

Water Rights Relinquishment

Survey of Forfeiture and Abandonment Laws in California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming

Peter Heineccius

Washington State Senate Committee Services

September 2008

Loss of Water Rights through Non-Use

Every western state that follows the appropriation doctrine also recognizes that beneficial use is the “basis, measure, and limit” of the right to use water. Appropriators who fail to put a water right to beneficial use risk losing that right, either intentionally or unintentionally.

Traditionally, an appropriator could only lose a water right by intentionally abandoning it. While intentional abandonment still results in the loss of a water right, all western states have also developed laws that allow a water right to be lost without proving an actual intent to abandon. Differences in how states approach unintentional forfeiture generally reflect the attitude of the state towards the necessity of at least presuming an intention to abandon.

Generally, a water right is forfeited after failing to use a water right for a statutory period of years, unless the appropriator can raise a suitable defense. In some states the forfeiture period creates a rebuttable presumption of intent to abandon, while in others the forfeiture works separately from the doctrine of abandonment. In the application of the law, this distinction is mostly academic. More important are the defenses that may overcome a finding of forfeiture, which vary widely among the states. Other major differences in this area include whether the forfeiture period may be extended and whether a forfeited right may be restored by the resumption of use.

Washington

Washington has an exclusive list of defenses to forfeiture. While other states have established a list of defenses, those states have not made that list of defenses exclusive. There are a few states that give some discretion to the regulating entity to determine defenses to forfeiture. Similarly, several states allow the regulating entity the authority to grant extensions of the forfeiture period. Additionally, some states allow the restoration of a forfeited water right by the resumption of use, whereas Washington does not allow for this.

CALIFORNIA

Summary of Law

California still recognizes riparian rights, which are not subject to forfeiture (or “reversion”). Additionally, California maintains separate regulations for surface water and groundwater. Groundwater is further distinguished between “percolating groundwater,” which is governed by riparian doctrines and not subject to forfeiture, and “subterranean streams” and “underflows of surface waters,” which are treated like appropriated surface water and therefore subject to forfeiture from non-use.

Cities and towns in California often have “pueblo rights” to provide water for municipal purposes that supersede either riparian or appropriative rights. Pueblo rights increase with population growth and are not subject to the forfeiture statute, but are limited to necessary municipal purposes.

Forfeiture Period

Five years (surface and non-percolating ground water only). “[Failure] to use beneficially all or any part of the water [right]... for a period of five years ... may revert [the unused water] to the public.” Cal Wat Code § 1241. An extension of up to 10 years is available for hardship. § 1241.6 (NB: Some sections of the code have not been updated and may still reference the previous “three-year forfeiture period.”)

Defenses

Intent to abandon is not necessary for forfeiture in California, so evidence of intent to keep the water right is not a defense to forfeiture. *See Lindblom v. Round Valley Water Co.*, 173 P. 994 (1918).

Municipalities with pueblo rights are not subject to statutory forfeiture. *See Los Angeles v. Glendale*, 142 P.2d 289 (1943).

California designates certain uses as “beneficial,” which are immune from forfeiture:

- Storing water underground, if eventually used beneficially (§ 1242)
- Using recycled, desalinated, or polluted water instead of surface water (§ 1010)
- Using less due to conservation efforts (§ 1011)
- Using groundwater instead of surface water (§ 1011.5)
- Using less of the Colorado River (§ 1012)

Restoration

A change to the Water Code in 1980 granted more discretion to the California Water Resources Control Board in forfeiture proceedings. The Board may restore a forfeited water right only after a hearing.

Water Rights Transfers

The established policy of California is to encourage and facilitate water rights transfers. The Board is required to publish a guide to water right transfers, which is available at <http://www.waterrights.ca.gov/watertransferguide.pdf>.

Transfers or changes in a water right may not result in substantial injury to other users or unreasonably affect instream uses, including fish and wildlife. Transfers for a period of more than one year must be approved by the Board.

