010. It was conducted by Mr. Jade Henderson, the Superintendent of Water Division Number Four and Hearing Officer, in accordance with Wyo. Stat. Ann. §41-3-104, §41-3-114 and Wyo. Stat. Ann. §16-3-107 through 112. Parties present at the hearing were: Petitioner City of Lander represented by its Attorney Kara Brighton; Protestants Kathy Pappas; Bill Lee; Amy Kenworthy; Edna Toponce; Kim Andermahr; James D. Corbett; David Vaughan; Darlene Vaughan; and Bernard and Helen Berger all appearing pro se. At the opening of the hearing twenty seven (27) individuals in attendance indicated to the hearing officer that they wished to protest the Amended Petition. As the hearing progressed seventeen (17) of these Protestants either left the hearing and or did not avail themselves of the opportunity to provide testimony or evidence to substantiate their protests during the hearing. By the end of the hearing, the record indicated that only the before mentioned ten (10) Protestants offered testimony for the record.

15. THAT Protestant Kathy Pappas testified that she objected to the Amended Petition and stated her belief that the proceedings were an illegal procedure because information was "withheld" from her by the Petitioner, although she stated she made no attempt to contact the Petitioner regarding the Amended Petition. (Transcript pages 69 and 72). Ms. Pappas had consented to the instant Amended Petitions prior to the hearing for one of the two parcels of property she claimed to own. (Transcript page 71). Her testimony relating to another parcel of property, which she stated she owns, was that she believed it was irrigated through the Wroe Ditch from Baldwin Creek. She stated that if her property was not irrigated from the Big or Middle Fork Popo Agie River, the source of the water right identified in the Amended Petition as the right to be affected, she would have no objection to the Amended Petition. (Transcript pages 72 through 74).

16. THAT Protestant Bill Lee testified that he objected to the Amended Petition because, if granted, he thought it may reduce the amount of water in the Big or Middle Fork Popo Agie River. (Transcript pages 76 through 78). Mr. Lee stated he does not have a water right from the Big or Middle Fork Popo Agie River. (Transcript page 77). Mr. Lee was also concerned about possible impacts to instream flows. (Transcript page 78).

17. THAT Myron Smalley, Water Division Three, District One, Hydrographer Commissioner, employed by the State Engineer's Office, testified that there is no instream flow water right through the City of Lander. (Transcript page 137).

18. THAT Protestant Dr. Amy Kenworthy testified that she objected to the Amended Petition because, if granted, she thought it may reduce the amount of water in the Big or Middle Fork Popo Agie River. (Transcript page 80). Dr. Kenworthy further stated that her own property, approximately 2.6 acres, is "passively" irrigated. She was unable to provide any specific information about her water right but had estimated the granting the petition(s) would reduce flows to her property. (Transcript pages 80 through 84).

19. THAT Protestant Edna Toponce testified that she objected to the Amended Petition, because she did not want her water rights taken even though the Petitioner asserted that it was not seeking to affect residents' water rights beyond those already voluntarily assigned by Authorization for Detachment of Water Rights or Water Right Deed to the City of Lander. (Toponce Exhibit A; Transcript pages 85 and 86). Ms. Toponce criticized the Petitioner's "vague" approach in describing what its proposal was but acknowledged that she had made little attempt to learn more about it by calling the City or reviewing the maps on file at the City office. (Transcript page 89).

20. THAT Protestant Darlene Vaughan testified that she objected to the Amended Petition because, if granted, she believed the change may reduce the amount of water in the Big or Middle Fork Popo Agie River. (Transcript page 145). Ms. Vaughan stated that she has an 1875 water right but was unable to explain how this senior water right could be affected if the Amended Petition was granted. (Transcript page 147). Ms. Vaughan stated that "we, as downstream appropriators, are entitled to the flow of the stream as it existed at the time of our appropriation, which in our case at the Baldwin Ditch was 1875, which predates the City dates. And granting the petitions will violate the cornerstone concept of western water law." (Transcript page 145).

21. THAT Protestant Kim Andermahr testified that she objected to the Amended Petition because, if granted, she believed the change may reduce the amount of water in the Big or Middle Fork Popo Agie River and diminish the value of her property. (Transcript pages 148 and 149). Ms. Andermahr conceded that she had not inquired with the Petitioner about the Amended Petition. She was unable to identify or quantify any impact which might occur to her water rights if the Amended Petition were granted. (Transcript pages 151 and 152).

22. THAT Protestant Jim Corbett testified that he objected to the Amended Petition in light of what he considered possible cumulative impact due to speculative future water right transfers which might be anticipated. (Transcript page 157). He conceded on cross-examination that his property is not served by any water right. (Transcript page 159).

23. THAT Protestant David Vaughan testified that he objected to the Amended Petition because of the possibility of future injury. (Transcript pages 161 and 168). Mr. Vaughan stated, when asked if his water right was not being satisfied, that "if you put - it's an eight-mile ditch. And so you've got a guy at the end of it also," inferring considerable ditch loss and shortages to the end-of-ditch users. Mr. Vaughan's claim of injury was that "if you put in the bare minimum water rights he doesn't get any water because of the topography and the layer." (Transcript pages 164, 169 through 171). The Board notes that managing conveyance losses is typically the responsibility of the ditch owner(s).

