

ABANDONMENT OF WATER RIGHTS IN COLORADO

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In the summer of 2000, many water rights owners received a letter from one of the Division Engineers on Colorado's seven water divisions, notifying them that one or more of their water rights had been placed on the abandonment list. The purpose of this article is to explain how the abandonment process works and how a water right owner can prevent the abandonment of his or her water right.

I. What is a Water Right?

In Colorado, a water right is usufructuary in nature, meaning that it allows the use of water but it does not provide ownership of water. The two general types of water rights are direct flow and storage. A direct flow water right is generally measured in terms of a flow rate, usually cubic feet per second, not in terms of total volume. A storage water right, on the other hand, is measured in terms of total volume, usually acre-feet. An acre-foot is the amount of water required to cover an acre of ground with one foot of water (43,560 cubic feet or 325,851 gallons).

A water right is created through an appropriation. The essential elements of an appropriation are the diversion of water and its application to a beneficial use. Diversion is accomplished by either removing water from its natural course or location or by controlling water that remains in its natural course. Application to beneficial use may be satisfied through irrigation, mining and industrial application, stock watering, domestic and municipal use, and other non-wasteful economic activities.

Colorado follows the doctrine of prior appropriation. The essence of this doctrine is that, while no one may own the water in a stream, all persons, corporations, and municipalities have the right to use the water for beneficial purposes. Water is allocated based on the fundamental maxim "first in time, first in right." The first person to use water, known as a "senior appropriator," acquires the right or "priority" to its future use as against later users, known as "junior appropriators." Water rights may be evidenced by a court decree and such a decree is necessary in order to obtain protection of one's priority on a stream. Because water rights are based on the concept of diversion and beneficial use, if a person fails to use his or her water right, that right may be deemed abandoned.

II. The Abandonment Process

Colorado statutes define “abandonment of a water right” as “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 party of the water available thereunder.” Colo. Rev. Stat. § 37-92-103(2). By statute, the Division Engineer of each of the seven water divisions is required to prepare an abandonment list, every ten years, that identifies all of the absolute water rights which he has determined have been partially or completely abandoned. Colo. Rev. Stat. § 37-92-401. Partial abandonment indicates that only a portion of the decreed amount of water has been abandoned. The Division Engineer is obligated publish the abandonment list and to mail a copy of it to each owner of a water right that has been listed as partially or completely abandoned. *Id.* The most recent decennial abandonment list was published on July 1, 2000.

Any person who wanted to protest the placement of a water right on the 2000 abandonment list had until July 1, 2001 to do so. *Id.* Protests are submitted in the form of a written statement of objection that is filed with the Division Engineer. *Id.* As explained in more detail below, these statements of objection provide evidence to demonstrate that the water right has not been abandoned.

After receiving these protests, the Division Engineer made changes to the abandonment list as he deemed proper, after evaluating matters raised by the objectors and consulting with the State Engineer. The revised abandonment list was signed by the Division and State Engineers and filed with the water clerk on December 31, 2001. A copy of the list is available for inspection in the office of each Division Engineer and water commissioner and anyone may request a copy for a fee of \$10. A notice of the availability of the revision abandonment list was included in the resume for the December filings. The resume is a summary of all applications filed in a particular water court during the month.

Anyone who wishes to protest the inclusion of a water right in the revised abandonment list may do so by filing a written protest with the water clerk and with the Division Engineer, no later than June 30, 2002. The protest must set forth the legal and factual basis therefor and be accompanied by a filing fee of \$20.

Commencing on the September or October term-day, 2002, and continuing for as long as necessary, the Water Judge of each division will conduct hearings on the decennial abandonment list and any protests filed with the Division Engineer. The protestant must appear in person or by counsel to support the protest. The Division Engineer will defend the abandonment list, and may be represented by the attorney general, if the Division Engineer so requests. Anyone who may be affected by the subject matter of the protest or any ruling thereon must be permitted to participate in the proceedings, either in person or by counsel, upon a timely entry of appearance. Upon

the termination of the hearings, the Water Judge will enter a judgment and decree that will either incorporate the Division Engineer's abandonment list as filed, or incorporate such list with any modifications and conditions as the Water Judge deems fit based on the hearings. If no protests are filed, promptly after July 1, 2002, the Water Judge will enter a judgment and decree incorporating and confirming the abandonment list as filed without modification.

