

**Abandonment and Partial Abandonment
CAWA Water Resource Workshop
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1. The Basics of Abandonment:

a. Nature of Colorado water rights – “use it or lose it”.

- i. Failure to use water rights can result in finding of abandonment.
- ii. Key is intent to abandon – but intent must be manifested by evidence.
- iii. By statute, “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 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.”

b. Abandonment lists

- i. Beginning in 1990 and every ten years afterward, legislature directed each of the 7 Division Engineers to prepare a list “comprising all absolute water rights that he or she has determined to have been abandoned in whole or in part.”
- ii. “In whole or in part” = partial abandonment
- iii. Proposed 2020 lists issued on July 1st:

<https://dwr.colorado.gov/services/water-administration/water-rights#abandonment>

c. Preparation of 2020 lists

- i. Since the 2010 lists, DWR has digitized much of its records regarding water right decrees and diversions.
- ii. 2020 lists created in part by comparing digital diversion records for the last 10 years with decreed amounts.
- iii. Correspondence indicating DWR's position is that in the absence of special circumstances, where a water right has diverted less than full decreed amount during the past 10 years, DWR is legally required to include on the list.
- iv. Many structures may have more than one decree – diversions are allocated to the senior water right first unless there is a justification (i.e. difference in decreed uses) that allow diversions to be first allocated to a junior decree.
- v. Result - dramatic increase in size of list:
 1. Statewide: 2,700 rights on 2010 list vs. 4,500 in 2020.
 2. Some divisions reduced lists in 2020 (Division 4 and 7).
 3. Others increased significantly – Division 6: 275 to 700.
 4. Many water rights listed for partial abandonment.

2. What to Do if Your Water Right is Listed? –

a. Deadlines:

- i. **July 1, 2021:** Deadline to file a written statement of objection for each water right with Division Engineer
 1. Form attached and at link above – may not be required to use form but it provides a good outline of arguments to be made for not listing a right.
- ii. July – December 2021: Division Engineers consider objections and revise lists as appropriate. Has been practice for Division Engineers to provide a response to filed objections.
- iii. December 31, 2021: Deadline for Division Engineers to file revised lists in Water Court and make copies available to the public.

- iv. January 31, 2022: Deadline for Water Courts to publish revised lists in resume.
- v. **June 30, 2022:** Deadline to file written protests to listings with the Water Court – “last chance”.

https://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=10

- vi. October 2022: Water Courts begin conducting trials on opposed listings, after which Judge enters final lists.

b. *Effect of final lists.*

- i. Abandonment is permanent and irreversible, water rights found to have been abandoned cannot be revived.
- ii. Water rights are abandoned to the stream. Priority is removed and junior rights move up in line.

c. *Although filing an objection with DWR does not appear to be a prerequisite to protesting a listing in Water Court, there are advantages to filing an objection by July 1, 2021:*

- i. Possibility of quicker resolution prior to Water Court.
- ii. Even if Division Engineer maintains listing, should provide explanation as to rationale, which can help in decision to protest in Water Court.
- iii. Water Court protests are resolved through regular court process. Can get expensive, especially if represented by counsel.

3. Factors to Support Removal of Water Rights from the 2020 Lists via DWR Objection or Water Court Protest.

a. *Has there been use of the water right in priority which would prevent finding of abandonment?*

- i. Has water physically been available in priority during the claimed period of nonuse?
- ii. Are there records (including anecdotal information) of diversions in addition to those maintained by DWR?

- iii. C.R.S. 37-92-103(2): “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:”
 - 1. The land on which the water right has been historically applied is enrolled under a federal land conservation program *[including some conservation easements]*; or
 - 2. The nonuse of a water right by its owner is a result of participation in:
 - a. A water conservation program approved by a state agency, a water conservation district, or a water conservancy district;
 - b. A water conservation program established by a municipality or municipal water supplier;
 - c. An approved land fallowing program;
 - d. A water banking program;
 - e. A loan of water, contract or agreement with the Colorado Water Conservation Board that allows the CWCB to use all or a part of a water right to maintain instream flows.
- b. *If there is 10 years of nonuse so that the presumption applies, is there a justification for the nonuse? [No silver bullet, based on totality of circumstances – see DWR form.]*
 - i. Have you attempted to put the water to beneficial use?
 - ii. Have diversion structures been repaired or maintained?
 - 1. In 2010, capacity of structures was a frequent issue in abandonment protests – may need a concrete plan to upgrade insufficient structures.
 - iii. Have you filed any documents to protect, change or preserve the water right, such as a water court application or opposition?
 - iv. Was the water right previously removed from an abandonment list?
 - v. Has the water right been leased to others?
 - vi. Have there been any attempts to sell the water right?