24. THAT Mr. Vaughan's testimony suggested that, though water is available for his priority at the diversion from the Big or Middle Fork Pogo Agie River, taking the proposed amount at the City intake upstream would result in requiring more effort from him at his diversion point to get his full water right into his ditch, a new burden that did not exist when his water right was established in 1875. (Transcript pages 160 and 161).

25. THAT Mr. Vaughan stated that water going downstream to the ditch diversions from which the proposed transfer would come is partially lost in the tilted geologic strata. (Transcript pages 160 and 161). The proposed transfer would divert upstream of some of these geologic features.

26. THAT Protestant Bernard Berger made an unsworn statement to the effect that he objected to the Amended Petition, because he was concerned about the Petitioner taking his water rights. Petitioner asserted and provided testimony to the effect that the City of Lander was not seeking to take any water rights other than those which already had been voluntarily assigned through Authorization for Detachment of Water Rights or Water Right Deed. (Transcript pages 40 and 175).

27. THAT at the end of the hearing, the Hearing Officer, invited the parties to submit closing statements by April 23, 2010.

28. THAT the State Board of Control received closing statements from David and Darlene Vaughan on April 15, 2010; from Amy Kenworthy and Frank Wheeler on April 22, 2010; from the Petitioner on April 23, 2010; and from James D. Corbett on April 28, 2010.

29. THAT the State Board of Control accepts that a reasonable estimate of the growing season in the area in question is a period of 188 days from April 1st to October 8th of each year, as noted in Petitioner's Exhibit C, titled Diversion and Return Flow Study to Accompany Petition for Change of Use, Point of Diversion and Place of Use.

30. THAT based upon the facts given in Petitioner's Exhibit C and the uncontroverted averments in the Amended Petition, the State Board of Control finds that the relevant Historical Consumptive Use Diversion Rate of the appropriation at issue is equal to 0.14 c.f.s. (13.63 acres x 0.01054 c.f.s. per acre).

31. THAT the State Board of Control finds that approximately 0.14 c.f.s. of the James Irwin Appropriation is eligible to be changed to municipal use for a seasonal total of 27.93 acre-feet (27.93 acre-feet ÷ 1.983 acre-feet per day ÷ 188 days). The remaining 0.0547 c.f.s. of this appropriation is not eligible for transfer and will therefore remain in the system to satisfy return flows.

32. THAT no evidence of injury that is defined by Wyoming water law was submitted by any Protestor who could show standing to claim injury. No factual evidence was offered by any Protestor to support any claims of injury. Several Protestants could not provide any specific information about their water right. None were able to identify any specific impact to their water right which could be expected to occur if the Amended Petition was granted.

33. THAT injury cannot be found unless the weight of the evidence establishes that the proposed change will materially affect a protestor's rights. As the Wyoming Supreme Court has explained:

It has been stated that generally junior appropriators have vested rights in a continuation of stream conditions existing at the time of their appropriations, thus entitling them to resist changes in points of diversion or use which materially affect their rights. See, *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629 (Colo. 1954); and §41-3-104, W.S. 1977.

Thayer v. Rawlins, 594 P.2d 951, 954 (Wyo. 1979) (emphasis added).

34. THAT the change of use from irrigation to municipal use for 0.14 c.f.s. or 27.93 acre-feet of water per year will not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators within the meaning of Wyo. Stat. Ann. §41-3-104(a).

35. THAT Wyo. Stat. Ann. §41-3-114 allows the State Board of Control to decide this Amended Petition to change point of diversion or means of conveyance, following a properly notified public hearing such as that held in this case. The evidence in the record shows that the Amended Petition meets all the requirements of that statute and the granting of the Amended Petition will not injuriously affect the rights of other appropriators within the meaning of Wyo. Stat. Ann. §41-3-114(f).

36. THAT the granting of the Amended Petition to change the use and place of use of the quantity of water sought to be changed will not injure any other existing lawful appropriator, and will not otherwise conflict with the terms of Wyo. Stat. Ann. §41-3-104(a).

37. THAT the granting of the Amended Petition will not injure any other appropriator, and at its May 2010 meeting the State Board of Control voted to grant this Amended Petition.

CONCLUSIONS OF LAW

1. The Wyoming State Board of Control has jurisdiction to consider this matter pursuant to Wyoming Statutes §§ 1-37-106, 41-3-104 and 41-3-114.

2. Upon the initiation of proper proceedings, a holder or holders of a water right may seek to change the use and point of diversion and means of conveyance of it, or a portion of it, at any time.

3. To the extent that any of the foregoing Findings of Fact may constitute Conclusions of Law, they are hereby incorporated as such.