Conservation

Conservation does not lead to forfeiture in California, due to § 1011. For conservation efforts to qualify as beneficial use, the conservator must file periodic reports describing the extent and amount of the conservation. The code specifically includes temporary land fallowing and crop rotation as examples of conservation.

California also generally includes the use of alternative water supplies as a beneficial use. This includes using recycled (reclaimed), polluted, desalinated, and stored water, as well as the use of groundwater, with some limitations (see § 1011.5). California apparently does not have an official policy on rain collection, but it appears as if it would be acceptable as an alternative supply source.

By statute, all such conserved water rights may be transferred to others, as long as the transfer would not cause injury to other users or affect instream uses.

Notes on Application of Law

Laws are routinely enforced as cases of forfeiture and abandonment come to the attention of the Water Resources Control Board.

Relevant Statutes, Cases

Water Code Div. 2, Pt. 2, Ch. 1, Art. 4 (forfeiture generally)

Water Code Div. 2, Pt. 1, Ch. 1 (exceptions to forfeiture)

Mt. Shasta Power Corp. v. McArthur, 292 P. 549 (Cal. App. 1930) (explanation of law)

Contact Information

State Water Resources Control Board
Division of Water Rights
1001 I Street
Sacramento, CA 95814
(916) 341-5300
<http://www.waterrights.ca.gov/>

COLORADO

Summary of Law

Colorado, like Montana, does not recognize unintentional forfeiture as a method of losing water rights to non-use. By statute, however, the intent to abandon is presumed after a period of ten years. Since the evidence required to rebut such a presumption is similar to that required to defend against forfeiture in other states, the ten-year period functions very much like a forfeiture period in all but name. Nevertheless, the presumption of intent has traditionally been fairly easy to overcome in Colorado, although that trend may be changing as water resources grow scarcer.

Once every ten years, the Colorado Division Engineers publishes a list of rights determined to have been abandoned. Appropriators may protest their inclusion on the list to a specially created water court. The court will determine whether the intent to abandon may be presumed by either the statutory ten years or an “unreasonable period of time” provided by common law.

The Colorado Ground Water Commission regulates groundwater. Groundwater is normally considered to be a tributary of surface water, but may be designated as non-tributary after passing a rigorous test. Non-tributary groundwater is allocated between the owners of the land above the aquifer and is not subject to abandonment.

Forfeiture Period

Ten years. “[F]ailure for a period of ten years or more to apply to a beneficial use the water available... shall create a rebuttable presumption of abandonment of a water right.” C.R.S. 37-92-402(11).

Defenses

Absence of the intent to abandon is the primary defense. The courts are generally receptive to any evidence that may negate intent to abandon, including a diligent effort to sell a water right. “Statements of intent by the owner of water rights, standing alone, however, are insufficient to rebut the presumption of abandonment.” *People ex rel. Danielson v. Thornton*, 775 P.2d 11, 18-19 (Colo. 1989). “To rebut the presumption of abandonment arising from such long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse.” *In re CF&I Steel Corp.*, 515 P.2d 456, 458 (Colo. 1973).

The Division Engineer also has the discretion to waive the statutory presumption if circumstances negate an intent to abandon.

Restoration

Colorado does not allow restoration of an abandoned water right. To resume water use, a new water right must be appropriated.

Water Rights Transfers

A change in a water right will not be approved if it will injure another rights holder. The courts may look at whether a water right has been abandoned during proceedings for a change in a water right. C.R.S. 37-92-301(5).

Conservation

Colorado Water Conservation Board may hold water rights for instream flow purposes, but all other water rights require actual diversion.

Notes on Application of Law

State administrative action is only taken in conjunction with the decennial list published by the Division Engineers. Presumed abandonment may also arise in private civil litigation in the water courts, although this happens much less frequently than cases brought by the Division Engineers.

