The Purposeful Tension Within the Doctrine of Beneficial Use

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I. INTRODUCTION

In the western United States, water law developed around two main principles: (l) the goal of full beneficial use of water, and (2) the need to afford vested water right holders certainty as to their rights. At the time western water codes developed, these goals were seemingly in harmony—rewarding those who needed the water and invested in infrastructure for water use with rights that were enforceable against subsequent appropriators. Over the decades, as water needs and demands were reshaped by changing land use priorities, economics, and technology, these principles began to conflict with each other. Water right holders who had initially beneficially used water, and thus were afforded certainty regarding their future water use through water rights, no longer consistently used the water to which they were entitled. Thus, state water regimes were adjusted to enforce beneficial use requirements through abandonment and forfeiture laws that strive to return to the available "pool" the water rights of those that failed to timely make the investments needed to make or maintain their

water use. The obligation to show continuing beneficial use of water to avoid relinquishment and abandonment of water rights slowly undermined the certainty of vested water right holders in their water rights and water infrastructure investments.

Critically, the conflict between the certainty demanded by water right holders and the need to show continuing beneficial use began to create a disincentive for water right holders to conserve water, out of fear that they would lose their right to the unused water. Now, when water resources have largely been appropriated and are threatened by climate change, it is increasingly important to incentivize water conservation, rather than treating conservation or nonuse of water as "speculation." In response, state water regimes have gone through yet another period of adjustment to create exceptions for some circumstances of nonuse and to establish programs that promote a non-wasteful, socially and environmentally beneficial use (or nonuse) of water that might otherwise be at risk of forfeiture unless used. This article explores the evolution of western water law as it recognizes and accommodates for these tensions.

II. BACKGROUND

A. Historical Policy Drivers

> [T]he appropriation doctrine developed with a recognition that the ultimate goal of encouraging the fullest beneficial use of water, and the resulting economic development of the West, could not be realized unless water users were provided certainty in the holding and exercise of water rights.[1]

A sense of anxiety pervades the history of water rights development in the western states. In the 1800s, it was fear of speculation. The privatization of railroads fostered concerns that wealthy monopolists would usurp control of other public resources. It is against this backdrop that throughout the West, states enacted water rights statutes and attempted to eliminate the ability to hold water rights on a speculative basis.[2]

This "anti-speculation doctrine" is closely related to beneficial use. Beneficial use has been a central tenet of western water law since the early days of mining camps in California and Colorado as part of the prior appropriation system, under which the first person to put the water source

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[1] Charles B. Roe, Jr. & William J. Brooks, "Loss of Water Rights—Old Ways and New," 35 *Rocky Mt. Min. L. Inst.* 23-1, § 23.01 (1989).

[2] Peter R. Anderson & Aaron J. Kraft, "Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?" 48 *Idaho L. Rev.* 419, 422–23 (2012).

to beneficial use has superior rights over any future users.[3] Today, 18 states use the prior appropriation system or a dual appropriation-riparian system.[4] The basic principles of prior appropriation remain the same in each state with four primary components: intent, diversion, beneficial use, and priority.[5] An appropriative water right gives the holder the ability to legally take water from a public waterway on the condition that it is applied to beneficial use. From its focus on diversions and vesting of a right after actual use, the beneficial use requirement has grown to encompass states' efforts to determine what types of uses are considered beneficial and the maximum quantity to be appropriated. It has continued to evolve as a test to determine whether ongoing uses are reasonably efficient or wasteful.[6]

The beneficial use requirement is now well accepted in western water law.[7] Prior appropriation states strive to distribute water to those who effectively put it to use without waste and in the public good (as considered at a particular time and in a particular state).