RECOMMENDED INTERLOCUTORY DECREE

The above-entitled matter came to be heard on the Report of the Wyoming State Board of Control pursuant to the Order of the Court dated January 21, 1986. The Court being fully advised, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. THAT this Report is confirmed in all respects and the Findings of Fact and Conclusions of Law of the State Board of Control are hereby adopted as Findings of Fact and Conclusions of Law of the Court.

2. THAT this Amended Petition filed herein should be and the same is **GRANTED**.

3. THAT the Petitioner be allowed a change of use from irrigation to municipal use in the amount not to exceed 27.93 acre-feet per year which may be diverted, when in priority, during a period of 188 days beginning April 1st through October 8th of each year at a rate not to exceed 0.14 c.f.s., and the remainder of the appropriation (0.0547 c.f.s.) shall remain in the stream channel to offset any diminished return flows.

4. THAT this water is obtained by detaching and changing the use of the water from a historically irrigated portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, attaching to the following described lands:

<u>Township 33 North, Range 100 West</u>	
Section 13: NE $\frac{1}{4}$ NW $\frac{1}{4}$	<u>13.63</u> acres
Total	13.63 acres (0.19 c.f.s.)

5. THAT the Petitioner be allowed a change of place of use of the portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, as changed to municipal use is to be used within the city limits of Lander within an area of use described as follows:

<u>Township 33 North, Range 99 West</u>	
Section 7: SW $\frac{1}{4}$ NW $\frac{1}{4}$	
	S $\frac{1}{2}$
Section 8: NE $\frac{1}{4}$ NE $\frac{1}{4}$	
	S $\frac{1}{2}$ N $\frac{1}{2}$
	NW $\frac{1}{4}$ SW $\frac{1}{4}$
	S $\frac{1}{2}$ SW $\frac{1}{4}$
	SE $\frac{1}{4}$
Section 9: NW $\frac{1}{4}$ SW $\frac{1}{4}$	
Section 17: N $\frac{1}{2}$	
	SW $\frac{1}{4}$
	E $\frac{1}{2}$ SE $\frac{1}{4}$
Section 18: All	

Section 19: N $\frac{1}{2}$
E $\frac{1}{2}$ SW $\frac{1}{4}$
N $\frac{1}{2}$ SE $\frac{1}{4}$
SW $\frac{1}{4}$ SE $\frac{1}{4}$

Section 20: N $\frac{1}{2}$
SW $\frac{1}{4}$
N $\frac{1}{2}$ SE $\frac{1}{4}$

Township 33 North, Range 100 West

Section 12: S $\frac{1}{2}$ NE $\frac{1}{4}$
SE $\frac{1}{4}$ SW $\frac{1}{4}$
SE $\frac{1}{4}$

Section 13: N $\frac{1}{2}$ N $\frac{1}{2}$
SE $\frac{1}{4}$ NE $\frac{1}{4}$
E $\frac{1}{2}$ SE $\frac{1}{4}$

Section 24: E $\frac{1}{2}$ NE $\frac{1}{4}$

6. THAT an amended certificate of appropriation be issued to the Petitioner describing the new use and new area of use.

7. THAT the Petitioner be allowed a change of point of diversion and means of conveyance of the portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, as changed from irrigation to municipal use from the Chalmers and Fogg Ditch, diverting at its record point of diversion described as South 20° 30' East, 1400 feet distant from the North Quarter Corner of Section 25, Township 33 North, Range 100 West, and situated in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, to the City of Lander Pipeline, diverting from the same source of supply approximately 3.5 miles upstream, at a point described as North 76° 53' East, 1067.2 feet distant from the South Quarter Corner of Section 4, Township 32 North, Range 100 West, and situated in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4 (Latitude 42° 46' 5.9" North, Longitude 108° 47' 10.1" West).

8. THAT the Petitioner be allowed a voluntary abandonment of a portion of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, described as follows:

Township 33 North, Range 100 West

Section 13: NE $\frac{1}{4}$ NW $\frac{1}{4}$	3.08 acres
Total	3.08 acres (0.05 c.f.s.)

9. THAT as a result of this action the unused balance of 0.97 acres (0.01 c.f.s.) unavailable for change under the Authorization for Detachment of Water Rights submitted with this Amended Petition is hereby removed from the appropriation due to inactivity.

10. THAT the remainder of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, is unaffected by the granting of this Amended Petition, and is described as follows:


Township 33 North, Range 100 West

Section 12: SE $\frac{1}{4}$ SW $\frac{1}{4}$	40.00 acres
Section 13: NW $\frac{1}{4}$ NE $\frac{1}{4}$	39.89
NE $\frac{1}{4}$ NW $\frac{1}{4}$	22.32
Total	102.21 acres (1.46 c.f.s.)

This Report, including Findings of Fact, Conclusions of Law, and Recommended Interlocutory Decree is respectfully submitted this 30TH day of SEPTEMBER, 2010.