Relevant Statutes, Cases

C.R.S. 37-92-402(11) (presumption of intent to abandon)
Strickler v. Colorado Springs, 26 P. 313 (Colo. 1891) (water rights are saleable)
Beaver Park Water, Inc. v. Victor, 649 P.2d 300 (Colo. 1982) (intent is the very essence of abandonment)

Contact Information

Colorado Division of Water Resources
1313 Sherman St. Rm. 818
Denver, CO 80203
(303) 866-3581
<http://water.state.co.us/>

IDAHO

Summary of Law

Idaho maintains a view that “forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.” *Application of Boyer*, 248 P.2d 540, 544 (Idaho 1952). Idaho therefore allows appropriators to extend the forfeiture period as well as restore forfeited rights by resuming use. In addition, the Idaho Code lists eleven exceptions to the forfeiture rule, including circumstance over which the appropriator had no control.

Forfeiture Period

Five years. “All rights to the use of water ... shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated.” Idaho Code 42-222(2). This includes groundwater. Idaho Code 42-237.

A one-time extension of up to five years is allowed if the director of the Department of Water Resources is satisfied that good cause exists for the non-use and that the extension would not impair other rights. Idaho Code 42-222(3)-(4).

Defenses

The Idaho Code enumerates eleven separate defenses to forfeiture. These include:

- Land contracted in a federal cropland set-aside program
- Reasonably anticipated future needs of municipal providers
- Land application of waste for disposal purposes (e.g. dairy lagoon discharge)
- Compliance with an approved groundwater management plan
- Water leased or placed in an approved water bank
- Circumstances over which the appropriator has no control
- Irrigation districts or other distributive associations if due to nonuse by members
- Land excluded from an irrigation district if the district had no control over use
- Conservation practices, including reductions in consumption and conveyance
- Approved mitigation plans or other statutory conditions
- Rights used in mining, mineral processing, or milling

These statutory defenses are not exhaustive. Idaho common law also recognizes that no forfeiture results if an appropriator is prevented from using a water right by the wrongful acts of another. *Hodges v. Trail Creek Irrigation Co.*, 297 P.2d 524, 527 (Idaho 1956).

Restoration

Under the “resumption-of-use” doctrine, an appropriator may restore water rights left unused for more than five years by resuming beneficial use of the water. The appropriator must resume use before a third party makes a claim of right by taking one of three actions: instituting proceedings to declare a forfeiture, obtaining a water right that predates the resumption of use, or using the water pursuant to an existing right. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 70 P.3d 669, 680 (Idaho 2003).

Water Rights Transfers

Idaho considers water rights to be private property, and appropriators may sell their rights by filing a petition to the Department of Water Resources. The Department may approve a change to a water right if it is in the public interest, consistent with conservation policies, and does not injure other rights or enlarge the original water right. Idaho Code 42-222(1).

Conservation

Idaho protects conserved water from forfeiture. Conservation practices are defined as any process where diversion is reduced while the full beneficial use is maintained. See Idaho Code 42-223(9) and 42-250.

Notes on Application of Law

The Department of Water Resources only takes action to enforce abandonment or forfeiture of water rights during water rights transfers or general stream adjudications.

Relevant Statutes, Cases

Idaho Code 42-222 (changes and forfeiture generally)
Idaho Code 42-223 (exceptions to forfeiture)

Contact Information

Department of Water Resources
322 E. Front St
PO Box 83720
Boise, Idaho 83720
(208) 287-4800
<http://www.idwr.idaho.gov/>

MONTANA

Summary of Law

Montana, like Colorado, does not recognize unintentional forfeiture as a method of losing water rights to non-use. By statute, however, the intent to abandon is presumed after a period of ten years. Since the evidence required to rebut such a presumption is similar to that required to defend against forfeiture in other states, the ten-year period functions very much like a forfeiture period in all but name. Nevertheless, the presumption of intent has traditionally been fairly easy to overcome in Montana, although that trend may be changing as water resources grow scarcer.

Water rights in Montana are divided between pre-1973 and post-1973 rights. Pre-1973 rights are only subject to common law abandonment, not to the ten-year forfeiture period. Under common law, 40 years of non-use was found to be unreasonable enough to warrant a rebuttable presumption of the intent to abandon.

