

# *Abandonment and Conservation Practices*

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# Abandonment Discussion

- Purpose
- Statutory Basis
- Effect of Conservation Practices
  
- Also, Attention to Historical Consumptive Use

# Abandonment, related to Anti-Speculation

- Start with Anti-Speculation Doctrine
- Colorado Constitution, Article XVI
  - Section 5; Water is “...declared to be the property of the public...”
  - Section 6; “... right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied...”
- Appropriations are premised on beneficial use
- This is the essence of our Anti-Speculation Doctrine

# Abandonment, related to Anti-Speculation

- Statutory definition of Appropriation
  - Section 37-92-103(3)(A); "Appropriation" means the application... of the waters of the state to a beneficial use...but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights..."

- **SB 20-048 Report (Strengthen Anti-Speculation Law)**

**SB 20-048 - Report of the Work Group  
to Explore Ways to Strengthen Current  
Water Anti-Speculation Law**

August 13, 2021

Submitted to the Interim Water Resources Review Committee of the  
Colorado General Assembly as required by Section 37-98-103, C.R.S.



# Abandonment, related to Anti-Speculation

- From the Executive Summary
  - “Coloradans value water for its beneficial use. Water should not be traded as a commodity for profit.”

# Abandonment

- Court supported Abandonment in early 20<sup>th</sup> Century
- 1969 Act codified abandonment process
  - Prevent the speculative holding of a water right,
  - Provide certainty to new appropriators
    - Stream conditions will not change due to the resumption of decades-old water rights

# Abandonment

- 1969 Act, Section 37-92-401, 402, C.R.S.
  - 37-92-401(1)(a); “(The Division Engineer) shall also prepare...a separate abandonment list comprising all absolute water rights that he or she has determined to have been abandoned.”
  - 37-92-402(11); “...failure for a period of ten years or more to apply to a beneficial use...shall create a rebuttable presumption of abandonment of a water right...”
    - “...waived...if special circumstances negate an intent to abandon”
- This is the perceived risk



- Colorado Water Institute (Center), Special Report No. 25, February 2016

How Diversion and Beneficial Use of Water Affect the Value and Measure of a Water Right

*Is "Use It or Lose It" an Absolute?*

Reagan Waskom, Kevin Rein, Dick Wolfe, MaryLou Smith

February 2016

Special Report No. 25



Colorado Water Institute

# Abandonment, related to Anti-Speculation

- From page 2
  - “A water right can be determined to be abandoned due to non-use for a long period of time (ten years or more), but only if the non-use is due to an actual intent of the owner of the water right to permanently forego the beneficial use of this water. This is the real basis for the term ‘use it or lose it.’”

# Abandonment Protections

- Case Law; no intent to abandon
- Statutory definition of abandonment; 37-92-103(2)
  - (2) "Abandonment of a water right" means the termination of a water right...as a result of the intent of the owner thereof to discontinue permanently..."
  - "...Any period of nonuse...shall be tolled, and no intent to discontinue...shall be...for the duration that:



# Abandonment Protections

- See sections 37-92-103(2)(a), (b)(I-VI), C.R.S.
  - (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 \(3\)](#).



# Abandonment Protections

- This statutory definition is the protection given to Coloradans
- Additional Protection: Historical Consumptive Use; SB13-019;
  - Section 37-92-305(3)(c), C.R.S. “In determining the amount of historical consumptive use for a water right in division 1, 2, 3, 4, 5, or 6, the water judge shall not consider any decrease in use resulting from the following...”
    - Conservation-oriented provisions, see statute
- What about process?

# Summary

- Colorado has strict abandonment principles in the law - premised on “intent to abandon”
- Colorado allows tolling and a finding of no intent to abandon for specific conservation practices
- Colorado allows protection for Historical Consumptive Use determinations
  - Not applicable in Division 7 (San Juan, Animas, La Plata, etc.)
- Protection is legal protection, the process for approval of protection is not well defined



# *Questions*