PATRICK T. TYRRELL, PRESIDENT
WYOMING STATE BOARD OF CONTROL

ATTEST:


ALLAN CUNNINGHAM, EX-OFFICIO SECRETARY
WYOMING STATE BOARD OF CONTROL

STATE OF WYOMING)
) SS
COUNTY OF WASHAKIE)

IN THE DISTRICT COURT

FIFTH JUDICIAL DISTRICT

IN RE THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER IN)
THE BIG HORN RIVER SYSTEM AND)
ALL OTHER SOURCES, STATE OF)
WYOMING.)

CIVIL NO. 4993-86-0012

AMENDED PETITION FOR CHANGE OF)
USE FROM IRRIGATION TO)
MUNICIPAL USE AND CHANGE OF)
POINT OF DIVERSION AND MEANS)
OF CONVEYANCE OF A PORTION OF)
THE JAMES IRWIN APPROPRIATION,)
TERRITORIAL APPROPRIATION,)
DIVERTING FROM BIG OR MIDDLE)
FORK POPO AGIE RIVER,)
TRIBUTARY LITTLE WIND RIVER,)
TRIBUTARY BIG HORN RIVER,)
TRIBUTARY YELLOWSTONE RIVER,)
THROUGH THE CHALMERS AND FOGG)
DITCH, WITH PRIORITY OF 1888,)
TO BE CHANGED IN PART TO THE)
CITY OF LANDER PIPELINE.)

DOCKET NO. III-2009-3-6
M.R. Book 34, Page 218
Map G-6, Page 90
Amended C.R. 90, Page 158

O.R. 2, P. 32; NO C.R. OF RECORD; PROOF NO. 1345

INTERLOCUTORY DECREE

The above-entitled matter came to be heard on the Report of the Wyoming State Board of Control pursuant to the Order of the Court dated January 21, 1986. The Court being fully advised, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. THAT this Report is confirmed in all respects and the Findings of Fact and Conclusions of Law of the State Board of Control are hereby adopted as Findings of Fact and Conclusions of Law of the Court.

2. THAT this Amended Petition filed herein should be and the same is **GRANTED**.

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S $\frac{1}{2}$ N $\frac{1}{2}$
NW $\frac{1}{4}$ SW $\frac{1}{4}$
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Section 18: All

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Township 33 North, Range 100 West

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SE $\frac{1}{4}$ NE $\frac{1}{4}$
E $\frac{1}{2}$ SE $\frac{1}{4}$

Section 24: E $\frac{1}{2}$ NE $\frac{1}{4}$

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9. THAT as a result of this action the unused balance of 0.97 acres (0.01 c.f.s.) unavailable for change under the Authorization for Detachment of Water Rights submitted with this Amended Petition is hereby removed from the appropriation due to inactivity.

10. THAT the remainder of the James Irwin Appropriation, Territorial Appropriation, Proof No. 1345, is unaffected by the granting of this Amended Petition, and is described as follows:

<u>Township 33 North, Range 100 West</u>	
Section 12: SE $\frac{1}{4}$ SW $\frac{1}{4}$	40.00 acres
Section 13: NW $\frac{1}{4}$ NE $\frac{1}{4}$	39.89
NE $\frac{1}{4}$ NW $\frac{1}{4}$	<u>22.32</u>
Total	102.21 acres (1.46 c.f.s.)

Dated this 6 day of October 2010.



JUDGE

But permanent changes can get still more complicated...

“Don’t expect instant gratification, or you’re not going to get very much water out of it,” says one city water manager experienced in water right changes

- ❖ In the 1980s, when the city of Casper looked at trying to move a water right downstream on the North Platte from a ranch near Saratoga and change the use to city water, it became apparent that conveyance losses would be so large that the city dropped the project.
- ❖ In 2007, when a ranch in Douglas tried to move water upstream on the North Platte, from a ranch 38 miles away, keeping the same irrigation use but changing the location, it was tough. Historic use was questioned, many people objected, a contentious public hearing with experts on both sides was held, and the final change transferred less water than the Douglas ranch had hoped.

It is possible to provide for future water supply before the change process

- ❖ acquiring the land with the water rights
- ❖ cleaning up any water rights tangles
- ❖ making sure the data will be there to make the change cover as much as possible of the water right
- ❖ all in preparation for undergoing permanent change process when the water is needed

Example:

- ❖ The City of Laramie in 1981 acquired the Monolith Ranch, adjacent to the city with the best priority water right on the Laramie River, to provide a future water supply if the city needs it. In the 40 years since, no water right has been transferred from that ranch to the city, but
 - The city puts a lot of \$ and effort into:
 - clean-up of water rights (eliminating overlaps, making sure state records match where water rights are used on the land)
 - creating and documenting steady water use
 - planning intensive effort on consumptive use data when need for the water appears to be 10 years out
 - The city also has other uses for the property – limited recreation, proposed solar array: but peak water use is top goal

What follows are

- ❖ Board of Control statistics (as of 2018)
- ❖ List of typical complexity issues

Compiled by the State Engineer's Office

Petitions Actions Within 1-Year

Fiscal Year	Total Number of Final Actions ¹	Number of Final Actions Within 1 Year ²	Percent of Petitions Processed Within 1 Year
FY 2012	175	156	89.1%
FY 2013	149	119	79.9%
FY 2014	203	159	78.3%
FY 2015	157	123	78.4%
FY 2016	135	105	77.78%
FY 2017	147	108	73.47%

¹ This column lists the total number of final actions taken on petitions by the Board during each fiscal year. These final actions are not limited to petitions that were received during the fiscal year.

