

## Andy Rossi

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**From:** tom@tomsharp.com  
**Sent:** Monday, March 15, 2021 8:22 PM  
**To:** Andy Rossi; Bob Weiss; kpbrennersteamboat  
**Subject:** Thoughts and concerns regarding ERC contract form and CWT proposed draft

Monday, March 15, 2021

Andy, Bob, Ken:

In examining the form Consent to Assignment, the following provision from the District Water Marketing Policy is not included, so the form should be revised to include it: “. . . such approval shall require the assigning Contractor and assignee to agree in writing to such changes in provisions of such Contract as will bring such Contract into full compliance with the then-current pricing and contracting policies duration, limitations, and principles in effect at the time of the assignment.” Maybe a paragraph 4 of the form Consent to Assignment?

In examining the Water Trust’s proposed 10-year contract and Bob’s draft ERC short-term form contract to be attached to the Marketing policy, I note the following problems:

1. Section 6.1.1 and 6.1.5.2, CWT proposal. Change “General Contract Pool” to Raise Pool. We don’t have a “General Contract Pool”. The supply should come from the Raise Pool, not the General Supply Pool.
2. Section 6.1.3, CWT proposal. Payment should be made for Volume 1 by August 1.
3. Sections 6.1.1 and 6.1.6.1 and 6.2 and 6.2.1, CWT proposal. Is April 1 date too early? Wouldn’t June 1 be better? We aren’t going to know enough by our March board meeting, and the next meeting is in May. Our historic practice was to measure whether we had enough by July 15. Given climate change study that runoff will occur a month earlier in NW Colo, shouldn’t June 1 work? For discretionary decisions by the Board for Volume 2 and Volume 3, don’t we want to have that made at the May board meeting?
4. Section 6.2.2, CWT proposal. The phrase–”in the event Upper Yampa does not have other stored water then-available to meet that third-party’s demand” should be struck. The District will always have other stored water under the preferred remainder pool and emergency remainder pool, so if you leave that phrase in 6.2.2, the legal effect is that the Volume 2 water will always be committed and set aside for Water Trust even though they don’t pay for it unless taken.
5. Section 6.2.1 of the CWT proposal must have a sentence added which provides a deadline and amount which Water Trust has to give back to District re how much of Volume 2 they want to “commit” to so that District doesn’t lease it that year to some other deserving agency [Note: Craig is getting \$\$ for a water park and will undoubtedly seek water rights/storage releases for a RICD]. Maybe CWT has to commit to how much “set aside” they want by June 15? If so the last sentence of 6.2.2 would need to reflect that their take and pay releases don’t exceed the amount they committed to. The way 6.2.2 now reads, the District will be uncertain whether it can or cannot release stream flow to some other agency out of Volume 2. Suppose the District gets a request from another agency and it looks like it will honor it, but then the Water Trust comes in at the last minute under the last sentence of 6.2.2 and says “wait,

we want to buy that amount and call for release of that water.” Some of that procedural wording should also be put into Section 6.2.3.

6. Section 7.1, CWT proposal. Are (a) and (b) duplicative?
7. Since ERC water is likely to be the largest contracted amount of the District out of Stagecoach, and since the release rate is to be specified by Water Trust under Section 7.1, please add the following as a new Section 7.4 in the CWT proposal: “The Parties acknowledge that the turbine capacity to release stored water through the outlet works of Stagecoach Reservoir is 105 cfs, and that the District may diminish the instantaneous rate of release of the contracted water under this contract after (and notwithstanding) a request from CWT under this Section, such diminishment to apply fully to contracted water under this contract before any diminishment would be applied to other non-ERC contractees, so that the maximum safe release rate of stored water and required bypasses through the outlet works is not exceeded.” Our Municipal and Industrial and Ag contract forms have language about this maximum 105 cfs problem, but in those forms, the diminishment is made pro-rata among other contractees. Because ERC water may have the highest requested volume, highest requested release rate, paying the lowest price, I urge that required administrative diminishment of release rate apply fully to the ERC water first, before any curtailment of required bypass flows or any other non-ERC contractee’s water request.

The above change should incidentally also result in revision to Section 4 of the FORM ERC short-term contract to be attached to the Marketing policy.