Failure to file a claim for a pre-1973 water right by 1982 was deemed abandonment by statute. After these claims are adjudicated in a water court they are subject to the post-1973 statute and the ten year forfeiture period.

Forfeiture Period

Ten years. “If an appropriator ceases to use all or part of an appropriation right ... for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used.” M.C.A. 85-2-404(2).

Defenses

Absence of the intent to abandon is the primary defense. The courts are generally receptive to any evidence that may negate intent to abandon, including resumption of use before the ten year period expires. Overly broad claims unsupported by more specific evidence, however, are not sufficient to rebut the presumption of abandonment. *In re Musselshell River Drainage Area*, 840 P.2d 577 (Mont. 1992) (generally hard times during the depression and World War II). “To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope.” *79 Ranch v. Pitsch*, 666 P.2d 215, 218 (Mont. 1983).

By statute, a lease to the Department for instream flow preservation cannot be used as evidence of intent to abandon. M.C.A. 85-2-404(4).

Restoration

Montana does not allow restoration of an abandoned water right. To resume water use, a new water right must be appropriated.

Water Rights Transfers

Changes to the elements of a water right require the approval of the Department of Natural Resources and Conservation, but transfers of ownership do not. Before the Department approves a change in a water right, the appropriator must demonstrate that the change will not impair other rights holders, that the appropriation works are adequate, and that the appropriator has a possessory interest in the place of use.

Conservation

Appropriators may lease their rights to the Department for instream flow protection, maintenance, and enhancement. A conservation lease may not be used as evidence of intent to abandon the water right. Before a lease is approved, it must satisfy the same criteria as a change in a water right.

Notes on Application of Law

All cases of abandonment have been initiated by the action of private parties, not the Department of Natural Resources and Conservation.

Relevant Statutes, Cases

M.C.A. 85-2-404 (abandonment generally)
M.C.A. 85-2-405 (abandonment procedures)
79 Ranch v. Pitsch, 666 P.2d 215, 218 (Mont. 1983) (evidence sufficient to rebut presumption of abandonment)

Contact Information

Department of Natural Resources and Conservation
Water Resources Division
1424 Ninth Avenue
PO Box 201601
Helena, MT 59620
(406) 444-6601
<http://dnrc.mt.gov/wrd/>

NEVADA

Summary of Law

Nevada has very different rules regarding the forfeiture of surface water and groundwater. In 1999 the Nevada Legislature removed the forfeiture period from the surface water statutes, and explicitly provided that “rights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose.”

Rights to groundwater, however, are still subject to forfeiture after five years of non-use. For water rights left unused for more than four but less than five years, the State Engineer is required to give notice that the appropriator has one year to either use the water or apply for an extension of time.

All water rights in Nevada are subject to abandonment, but, unlike other states, Nevada does not create a presumption of the intent to abandon after a statutory period of time. Instead, non-use is only one of many factors that courts must analyze to determine whether the appropriator truly intended to abandon a water right. Additionally, if an appropriator performs or pays for any maintenance related to the delivery of surface water in the ten years preceding a claim of abandonment, the Nevada statutes create a presumption that the water right was **not** abandoned. N.R.S. 533.060(4).

Forfeiture Period

Five years (groundwater only). “[F]ailure for 5 successive years after April 15, 1967, on the part of the holder of any right ... to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture ... to the extent of the nonuse.” N.R.S. 534.090(1). The State Engineer may also grant multiple one-year extensions if the appropriator can show a good cause and requests it before the end of the forfeiture period.

Defenses

Forfeiture of groundwater is automatic after five years of non-use. However, the state must prove actual non-use by the high standard of “clear and convincing evidence,” and courts have declared that the law “disfavors forfeiture.” *Town of Eureka v. Office of the State Engr. of Nevada*, 826 P.2d 948, 952 (Nev. 1992).