² This column lists how many final actions were taken by the Board during each fiscal year where the date of the final action was within 365 days of the receipt of the petition.

Petitions Action Summary

Fiscal Year	Total Petitions Received ¹	Total Petitions with Final Actions ²	Average Days Per Final Action Petition
FY 2012	183	183	212
FY 2013	162	162	238
FY 2014	207	206	219
FY 2015	147	140	262
FY 2016	137	133	218
FY 2017	163	119	162

¹ This column lists the total number of petitions that were received and accepted during each fiscal year.

² This column lists the number of petitions which were received during each fiscal year that have now had a final action taken on them. The petitions that have not yet had a final action remain on the Board's Docket for consideration.

Petitions using an Attorney as Agent

Fiscal Year	Total Petitions Received ¹	Total Petitions Known to Involve Attorneys ²	Percent of Petitions Known to Involve Attorneys
FY 2012	183	30	16.39%
FY 2013	162	17	10.49%
FY 2014	207	21	10.14%
FY 2015	147	24	16.33%
FY 2016	137	13	9.49%
FY 2017	163	13	7.98%

¹ This column lists the total number of petitions that were received and accepted during each fiscal year.

² This column lists the number of petitions which were received during each fiscal year where it is known that an attorney was involved in the project. This was determined by reviewing who the Board's staff was corresponding with regarding the project. If an attorney was receiving letters or receiving copies of letters, those petitions were included in this total. In addition, if the Board or their staff was aware that an attorney was directly involved, even though the attorney was not receiving correspondence, those petitions were included in this total as well. The petitions that were counted for this column are shaded orange in the attached spreadsheet.

Comments Regarding Complexity of Petitions

Complexity associated with a change of place of use and/or means of conveyance is related to the distance between record location and proposed location. This relates to consent burden required to assure there is no injury to other water rights.

Consent burden to assure there is no injury to other water rights due to large number of potentially affected parties (i.e. Town of Pinedale, West bank Snake River, City of Lander).

Research required for petition preparation. The trend has been for firms to, more and more, submit less complete products which technicians must go through with a fine tooth comb while they complete all of the research necessary and then return it back to the engineer with a long list of corrections. These corrections may or may not be done and the process continues.

Version control problems when many rounds of edits are made by engineers which makes things difficult as they lose track of the version they are working from and they end up stepping backwards at times, which requires more scrutiny by the BOC, more time etc. and then they are upset when the letter requests changes that they made a couple versions ago.

Recent historic use verification on municipality projects, especially where there has been large time gap between annexation/cessation of irrigation and when the petitions are filed.

Blanket descriptions and the understanding of who can be affected to assure no injury. Often lands have been subdivided in a blanket description; going from a few consents needed to define the right to many consents.

Resurveys, especially when water was appropriated in original survey and the two surveys do not line up.

Engineer/Surveyors often have a lack of familiarity with the petition process. Those versed in the process are much better at it than first timers.

Protests from potentially affected parties lead to hearings.

Attorney involvement can be double edged sword, they can be good or they can end up being a middleman who doesn't clearly get the message to their clients or the engineer.

Agents often submit petitions at the petition deadline. Limited BOC staff cannot get everything filed at deadline reviewed in time for board meeting.

The number of co-petitioners on single petition creates time lags for signatures etc.

Large whole farm projects are often very complex with numerous appropriations involved.

Engineers who put lots of appropriations on one petition often make things too complex, there currently is a petition on the docket that has close to 50 appropriations listed and mapped on one petition making for a very complex review.

Multilayered water rights such as: original supply with various supplemental supplies, secondary supplies, and possibly additional supplies; all which may or may not align accurately. This often occurs when transbasin diversions are involved.

Railroad, BLM, USFS and/or WYDOT involvement adds greatly to the consent burden and the time needed to get their comments or consent which may never come, followed by a hearing that they don't show up to.

Through a field inspection, finding that what is happening on the ground does not match what was presented in the petition delays the process.

Sometimes there is a need to adjust existing rights in areas where new permits cannot currently be obtained.

Court decreed rights are often vague in their descriptions making analysis difficult.

Changes to points of diversion on sources with multiple channels can lead to complicated records searches for intervening facilities and increases the consent burden.

Large ditch systems with many owners and no organized ditch company or irrigation district makes for a large consent burden.