- vii. Has the water been needed for beneficial use? [*Caution: if water is never needed, that can be an argument in favor of abandonment.*]
 - viii. Were there any financial or legal obstacles to putting the water right to beneficial use?
 - ix. Has the water right been diverted at an undecreed point of diversion or used in other ways not authorized by the decree?
 - 1. DWR may argue this is evidence of abandonment, but case law says it is actually evidence of intent not to abandon.
 - x. Are there any other explanations as to why the water right was not used and/or plans to use the water right in the future?
- c. If there is joint ownership or multiple owners of the water right, each owner may have the ability to justify nonuse, i.e. mutual ditch companies.
 - d. Ultimately, the more detail and specificity you can include in the statement of objection the better. Supporting letters and documentation can be submitted along with the objection form.

4. Conclusion

- a. Agricultural users have greater exposure when it comes to abandonment, especially smaller operations.
- b. Even if your water rights are not listed or are removed from the list, abandonment should be an ongoing consideration in your operations.
- c. Ensuring that you are making full use of your water rights, keeping records, and maintaining water infrastructure can help prevent abandonment of water rights when the next list comes around in 2030.

5. Questions.



2020 Abandonment Timeline with Statutes July 2020

July 1, 2020: Official Publication Date for the Division Engineer's Proposed Abandonment List per CRS 37-92-401(1)(a).

By July 31, 2020: The Division Engineer shall send by certified mail notices to the owner or last-known owner or claimant (if known) of every water right on the proposed abandonment list per CRS 37-92-401(2)(b).

July-August 2020: Publication shall be made of the respective portion of the abandonment list in each county for four successive weeks per CRS 37-92-401(2)(b).

July 1, 2021: Deadline for filing a written Statement of Objection to the Division Engineer per CRS 37-92-401(3).

July - Dec. 2021: The Division Engineer shall consider the Statements of Objections received and make any revisions to the abandonment that he/she deems proper per CRS 37-92-401(4)(a).

By Dec. 31, 2021: The Division Engineer shall file his or her revised abandonment list in Water Court and make copies available to the public per CRS 37-92-401(4)(c).

By Jan. 31, 2022: The Water Clerk publishes notice of the revised abandonment list in the Water Court resume per CRS 37-92-401(4)(d).

June 30, 2022: Deadline for filing written protests with the [Water Court Clerk](#) (\$45 fee) and with the Division Engineer per CRS 37-92-401(5)(a).

October 2022: The Water Court Judge may begin conducting trials on abandonment cases with opposition after which the Judge enters a ruling and decree confirming the Final 2020 Abandonment List per CRS 37-92-401(6) through (10).

Listing of Abandonment Statutes

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 there under. 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 following 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).

37-92-301(5) - In all proceedings for a change of water right and for approval of reasonable diligence with respect to a conditional water right, it is appropriate for the referee and the courts to consider abandonment of all or any part of such water right or conditional water right.... In all such proceedings, no water storage right shall be declared abandoned in whole or in part on account of carrying water over in storage from year to year.

37-92-401(1)(a) - The division engineer of each division with the approval of the state engineer shall also prepare decennially, no later than July 1, 1990, and each tenth anniversary thereafter, a separate abandonment list comprising all absolute water rights that he or she has determined to have been abandoned in whole or in part and that previously have not been adjudged to have been abandoned.

37-92-401(1)(c) - In making his [or her] determinations with respect to abandonment, the division engineer shall investigate the circumstances relating to each water right for which the available water has not been fully applied to a beneficial use and in such cases shall be guided by the criteria set out in section 37-92-402(11). The decennial abandonment list, when concluded by judgment and decree as provided in this section, shall be conclusive as to absolute water rights or portions thereof determined to have been abandoned.