A copy of the judgment and decree entered by the Water Judge will be filed with the state and Division Engineers and the water clerk. The state and Division Engineers will then enter into their records any water rights that have been adjudged to have been completely or partially abandoned. Appellate review is available for any portion of the judgment and decree for which a protest had been filed. If a water right is ultimately deemed abandoned, it is terminated and the water originally decreed belongs to the stream and is subject to appropriation by others. *See* Colo. Rev. Stat. § 37-92-103(2); *Southeastern Colorado Water Conservancy Dist. v. Twin Lakes Assoc., Inc.*, 770 P.2d 1231, 1238 (Colo. 1989).

III. Elements of Abandonment

The Colorado courts have consistently held that the two elements necessary to prove abandonment are nonuse coupled with an intent to abandon. *See Consolidated Home Supply Ditch and Reservoir Co. v. Town of Berthoud*, 896 P.2d 260, 266 (solo. 1995). The standard for proving abandonment is preponderance of the evidence. *See id.* Abandonment is a question of fact that depends on the particular circumstances of each case. *Haystack Ranch, LLC v. Fazzino*, 997 P.2d 548, 552 (solo. 2000).

A. Nonuse

While nonuse alone cannot establish an intent to abandon, courts have held that continued and unexplained nonuse over an unreasonable period of time will raise a rebuttable presumption of intent to abandon. *See id.* at 551. The determination of what constitutes an unreasonable period of nonuse will vary with the facts of each case. *See id.* However, for purposes of the abandonment list, the legislature has determined that ten years of nonuse will create the rebuttable presumption. Colo. Rev. Stat. § 37-92-402(11).

A finding of nonuse will often be based on the diversion records kept by the water commissioner. Sporadic use of a substantially smaller quantity of water than originally decreed over a long period of time may constitute nonuse. *See Twin Lakes*, 770 P.2d at 1238. Nonuse may also be manifested by conditions inconsistent with active use of a water right. *See id.* at 1237. These conditions include failure to repair and maintain the diversion structures, failure to make beneficial use of the water, vacation of the land on which the water right has been used, failure to defend legal challenges to the water right,

and failure to pay taxes on the land. *See id*; *see also Haystack Ranch*, 997 P.2d at 553 (noting the absence of diversion records, the state of disrepair of the ditches in question, and the fact that they could not be feasibly reconstructed as evidence of nonuse).

Nonuse of a water right is fairly straightforward and difficult to refute. However, a water right owner should challenge the water commissioner's diversion records if the owner feels they inaccurately reflect the amount or frequency of use of the water right. Any additional records kept by the owner or photographs of actual use may help strengthen a case against abandonment. While challenging nonuse is certainly an option, a majority of the cases involving abandonment involve the intent element.

B. Intent to Abandon

Intent is the critical element of abandonment. *See Haystack Ranch*, 997 P.2d at 552. The requisite intent to abandon need not be proved through direct evidence but may be inferred through the circumstances of the case. *Id.* Once an unreasonable period of nonuse creates a presumption of abandonment, the burden shifts to the water right owner to introduce evidence of no intent to abandon. *Id.*

Evidence sufficient to rebut the presumption of abandonment must consist of more than subjective, self-serving declarations of the owner regarding intent not to abandon or to continue use of the right at some future time. *See Consolidated Home Supply*, 896 P.2d at 266-67. While some courts inquire into excuse for a long period of nonuse, such excuse is not independently significant but is relevant to the issue of the owner's intent. *City and County of Denver v. Snake River Water Dist.*, 788 P.2d 772, 776 (solo. 1990).

Diligent efforts to sell a water right are considered evidence of intent not to abandon. *See Snake River Water Dist.*, 788 P.2d at 778; *People v. City of Thornton*, 775 P.2d 11, 20 (solo. 1989). However, in the absence of other competent evidence, an owner's expression of his desire to place a water right on the market is insufficient. *See City of Thornton*, 775 P.2d at 19. At least one court has considered the fact that the owner mortgaged the water right in its analysis of intent. *See Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300, 302 (solo. 1982). Attempts to change the point of diversion for the water right or to use the right in a development plan are also relevant to show intent not to abandon. *See id.* at 20; *Consolidated Home Supply*, 896 P.2d at 267.

Because the condition of the diversion structures is important for a finding of abandonment, courts look to the ability of the structures to be made operational on short notice. *See City of Thornton*, 775 P.2d at 22; *Beaver Park Water*, 649 P.2d at 302. A water right owner should also indicate if he has recently repaired, upgraded, or made any investments in any diversion structure connected to the water right.

This discussion of intent is not intended to represent the only grounds the Division Engineer or water court will consider as evidence of intent not to abandon. Because the issue of abandonment is very case specific, it is impossible to conclude what will or will not be persuasive to demonstrate the water right has not been abandoned. Therefore, any information a water right owner can provide that may justify a period of nonuse can and should be submitted to demonstrate that the water right has not been abandoned.