Exchanges

- ❖ Favored by statutory policy
- ❖ State Engineer review: No expansion of historic use is key
- ❖ Typically reservoir water; but use of direct flow, groundwater, combos allowed

Wyoming Statutes §41-3-106

- ❖ Water right holder proposes to take water out of priority when water from exchange source goes as “make-up” water to earlier priority rights that would otherwise be injured
- ❖ Water right holder can request exchange if:
 - Own water source sometimes insufficient, OR
 - Water from exchange source can't be conveyed to requestor's site, OR
 - Better use of state's water could be accomplishedAND
 - Water from another source is available for exchange
- ❖ State Engineer determines exchange will not injure other appropriators, be too difficult to administer, or be adverse to the public interest; beneficial use and equality of water required

What follows is a recent order approving an exchange from a reservoir.

PETITION FOR DIVERSION OF WATER TO)
ENABLE UTILIZATION OF RESERVOIR)
WATER THROUGH THE EVANSTON)
PIPELINE, TERRITORIAL PERMIT, PROOF)
8600, TERRITORIAL PERMIT, PROOF 8606,)
TERRITORIAL PERMIT, PROOF 8608,)
TERRITORIAL PERMIT, PROOF 8610, PERMIT)
No. 563, PERMIT No. 3643, PERMIT No. 3520)
ENL., PERMIT No. 24325, AND PERMIT No.)
6911 ENL., IN EXCHANGE FOR EQUAL)
AMOUNT OF WATER TO BE RELEASED)
FROM SULPHUR CREEK RESERVOIR,)
WHICH STORES WATER UNDER ORIGINAL)
PERMIT NO. 5695 Res., FIRST)
ENLARGEMENT PERMIT NO. 6481 Res.,)
SECOND ENLARGEMENT PERMIT NO. 6562)
Res., AND THIRD ENLARGEMENT PERMIT)
NO. 9222 Res.)

BEFORE THE STATE ENGINEER
CHEYENNE, WYOMING

ORDER GRANTING AN EXCHANGE OF DIRECT FLOW WATER FOR AN EQUAL
AMOUNT OF RELEASED, STORED WATER

Petitioners:

City of Evanston, acting through its City Engineer, Dean Barker
33 Allegiance Circle
Evanston, Wyoming, 82930

Having petitioned the State Engineer for an ORDER granting an exchange of direct flow water for an equal amount of released, stored water and the State Engineer having review the records in this matter and being duly and fully advised in the premises, does hereby find and conclude as follows:

FINDING OF FACT

1. THAT the petitioner is the sole owner of 14,060.3 acre feet of the valid adjudicated storage water rights to be exchanged which is identified as:

Sulphur Creek Reservoir, original Permit No. 5695 Res., with priority of 12/14/1950; first Enlargement Permit No. 6481 Res., with priority of 08/12/1958; second Enlargement Permit No. 6562 Res., with priority of 10/01/1958; and third Enlargement Permit No. 9222 Res., with priority of 09/08/1982, storing water from Bear River and Sulphur Creek, tributary of Bear River, issued to said City of Evanston.
2. THAT the following pipeline is adjudicated in the amount as follows:
 - a. Evanston Pipeline, Territorial Permit, Proof 8600, 0.6 c.f.s with a priority of 1869, Territorial Permit, Proof 8606, 4.0 c.f.s with a priority of 1875, Territorial Permit, Proof 8608, 0.45 c.f.s with a priority of March 28, 1875, Territorial Permit, Proof 8610, 0.39 c.f.s with a priority of March 28, 1875, Permit No. 563, 3.0 c.f.s with a priority of August 28, 1893, Permit No. 3643, 0.27 c.f.s with a priority of January 11, 1902, Permit No. 3520 Enl., 0.685 c.f.s with a priority of September 22, 1915, Permit No. 24325, 7.55 c.f.s with a priority of April 17, 1974, and Permit No. 6911 Enl., 43.1 c.f.s. with a priority of February 1, 1988
 - b. And further that original Permit No. 5695 Res., first Enlargement Permit No. 6481 Res., second Enlargement Permit No. 6562 Res., and third Enlargement Permit No. 9222 Res. is in good standing and adjudicated for the storage of 14,060.3 acre-feet of active capacity for municipal use, with all the required notices filed and that beneficial use of water is presently being made under said permits.

3. THAT the petitioner desires the ability to provide storage water by exchange up to the total appropriated amount for municipal use under the above permits and the total active reservoir capacity, according to the appropriations identified in paragraph 2a and 2b of this petition, for the reason that the quality of the water, when delivered to the water treatment plant directly from Sulphur Creek Reservoir, contains a large amount of organic material and is difficult to properly treat for delivery to the municipal users, but water can be provided by exchange release to make the system whole below the confluence of the Bear River and Sulphur Creek, from water stored in the Sulphur Creek Reservoir, original Permit No. 5695 Res., first Enlargement Permit No. 6481 Res., second Enlargement Permit No. 6562 Res., and third Enlargement Permit No. 9222 Res..
4. THAT the petitioner hereby agrees to such exchange under the conditions set out in this petition and the conditions imposed by the Order of the State Engineer in granting this petition. It is further agreed that such exchange shall remain in effect, unless a request is submitted by your petitioner for an earlier termination of such exchange.
5. THAT the exchange of water will be accomplished by releasing storage water from the Sulphur Creek Reservoir, original Permit No. 5695 Res., first Enlargement Permit No. 6481 Res., second Enlargement Permit No. 6562 Res., and third Enlargement Permit No. 9222 Res. at a maximum volume not to exceed the requested exchange amount of water each irrigation season at the outlet of said reservoir with a record headgate location of S 80°36' W, 1973 feet from the Northeast corner of Section 33, Township 14 North, Range 119 West; said storage water will provide “make up” or “replacement” water to downstream prior rights on the Bear River at a point described as below the confluence of the Bear River and Sulphur Creek, for water to be diverted in an equal amount (less any conveyance loss) into the following pipeline:

