FACT SHEET

What is forfeiture and abandonment of a water right?

Q: What is a Valid Water Right?
A: A legal right to divert water for a specific beneficial use. Beneficial use is the basis, the measure, and the limit of the right to use water. Generally, all uses including agricultural, commercial, industrial and recreational are considered beneficial; the exception is willful waste of water. The doctrine of prior appropriation as interpreted in New Mexico provides that the validity of a water right, once established by actual beneficial use, requires continuous beneficial use of water. Water that is no longer beneficially used must revert to the public water supply so it is again available for appropriation by others.

Q: How can a water right be lost?
A: Water rights may be lost in two ways due to the failure to make beneficial use of water for a given period. First, the rights may be forfeited, as a matter of statutory law. Forfeiture is the involuntary or forced loss of a water right, caused by the failure of the appropriator or owner to put the water to beneficial use. Second, the rights may be lost through abandonment, which is a common law or court-created doctrine. Abandonment is the relinquishment of the right by the owner with the intention to forsake and desert it.

Q: What period of nonuse constitutes forfeiture of a Water Right?
A: The New Mexico statutes governing the forfeiture of water rights are N.M. Stat. §§72-5-28 and 72-12-8 (Cum. Supp. 1991). These statutes provide that the failure to make beneficial use of water for a period of four years shall result in a reversion of the water to the public. Prior to June 1, 1965, four years of nonuse results in forfeiture by operation of law, without notice and without any judicial or administrative procedure, provided circumstances beyond the control of the water right owner did not cause nonuse. Thus, if a water right owner did not use the water beneficially for any four-year period prior to June 1, 1965, that water right has been forfeited and the water belongs to the public. After June 1, 1965, four years of nonuse shall result in forfeiture, provided the failure persists one year after notice and declaration of nonuse by the state engineer.

Q: What period of nonuse constitutes abandonment of a Water Right?
A: Whether a water right is lost by abandonment turns on the factual question of whether the owner intended to abandon the right. The difficult question in the use of the abandonment doctrine is how that intent is proven. While the court states "nonuse alone is not sufficient to show intent to abandon," the court holds that nonuse for an unreasonable period of time may shift the burden of proof to the holder of the right to show no intent to abandon. By shifting the burden, the court is saying in effect that nonuse for an unreasonable period of time implies intent to abandon.
Based on decisions by the courts, abandonment may be considered if at least 16 consecutive years of nonuse or at least 4 consecutive years of nonuse plus the presence of additional facts of the intent to abandon are present – such as, permanent structures (houses, barns, etc.), permanent roads or parking areas, no extensions of time, nonuse or neglect works for an unreasonable period, use of land in a manner which creates a condition inconsistent with the use of water, failure to defend legal challenges to the water right, or failure to pay taxes on the land or assessments for ditch use. If conditions determining forfeiture or abandonment are established, the right is considered lost as of the date this condition occurred. The original right may not be reestablished by subsequent use.

Q: How is beneficial use verified?

A: Once a requirement is made to determine the validity of a water right, such as a transfer of water rights or adjudication, all available information is collected and evaluated to verify the continuity of beneficial use.

The following types of information have been accepted by the State Engineer to provide evidence of continuous beneficial use:

1. Water rights files
2. Historical aerial photography and documents
3. Information received from irrigator, irrigation districts, majordomos, acequias, affidavits from neighbors or other knowledgeable persons regarding past water use practices.

4. Irrigation, soil, and county surveys
5. Vegetation Studies
6. 1889 Railroad Survey Maps (NM & Southern Pacific RR)
7. Small Holdings and Grant Claims Maps and Notes (BLM)
8. Wills, Deeds and Lease Documents
9. Papers documenting lawful exemptions for non-beneficial use

Q: Are there other Factors Considered by the Office of the State Engineer when Reviewing Forfeiture and Abandonment of a Water Right?

A: Yes, some of the other factors the Office of the State Engineer reviews when determining forfeiture and abandonment include; review of whether the water right is covered under an approved 40 year plan, whether the water right owner was in active duty in the armed forces, whether there were factors beyond the water right owner's control in applying water to beneficial use, and whether the water right were placed in a irrigation district or water conservation program.