37-92-401(2)(b) - No later than July 31, 1990, and every tenth anniversary thereafter, the division engineer shall mail a copy of the respective decennial abandonment list by certified mail, return receipt requested, to the owner or last-known owner or claimant, if known, of every absolute water right which the division engineer has found to have been abandoned in whole or in part. The division engineer shall make such examination as is reasonably appropriate to determine the owner or claimant of such absolute water rights. He/she shall also cause publication to be made of the respective portion of the decennial abandonment list in each county in which the points of diversion of any absolute water rights on the list are located. Such publication shall be made for four successive weeks and shall be published, if possible, in a newspaper published in the county where the decreed point of diversion of the water right is located. The publication and mailing requirements of this paragraph (b) shall apply only to absolute water rights or portions thereof which previously have not been adjudged to have been abandoned.

37-92-401(2)(c) - ... not later than July 1, 1991, and every tenth anniversary thereafter, any person wishing to object to the inclusion of any absolute water right or portion thereof in the decennial abandonment list must file a statement of objection in writing with the division engineer.

37-92-401(4)(a) - Not later than December 31, 1991, and every tenth anniversary thereafter, the division engineer shall make such revisions, if any, as he deems proper to the decennial abandonment list. In considering the matters raised by statements of objection, the division engineer may consult with any interested persons. The division engineer shall consult with the state engineer and shall make any revisions in the decennial abandonment list determined by the state engineer to be necessary or advisable.

37-92-401(4)(c) - The division engineer shall file the decennial abandonment list, together with any revisions, signed by the division engineer and the state engineer or his or her duly authorized deputy, with the water clerk as promptly as possible, but not later than December 31, 1991, and every tenth anniversary thereafter. Each respective division engineer, water clerk, and the state engineer shall make a copy of the decennial abandonment list, together with any revisions, available for inspection in their offices at any time during regular office hours, as well as on the state engineer's web site, and the division engineer shall furnish or mail a copy to anyone requesting a copy upon payment of a fee in an amount set in section 37-80-110(1)(h).

37-92-401(4)(d) - If the decennial abandonment list is revised, the water clerk, in cooperation with the division engineer, not later than January 31, 1992, and every tenth anniversary thereafter, shall cause notice of the availability of such revision to be included in the resume described in section 37-92-302 (3) of cases filed in the respective water divisions during said month of December stating that the revision may be inspected or a copy thereof obtained as specified in paragraph (c) of this subsection (4). In addition, the water clerk shall cause such publication of the notice as is necessary to obtain general circulation once in each county or portion thereof which is in the division.

37-92-401(5)(a) - Any person who wishes to protest the inclusion of any water right in a decennial abandonment list after its revision by the division engineer shall file a written protest with the water clerk and with the division engineer. All such protests to the decennial abandonment list shall be filed not later than June 30, 1992, or the respective tenth anniversary thereafter. Such protest shall set forth in detail the factual and legal basis therefor. Service of a copy of the protest or any other documents is not necessary for jurisdictional purposes, but the water judge may order service of a copy of the protest or any other document on any person and in any manner which he or she may deem appropriate. The fee for filing such protest with the water clerk shall be forty-five dollars.

37-92-401(7) - If no protests have been filed, then promptly after July 1, 1992, and every tenth anniversary thereafter, the water judge shall enter a judgment and decree incorporating and confirming the decennial abandonment list of the division engineer without modification.

37-92-401(8) - A copy of the judgment and decree entered under subsection (6) or (7) of this section shall be filed with the state engineer and the division engineer and shall be provided by the water clerk to any other person requesting same upon payment of a fee of seventy-five cents per page. Promptly after receiving such judgment and decree, the division engineer and the state engineer shall enter in their records the determinations therein made as to the absolute water rights or portions thereof adjudged to have been abandoned and shall regulate the distribution of water accordingly.

37-92-402(11) - For the purpose of procedures under this section, 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 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.