Appropriators may file for one-year extensions of the forfeiture period, however, on showing of good cause. What qualifies as “good cause” is apparently left to the discretion of the State Engineer. In addition to the good cause requirement, the State Engineer must also take into consideration any prolonged dry periods, whether the appropriator demonstrated efficient methods of agricultural water use, and whether

the appropriator was unable to put water to use due to economic conditions, natural disasters, or other circumstances beyond the appropriator's control.

Restoration

Even after five years of non-use, subsequent substantial use of a water right will "cure" a forfeiture, but only if no claims or proceedings of forfeiture have begun. *Town of Eureka v. Office of the State Engr. of Nevada*, 826 P.2d 948, 952 (Nev. 1992).

Water Rights Transfers

Transfers must be in the public interest and may not impair any other water rights holder.

Conservation

The Nevada Supreme Court has held that instream flow for fish and wildlife is a beneficial use. *State v. Morros*, 766 P.2d 263 (Nev. 1988). Appropriators may change the purpose of use to instream flow preservation using the standard change application, but few have done so.

Notes on Application of Law

The State Engineer only initiates forfeiture proceedings if the right is involved in a change application. Forfeiture may also arise from private adjudications.

Relevant Statutes, Cases

N.R.S. 533.060 (surface water abandonment)
N.R.S. 534.090 (groundwater abandonment and forfeiture)
Town of Eureka v. Office of the State Engr. of Nevada, 826 P.2d 948 (Nev. 1992)

Contact Information

Nevada State Engineer
Division of Water Resources
901 South Stewart St., Suite 2002
Carson City, NV 89701
(775) 684-2800
<http://ndwr.state.nv.us/>

OREGON

Summary of Law

Oregon recognizes both common law abandonment and forfeiture by statute. Evidence of non-use for the statutory period creates a presumption of forfeiture, which may be rebutted by the appropriator.

Oregon, like Utah, requires forfeiture proceedings to begin within 15 years of the end of the forfeiture period. Otherwise, the lapse in continuous use is forgiven.

Forfeiture Period

Five years. "[Failure] to use all or part of the water appropriated for a period of five successive years ... shall establish a rebuttable presumption of forfeiture," O.R.S. 540.610(1).

Defenses

An appropriator may rebut the presumption of forfeiture by showing one of the circumstances listed by ORS 540.610(2). These include:

- Reasonable and usual municipal uses by cities and towns
- Forfeiture would impair the rights of cities and towns
- Land owned by the Department of Veterans' Affairs
- Inability to use due to a predefined economic hardship
- Land withdrawn from use under a federal reserve program
- Period of non-use occurred more than 20 years prior to proceedings
- Water use discontinued under an order of the Water Resources Commission
- Reclaimed or reused water used instead
- Water was unavailable
- Use prohibited by law
- Use unnecessary due to climate conditions
- Time period was during a pending transfer application
- Lease to an instream water right

Restoration

An appropriator may resume use to restore a water right only if forfeiture proceedings do not begin within 15 years of the resumption of use. Proceedings are considered initiated when evidence of non-use is submitted to the Commission.

Water Rights Transfers

Transfers may not enlarge the original right or injure other rights. Sale or lease of conserved water does not need to be approved by the Water Resources Department, but notice of the sale must be given. O.R.S. 540.510(2), (7).

Conservation

Water leased to the state for instream purposes or replaced use of reclaimed or reused water is not subject to forfeiture. O.R.S. 540.610(2).

Oregon also allows appropriators to elect to receive “conserved water” in exchange for a reduction of a water right. The amount reduced from a water right is converted into conserved water and allocated between the appropriator and the state. Normally, the appropriator receives 75% of the conserved water and the state receives the remaining 25%. There are fewer restrictions on the sale or lease of conserved water. ORS 537.455 to 537.500.

Notes on Application of Law

The Water Resources Department routinely enforces the forfeiture statute, either on its own initiative, during transfer applications, or based on an affidavit filed by private parties.