8. Section 9 of CWT proposal needs work. First, the contract must specify the original contracted stream reach in which the water remains in the stream flow—like a RICD or CWCB instream appropriation, the location must include an upper and lower terminus. Our marketing policy in Section 4.g.iii refers to the “contracted location(s).” Second, per our marketing policy, upstream from that lower terminus, the CWT may not use or contract sub-use of the water for anything other than retention in the Yampa River, i.e., there is no out-of-banks or consumptive use of the water above the lower terminus. Otherwise, it is diminished as stream flow enhancement before going through the “contracted location(s)” and becomes competitive with our Marketing of other storage. Third, the released volume may be subcontracted by CWT “to other water users approved by the District (a “Reuse Contractor”) for subsequent use downstream from the original contracted location(s)(whether within or outside of the District boundary) so long as such Reuse Contractor or its affiliates does not use the subcontracted reuse water to replace water lawfully available to such Reuse Contractor or its affiliates from direct flow water rights or other storage supplies (including storage supplies from a District project).” Language in Section 9 inconsistent with that must be revised. Noteworthy is that there is no contract language “preapproved” subsequent users: The District Board must pre-approve the Reuse Contractor in the year that CWT makes Volume 2 or Volume 3 written request. Since this proposed contract is multiple years with likely multiple changed circumstances, I would read the policy to require the Board to pre-approve the Reuse Contractor perhaps every time the CWT gives notice of an election to make a commitment for Volume 2 or Volume 3 water, and perhaps annually for Volume 1 water. This whole section needs careful thought. The City of Craig is applying for funding to build a water park on the Yampa in Craig, which will then lead to a RICD application for Craig. That may be another entity the District will want to deal with for stream flow storage releases. You would also need to revise Section 7.1 where the contents of the notification from CWT is described, in order to add a requirement that the notification include a description of the ReUse Contractor and where and how the water will be reused.

The language agreed to here should incidentally also result in revision to Section 4 and the last sentence of Section 6 of the FORM ERC short-term contract to be attached to the Marketing policy.

9. Section 13.2 of CWT proposal. The District can’t be prohibited from seeking money judgment at law for unpaid sums + interest. If limited to equitable petition, equity will not grant relief to a claim for monetary judgment. Without a change, this Section would render it impossible to enforce collection of unpaid billing. Section 12(b) of the FORM for short-term ERC water to be attached to the marketing policy should also make this change. Please note wording in Section 10.2 of the proposed industrial and proposed municipal contract forms, which is the wording we want to use in all contracts. That wording allows the District to sue to collect unpaid sums.
10. Section 14 of the CWT proposal should be struck. Local governments are not empowered to indemnify under TABOR, and there is no mutuality since the CWT has minimal resources and the District has substantial assets.
11. Section 16.8 of the CWT proposal should be struck.
12. Either Section 7 or Section 9 of the CWT proposal should specifically say that all transit losses assessed by the Division Engineer between the point of release from Stagecoach Reservoir to the lower terminus point of the “location(s) of use” will be borne by the CWT.
13. Should Section 12(a) of Bob’s draft FORM for short-term ERC water also be inserted into the CWT contract?
14. Looking at our old existing contracts, should we insert the following two paragraphs in our contract forms attached to the Marketing policy, and into the CWT contract?

- The water allocated to the Contractee under this Agreement shall never be first diverted or first used outside of the geographical limits of the District.
- In addition to all the other terms, conditions and covenants contained herein, it is specifically understood and agreed by and between the parties hereto that the rights of the Association hereunder are subject to the following terms, conditions and limitations, to all intents and purposes as though set forth verbatim herein and made a part hereof by reference, to-wit:

The Water Conservancy Act of Colorado,  
The terms and conditions of any and all water right decrees for  
or associated with the operation of Stagecoach Reservoir.

Tom

*Thomas R. Sharp*

Sharp, Sherman & Engle, LLC

Attorneys at Law

401 Lincoln Avenue

PO Box 774968

Steamboat Springs, CO 80477

Office: (970) 879-7600 ex 1

Fax: (970) 879-8162

Cell: (970) 846-8179

[tom@tomsharp.com](mailto:tom@tomsharp.com)

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