The Enlarged Evanston Pipeline, diverting from Bear River, with a record headgate location of S 85°24' W, 5376.0 feet from the Northeast corner of Section 13, Township 13 North, Range 120 West, 6TH P.M., with a Latitude of 41°06'38.1" N, and Longitude of 110°54'39.9" W (NAD83).
6. THAT consents for this petition are not needed due to Wyoming Statue 41.03.106(d), “The state engineer shall not issue an exchange order if it appears that the proposed exchange would adversely affect other appropriators, or if the proposed exchange would, in the opinion of the state engineer, be too difficult to administer or would be adverse to the public interest.” This exchange has been operational in varying degrees for decades.
7. THAT there are intervening appropriations between the point of diversion listed in paragraph 5 and the point where the exchange water will be returned to the stream, and such will not be adversely affected because such intervening rights will first be met in priority before this exchange can operate.
8. THAT the Water Commissioner for this district will be notified when the exchange of water will operate and such exchange will be under the supervision and limits of the Water Commissioner at all times. That the responsibility for tracking storage orders and operating the reservoir release under § 41-3-304 is the City of Evanston’s, after concurrence with the Water Commissioner whose duty it is to administer the water rights involved.
9. THAT no other appropriations from the same source of supply involved in the exchange will be injured in any way, since the exchange will not occur without the non-injury conditions set in this petition and the exchange agreement being met.
10. WAIVER of the requirement to show lands on the accompanying map from a licensed engineer or land surveyor is hereby requested, because the lands potentially involved are already shown on records in the State Engineer’s Office and Board of Control, and the exchange is already operational.

CONCLUSIONS OF LAW

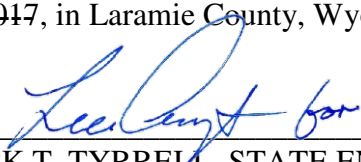
1. THAT the appropriations under The Evanston Pipeline, Territorial Permit, Proof 8600, Territorial Permit, Proof 8606, Territorial Permit, Proof 8608, Territorial Permit, Proof 8610, Permit No. 563, Permit No. 3643, Permit No. 3520 Enl., Permit No. 24325, And Permit No. 6911 Enl., and the Sulphur Creek Reservoir, Permit No. 5695 Res., First Enlargement Permit No. 6481 Res., Second Enlargement Permit No. 6562 Res., And Third Enlargement Permit No. 9222 Res. are all a matter of record with the State Engineer and the State Board of Control.
2. That the State Engineer has the authority to consider and grant an exchange under Wyoming Statutes 41-3-106 and Rules and Regulation promulgated therefrom.
3. That the petition for an exchange for diversion from Bear River for an equal amount released from Sulphur Creek Reservoir and its enlargements can be allowed without injury to other appropriators.
4. That the petition for an EXCHANGE of direct flow water from Bear River for an equal amount released from Sulphur Creek Reservoir and its enlargements should be granted.

ORDER

THEREFORE, IT IS HEREBY ORDERED THAT the petition for an exchange for diversion from Bear River for an equal amount released from Sulphur Creek Reservoir and its enlargements is hereby granted subject to the following conditions and limitations.

- (1) a. THAT the Water Commissioner of the District in which the exchange is to occur must be notified at least 24 hours prior to the initiation of said exchange. Said Water Commissioner shall supervise this exchange in accordance with stream administration policies as may be directed by the State Engineer and the State Board of Control, and shall assure that all appropriators are fully protected in accordance with their respective stream priorities;
b. THAT the exchange may only be made when it can be accomplished without injury to all other appropriators.
- (2) THAT this exchange shall remain in effect until dissolved by the petitioner and an ORDER of the State Engineer.
- (3) THAT this ORDER and the accompanying petition will be recorded in Miscellaneous Records of the State Engineer's Office in Book 17, pages 302 through 307 and appropriate reference to said Order and petition will be endorsed on the proper records in the State Board of Control and the State Engineer's Office; also this Order shall be recorded in the Office of the County Clerk of Uinta County, State of Wyoming.

DONE this 4th day of March, ²⁰¹⁹~~2017~~, in Laramie County, Wyoming.



PATRICK T. TYRRELL, STATE ENGINEER

STATE OF WYOMING)
) SS
STATE ENGINEER)

The foregoing instrument was duly recorded in Miscellaneous Records Book 17, Pages 302 through 307.

Documents filed electronically under Permit No. P5695.0R.