Relevant Statutes, Cases

O.R.S. 540.610 (forfeiture)
O.R.S. 537.490 (conserved water)

Contact Information

Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
(503) 986-0900
<http://www.wrd.state.or.us/>

UTAH

Summary of Law

Utah recognizes both common law abandonment and forfeiture by statute. Utah allows appropriators to file a nonuse application with the State Engineer to extend the forfeiture period.

Utah, like Oregon, requires forfeiture proceedings to begin within 15 years of the end of the forfeiture period. Otherwise, the lapse in continuous use is forgiven.

Forfeiture Period

Seven years. “When an appropriator ... ceases to use all or a portion of a water right for a period of seven years ... the unused portion of that water right is subject to forfeiture,” U.C.A. 73-1-4(2)(a).

The State Engineer may grant multiple extensions, each up to seven years, on receipt of a nonuse application. To receive an extension, the appropriator must show reasonable cause for nonuse, which includes:

- Demonstrable financial hardship or economic depression
- Initiation of approved conservation or groundwater recharge programs
- The operation of legal proceedings
- A public supply entity holding a right for reasonable future public use
- Situations where nonuse would assist an approved water management plan
- Specific plans to improve water delivery equipment to restore a loss of capacity

Defenses

If the period of non-use occurred more than 22 years prior to judicial action (15 years after the end of the seven-year forfeiture period), then the water right may not be forfeited.

Utah also recognizes several situations where forfeiture does not apply in U.C.A. 73-1-4(2)(e), which includes:

- Use of water according to a lease
- Land under a state agreement or federal conservation following program
- Water unavailability due to shortage or priority date
- Storing water in an approved reservoir or aquifer
- Substantially all of a water right has been put to use
- Rights held for reasonable future public use by a public water supplier
- Supplemental water rights if alternative water rights satisfy beneficial use
- Rights pending an approved change application

Additionally, Utah common law provides a defense of forfeiture where the non-use is a result of physical causes beyond the control of the appropriator, including natural disasters. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 135 P.2d 108, 111 (Utah 1943).

Restoration

An appropriator may resume use to restore a water right only if judicial action to declare the right forfeited does not begin within 15 years of the resumption of use. Judicial action includes service to a claimant of a proposed determination of rights by the State Engineer. U.C.A. 73-1-4(2)(c).

Water Rights Transfers

The State Engineer must approve all transfers, and a transfer may not impair any vested right without just compensation.

Conservation

Using a water right for instream flow purposes is considered a beneficial use, but only the Division of Water Rights may hold such rights.

Notes on Application of Law

The State Engineer prefers abandonment to forfeiture proceedings, due to difficulty of proving non-use for seven continuous years.

Relevant Statutes, Cases

U.C.A. 73-1-4 (forfeiture)
U.C.A. 73-3-3 (change applications)
U.C.A. 73-3-30 (instream flow changes)
Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 135 P.2d 108 (Utah 1943).

Contact Information

Utah Division of Water Rights
1594 West North Temple, Ste 220
P.O. Box 146300
Salt Lake City, UT 84114
(801) 538-7240
<http://www.waterrights.utah.gov/>

WASHINGTON

Summary of Law

Washington recognizes both common law abandonment and forfeiture by statute, also known as relinquishment. Defenses to forfeiture are limited to an exhaustive list of “sufficient causes” provided by statute.

Forfeiture Period

Five years. “Any person ... who voluntarily fails, without sufficient cause, to beneficially use all or any part of [a water] right ... for any period of five successive years after July 1, 1967, shall relinquish such right.” R.C.W. 90.14.160. (See also 90.14.170 and 90.14.180.)

Defenses

Washington has 19 “sufficient causes” that serve as the exclusive defenses to forfeiture. These include:

- Unavailability of water
- Military service
- Legal proceedings that preclude use
- Government leases or purchase options that preclude use
- Federal restrictions on use
- Irrigation reductions due to varying weather
- Irrigation reductions due to an electricity buy-back program
- Approved conservation measures (Yakima basin only)
- Using transitory return flows instead of diversion
- Crop rotation for recognized farming practices
- Water for municipalities and power developments
- Reserves for drought
- Authoritatively fixed development plans (15 year limit)
- Claims by the federal government
- Leased for beneficial use
- Authorized use of agricultural industrial process water
- Approved trust water rights

Restoration

Washington does not allow restoration of a forfeited water right. To resume water use, a new water right must be appropriated.