Form Instructions

The Division Engineer must receive objections no later than July 1, 2021 pursuant to Section 37-92-401(3), Colorado Revised Statutes. Submit the completed form and any additional documentation as attachments through the [AskDWR tool](#) on DWR’s website with the Subject “Abandonment 2020”.

Please complete as much information as possible. All fields marked with an asterisk (*) are required.

Complete one Statement of Objection **for each water right**, not for each structure. Any structure may have more than one decreed water right.

1. Objector Contact Information

First Name*	Middle Initial	Last Name*	Suffix
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Name of Company (if applicable)			
<input type="text"/>			
Phone Number*	Email Address*		
<input type="text"/>	<input type="text"/>		
Mailing Address*	City*	State*	Zip Code*
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Are you the owner of the water right?* Yes No

If you selected yes, skip to section 3. If you selected no, complete section 2.

2) Water Right Owner Information (if different from Objector)

Describe your relationship to the owner:

Contact Information

First Name	Middle Initial	Last Name	Suffix
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Name of Company (if applicable)			
<input type="text"/>			
Phone Number	Email Address		
<input type="text"/>	<input type="text"/>		
Mailing Address	City	State	Zip Code
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>



3. Water Right Identification

Refer to the Division Engineer's abandonment list, the notice letter you received from the Division Engineer, or contact the division office for the required information.

WDID*	Structure Name*	Admin Number
<input type="text"/>	<input type="text"/>	<input type="text"/>
Source Stream	Amount Being Abandoned (CFS or AF)	
<input type="text"/>	<input type="text"/>	
Adjudication Date	Appropriation Date	Use Being Abandoned
<input type="text"/>	<input type="text"/>	<input type="text"/>

4. Water Right Information (provide supporting documentation as an attachment)

A) Was this water right included in an augmentation plan at any time over the last 10 years? Yes No

If yes, please provide the following:

Augmentation Plan Name:

Water Court Case Number:

B) What attempts have you made to divert and place water to beneficial use in the last 10 years? (please explain in detail, location of diversion, type of use, place of use, amount of use, etc.)

C) What have you done in the last 10 years to repair and maintain the diversion structure(s) associated with this water right? (please be specific and provide evidence if available, attach additional sheets if necessary)

D) Have you purchased, leased, or attempted to sell this water right in the last 10 years? If so, please provide details as to the purchase or your efforts to sell.

E) Have you taken steps to protect, change, or preserve this water right in the last 10 years? If so, please provide details of those efforts including case numbers in which you have participated or specific other efforts you have made.

F) Have there been economic or legal obstacles that have prevented your ability to exercise this water right in the last 10 years? If so, please explain in detail.

G) Please provide any evidence that establishes a justifiable excuse for nonuse of this water right along with a detailed explanation. (Provide any evidence that you did not intend to abandon this water right. That evidence must be documentary or clear evidence more than just your claims that you do not intend to abandon the water right.)

H) Has nonuse of the water right been the result of:

- The land on which the water right has been historically applied is enrolled under a federal land conservation program
- Participation in a water conservation program approved by a state agency, a water conservation district, or a water conservancy district
- Participation in a water conservation program established through formal written action or ordinance by a municipality or its municipal water supplier
- Participation in an approved land fallowing program as provided by law in order to conserve water
- Participation in a water banking program as provided by law
- Participate in a loan of water to the Colorado Water Conservation Board for instream flow use under section 37-83-105(2)
- Participation in 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)

If you selected any of the checkboxes above, please provide details:

5. Sign or Enter Name of Objector

The making of false statements herein constitutes perjury in the second degree, which is punishable as a class 1 misdemeanor pursuant to C.R.S. 24-4-104 (13)(a). I have read the statements herein, know the contents thereof and state that they are true to my knowledge.

Sign or Enter Name(s) of person(s) submitting statement of objection.*

Date*

If signing, print name (and title, if applicable)*

6. What happens after I submit this objection form?

After reviewing this Statement of Objection, the Division Engineer's Office will investigate the claims and may contact you regarding your objection. You may be asked to provide additional documentation to support your objection. You will receive a response stating the Division Engineer's determination regarding whether the water right will be removed or partially removed from the Decennial Abandonment List. The Revised Abandonment List will be filed with the water court no later than December 31, 2021.