

# COLORADO'S WATER RIGHTS ABANDONMENT LIST

"It's not dark yet, but it's getting there." – Bob Dylan

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## 1. Introduction

- a. Fundamental principles of western water law:
  - i. First in time, first in right - Prior appropriation doctrine.
  - ii. Use it or lose it - Abandonment.

## 2. Use It or Lose It.

- a. C.R.S. § 37-92-103(2): "Abandonment of a water right' means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder."
- b. Crucial phrase in the definition of abandonment: "the *intent* of the owner . . . to discontinue *permanently* the use of . . . the water."
- c. Actions which are evidence of the intent to abandon a water right:
  - i. Nonuse.
    - (1) Nonuse alone will not establish intent to abandon, but "continued and unexplained nonuse for an unreasonable time can give rise to a rebuttable presumption of abandonment."
    - (2) For purposes of the state abandonment lists, ten years of nonuse of a water right creates a presumption of the intent to abandon.
  - ii. Other actions which are evidence of the intent to abandon:
    - (1) Failure to repair or maintain diversion structures.
    - (2) Change of use of irrigated land served by the water right.
    - (3) Vacation of the land on which the water right had been used.
    - (4) Failure to pay taxes on the land served by the water right.

- (5) Failure to defend legal challenges to the water rights.
  - (6) Sporadic use over a long period of a substantially smaller quantity of water than that originally decreed.
- d. An unreasonable period of nonuse creates a “rebuttable presumption” of the intent to abandon. Once the presumption is applied, the water right owner must introduce evidence to excuse nonuse in order to stave off abandonment.
- e. Acceptable justifications for an unreasonable period of nonuse are limited.
  - i. There are specific statutory exceptions which may be particularly relevant to water rights on land encumbered by a conservation easement:
    - (1) “Any period of nonuse of any portion of a water right shall be tolled, and no intent to discontinue permanent use shall be found for purposes of determining an abandonment of a water right for the duration that:
      - (a) “The land on which the water right has been historically applied is enrolled under a federal land conservation program; or
      - (b) “The nonuse of a water right by its owner is a result of participation in:
        - (i) “A water conservation program approved by a state agency, a water conservation district, or a water conservancy district;
        - (ii) “A water conservation program established through formal written action or ordinance by a municipality or its municipal water supplier;
        - (iii) “An approved land fallowing program as provided by law in order to conserve water;
        - (iv) “A water banking program as provided by law;
        - (v) “A loan of water to the Colorado water conservation board for instream flow use under section 37-83-105(2); or
        - (vi) “Any contract or agreement with the Colorado water conservation board that allows the board to use all or a part of a water right to preserve or improve the

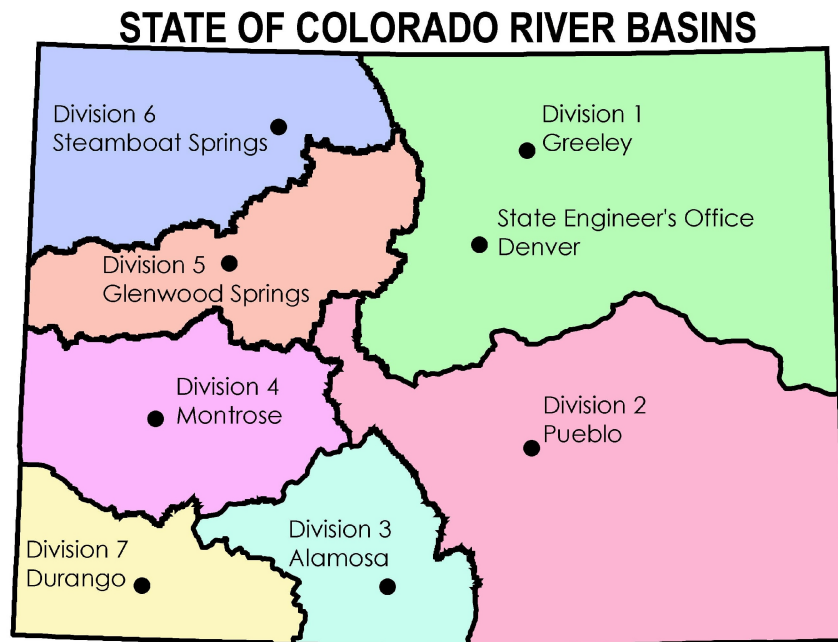
natural environment to a reasonable degree under section 37-92-102(3).”

- (c) There may be some overlap between these exceptions and the “clearly delineated Federal, State, or local governmental conservation policy” standard for open space easements under IRC 170(h).
- ii. Other justifications for nonuse:
  - (1) Uavailability of water.
  - (2) Use of water right by another party can rebut the presumption of abandonment.
  - (3) No need for water.
  - (4) Economic obstacles can be an excuse for nonuse of a water right.
- f. Other actions which can indicate that there is no intent to abandon a water right.
  - i. Participation in court proceedings to protect a water right is also indicative that the owner intends to continue the water right.
  - ii. Diligent attempts to market and sell a water right can demonstrate intent not to abandon the right.
- g. “Owner” of the water right.
  - i. The relevant intent is of the owner of the water right during the period of nonuse. If the period of nonuse occurred under a prior owner or owners, their intent is the basis for determinations as to abandonment.
  - ii. When a water right is encumbered by a conservation easement, the land trust has ownership interest in encumbered water rights, and may be able to establish an intent regarding the water rights separate from the underlying landowner.
- h. Effects of abandonment.
  - i. Statute: abandonment is the “termination of a water right in whole or in part.”
  - ii. Upon a finding of abandonment, the water right, with its specific amount and priority, no longer exists. The water is abandoned to the stream, meaning it is available for new appropriation, and all junior priorities move up in line.