Water Rights Transfers

Changes to a water right may not injure existing rights or increase the annual consumptive use. The Department of Ecology must make a determination on the extent and validity of a water right before approving a transfer. R.C.W. 90.80.055(1)(b).

Conservation

Forfeiture does not apply to water in the Yakima basin that is conserved and reallocated according to P.L. 103-434.

Appropriators may apply to place water rights in trust with the Department of Ecology for instream purposes without risk of forfeiture.

Notes on Application of Law

The Department of Ecology discovers almost all cases of forfeiture during general stream adjudications and when determining the extent and validity of a water right during a transfer.

Relevant Statutes, Cases

R.C.W. 90.14.130 (forfeiture)
R.C.W. 90.14.140 (defenses)
R.C.W. 90.03.380 (transfers)

Contact Information

Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503
(360) 407-6000
<http://www.ecy.wa.gov/>

WYOMING

Summary of Law

While Wyoming recognizes both abandonment and forfeiture, both are statutory and neither requires the element of intent. Forfeiture and abandonment are primarily distinguished by who brings the suit: abandonment proceedings are brought by private parties, while forfeiture is brought by the State Engineer.

The State Engineer may not bring forfeiture proceedings if the water right is currently in use. Similarly, the Wyoming State Board of Control typically allows the resumption of use within the past five years to defeat an abandonment proceeding. Most proceedings, however, are initiated before resumption of use.

Forfeiture Period

Five years. “Where the holder of an appropriation of water ... fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated ... during any five (5) successive years, he is considered as having abandoned the water right,” W.S.A. 41-3-401(a)

Appropriators may file for multiple extensions of up to five years each for water stored in a reservoir. An appropriator must demonstrate due diligence towards using the right as well as reasonable cause for non-use. Reasonable cause includes:

- Court or administrative proceedings
- Reservoir works that require more than five years to build
- Any other causes beyond the control of the appropriator

Defenses

The only defense that excuses non-use for the forfeiture period is the total absence of water to divert for irrigation purposes. W.S.A. 41-3-401(a); W.S.A. 41-3-402(a). Partial non-use is excused from abandonment if diversion facilities were in good working order and diligent effort was made to use what water was available, but there was not sufficient supply of water. W.S.A. 41-3-401(f).

Restoration

An appropriator may restore an unused water right by resuming even partial use. If any portion of a water right is being put to use, the State Engineer is prevented from initiating forfeiture proceedings. W.S.A. 41-3-402(j). Also, if land has been irrigated in the five years prior to an abandonment proceeding, the State Board of Control will rarely find abandonment.

Water Rights Transfers

Water right transfers must be approved by the State Board of Control. Transfers may not enlarge the historic amount or rate of water diverted and consumed. Additionally, transfers may not decrease the historic amount of return flow or cause injury to other appropriators.

Conservation

Wyoming considers the preservation of instream flow a beneficial use, but only the State Engineer may purchase or appropriate water rights for instream flow purposes.

Notes on Application of Law

Abandonment actions by private parties far outnumber forfeiture actions initiated by the State Engineer.

Relevant Statutes, Cases

W.S.A. 41-3-401 (abandonment)

W.S.A. 41-3-402 (forfeiture)

W.S.A. 41-3-1001 (instream flows)

Wheatland Irrigation Dist. v. Laramie Rivers Co., 659 P.2d 561 (Wyo. 1983) (no excuses other than lack of water)

Contact Information

Wyoming State Engineer
Herschler Building, 4E
122 West 25th Street
Cheyenne, Wyoming 82002
(307) 777-6150
<http://seo.state.wy.us/>