C. Lamblin

CLERK

Use of Reservoir Water

Most water stored in reservoirs in Wyoming is not tied to a specific delivery point. Therefore, the owner of the reservoir can sell or lease the water to any water user if the reservoir storage right includes the type of use involved.

Also, the amount of water that has been previously stored in priority can be used out of priority in a curtailment situation.

Total Reservoir Capacity = 345,360 Acre-Feet
Top of Conservation Pool – Elev. 6506

5,000 AF Allocated to Seedskaadee National Wildlife Refuge (NWR)

120,000 AF of Existing Wyoming's Contract Water. Currently 46,550 AF are under contract to four industrial water users.

139,000 AF of active capacity available for contract.
WY has the first right of refusal to purchase additional water in this space.

Active Usable Capacity = 264,000 AF

Inactive Capacity = 80,796 Acre-Feet

Bottom of Riprap Elev. 6460

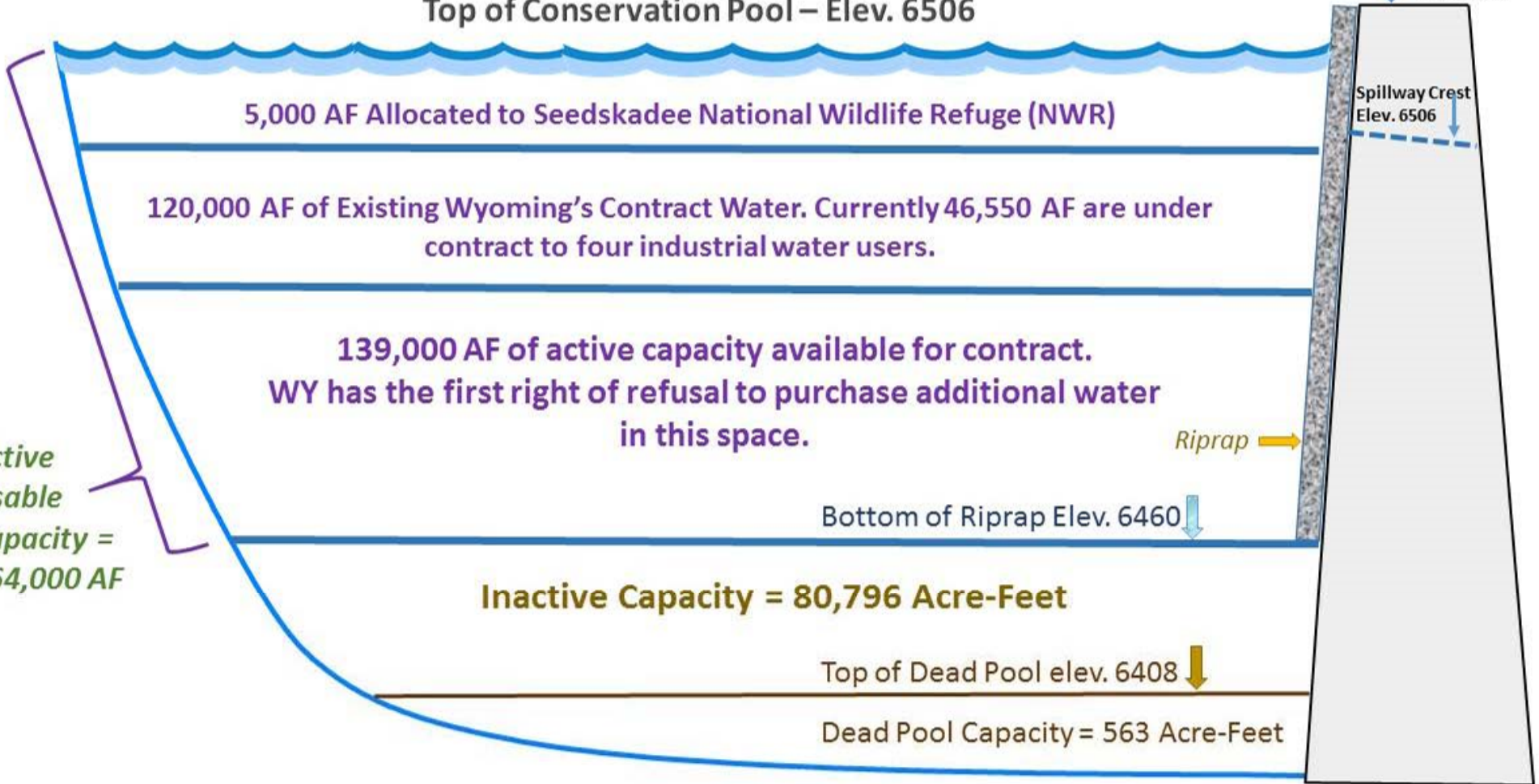
Top of Dead Pool elev. 6408

Dead Pool Capacity = 563 Acre-Feet

Dam Crest Elev. 6519.0

Spillway Crest Elev. 6506

Riprap



Major Reservoir Information (From WWDC)