- iii. Subsequent efforts by current owners to put water rights to beneficial use cannot revive water rights already abandoned by previous owners.

**3. Colorado's 2010 Abandonment Lists.**

- a. Seven water divisions each with its own Division Engineer and Water Court:
  - i. Division 1: South Platte River basin [Greeley].
  - ii. Division 2: Arkansas River basin [Pueblo].
  - iii. Division 3: Rio Grande River basin [Alamosa].
  - iv. Division 4: Gunnison River basin [Montrose].
  - v. Division 5: Colorado River basin [Glenwood Springs].
  - vi. Division 6: Yampa/White River basin [Steamboat Springs].
  - vii. Division 7: San Juan/Dolores River basin [Durango].



- b. Every ten years the Division Engineer in each water division is required to prepare and publish a list of water rights determined to be abandoned in whole or in part.
- c. C.R.S. § 37-92-402(11): “failure for a period of ten years or more to apply to a beneficial use the water available under a water right when needed by the person entitled to use [the] same shall create a rebuttable presumption of abandonment of a water right with respect to the amount of such available water which has not been so used; except that such presumption may be waived by the division engineer or the state engineer if special circumstances negate an intent to abandon.”

- d. Most recent lists were published by Division of Water Resources in July 2010.  
<http://water.state.co.us/pubs/abandonment.asp>
- e. Any objections to an abandonment list must be filed with the appropriate Division Engineer by July 1, 2011, accompanied by a \$10 filing fee, except for requests to correct clerical errors in the list.
- f. Each Division Engineer will then revise the abandonment list and file it with the respective Water Court by December 31, 2011.
- g. Protests to the revised abandonment lists must be filed with Water Court by June 30, 2012.
  - i. Protests may be filed not only over the inclusion of a water right on the abandonment list, but also over the omission or removal of a right from the list.
  - ii. A form for Protests is available on the Water Courts' website:  
[http://www.courts.state.co.us/Forms/Forms\\_List.cfm?Form\\_Type\\_ID=10](http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=10)
  - iii. The filing fee for protests to the Water Court is \$45.
- h. If no protests are filed, the abandonment list is entered as a decree of the Court on July 1, 2012.
- i. If protests are received, each Water Court will hold hearings on the protests in September and October 2012.
  - i. Appeals of the Water Courts' determinations on the abandonment lists are made directly to the Colorado Supreme Court.
  - ii. Determinations by the Water Court as to whether there was intent to abandon a water right are fact specific, and are rarely overturned on appeal.
  - iii. There is no appeal of any portions of the list to which no protests were filed.

**4. Objecting to inclusion on the abandonment list.**

- a. Intent is the critical issue.
- b. Demonstrate use of water right:
  - i. Division Engineer diversion records.  
<http://cdss.state.co.us/DNN/ViewData/StructuresDiversions/tabid/75/Default.aspx>
  - ii. Landowner records/testimonials

- iii. Evidence of irrigation of land.
- iv. Baseline Report.
- c. Repair and maintenance of diversion structures.
- d. Leasing of water right to other users.
- e. Actual diligent attempts to sell water rights.
- f. Filing court documents to protect, change, or preserve the water right.
- g. Donation of a conservation easement may be evidence of the intent of both the landowner and the land trust not to abandon a water right, particularly where specific water rights are identified and encumbered by the easement.
  - i. A conservation easement explicitly intended to preserve agricultural use of the land may also be evidence that there was not any intent to abandon the water rights serving the property.

**5. I'm not on the list. I'm safe until 2021, right?**

- a. Claims of abandonment can be raised outside of the statutory abandonment lists.
- b. Easement language.
  - i. Many easements now incorporate water rights provisions specifically geared at preventing the abandonment of the encumbered water rights:
    - (1) A commitment by the Grantor to not allow the water rights to be abandoned.
    - (2) A right of the Grantor to cure any threat of abandonment, such as inclusion on the abandonment lists.
    - (3) A right of the land trust to seek removal of the water rights from the abandonment list.
    - (4) The land trust may also be able to enter on the property and continue the historical use of the water rights, or to change the water rights for another conservation use, or even convey the water rights to the Colorado Water Conservation Board for instream flow uses.
- c. Monitoring is crucial in order to be able to use these easement provisions to prevent the abandonment of water rights subject to the easement.

- i. Review diversion records for water rights.
- ii. On-site inspections should also be part of monitoring the use of the water rights:
  - (1) Is the property actually being irrigated?
  - (2) Are the diversion structures and ditches being maintained?
- d. Baseline reports may also be a tool in preventing the abandonment of encumbered water rights.

**6. Conclusion and Questions.**