B. Focus on Use

> The beneficial use doctrine, and its corollaries, waste and forfeiture, had three original purposes: 1) avoiding speculation and monopoly; 2) maximizing the use of a scarce resource for all; 3) providing flexibility to the water user, thus allowing the user (rather than courts, legislatures, or agencies) to determine appropriate improvements in water use practices except in extreme circumstances.[8]

Beneficial use of water is not only a requirement for initial appropriation, but an ongoing obligation to maintain a water right. Since water is scarce and subject to many competing demands, nearly all western states implement the "use it or lose it" doctrine, meaning that appropriative rights can be lost in whole or in part by nonuse.[9]

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[3] Amanda Waters & Erica Spitzig, *Water Rights and Environmental Regulation: A Lawyer's Guide*, (Robert H. Abrams & Latravia Smith eds.), ABA Section of Env't, Energy, & Res., at 12 (2018).

[4] 1 *Waters and Water Rights* § 11.01 (Amy K. Kelley ed., 3d ed. Lexis Nexis/Matthew Bender 2019).

[5] Waters & Spitzig, *supra* note 3, at 15.

[6] Lawrence J. MacDonnell, "Prior Appropriation: A Reassessment," 18 *U. Denv. Water L. Rev.* 228, 294 (2015).

[7] Anderson & Kraft, *supra* note 2, at 420.

[8] Janet C. Neuman, "Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use," 28 *Envtl. L.* 919, 962–63 (1998) (footnotes omitted).

[9] Janet C. Neuman & Keith H. Hirokawa, "How Good Is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights," 4 *U. Denv. Water L. Rev.* 1, 2 (2000).

The rationale for the doctrine is prevention of the speculative holding of water rights by requiring diligence in the application of water to a beneficial use.

The "use it or lose it" doctrine manifests itself in states' implementation of abandonment and forfeiture laws, under which nonuse of water may result in the loss of the right and in return of such water to the "pool" available for new appropriations unless the stream is so over-appropriated that junior appropriators will use all the relinquished water to fulfill their entitlements.[10]

Prior to enactment of water codes, one could only lose a vested water right by common law abandonment, which required a finding of nonuse of the water and intent to give it up. Thereafter, water codes in many western states incorporated strict statutory forfeiture provisions under which nonuse of the water for some specified and usually short period of time would result in the loss of the water right, without regard to intent.[11] However, in line with the balance of certainty, each state stays that principle if there is a rational explanation for the nonuse.

The issues of forfeiture and abandonment arise in administrative proceedings (in the contexts of new applications, transfers of rights, applications for changes of use or point of diversion) and in court proceedings, including both those commenced on behalf of the public by administrative officials, and those begun as private litigation.[12]

C. Balance with Certainty

There is an inevitable tension between the creation of a water right based upon the first instance of beneficial use and the need to develop the infrastructure needed to make use of the water. Promoting capital investment and development of infrastructure can be time-consuming. To provide certainty to a developer while ensuring that such entity does not hoard water resources, states grant conditional water rights (e.g., licenses or preliminary decrees), which require proof that the developer has invested sufficient capital in good faith to place the water to beneficial use.

There is also a tension between the capital investment needed to use water and the threat of the loss of the water right for nonuse when water uses are buffeted by variables like the weather and general or industry-specific economic factors. Once the license, certificate, final decree, or other instrument has been issued, regulators have considered it unfair to immediately revoke that instrument because of circumstances beyond the control of the developer. Some beneficial users must invest in expensive

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[10] Anthony D. Tarlock & Jason A. Robison, *Law of Water Rights and Resources* § 5.90 (2019).

[11] Neuman & Hirokawa, *supra* note 9.

[12] Kelley, *supra* note 4.

infrastructure and equipment (real estate purchases, dams, reservoirs, canals, irrigation systems, roads, mining equipment) only to have it sit idle or not fully used while they "weather the storms," either real or proverbial. The history of adjustments to states agencies' treatment of forfeiture and abandonment, and the progression of state law enactments and court opinions through the decades, clearly demonstrate an effort to achieve balance between requiring continuing beneficial use and protecting the investments of vested water right holders. This balance is ever more important in the context of increasing water demands, coupled with greater uncertainty in water supply, which will require water management regimes that provide flexibility (frequently called "resilience") to meet water challenges in the West.

D. Overview of Abandonment

Abandonment is the intentional relinquishment of a known right. Abandonment is a constitutional method to terminate unused property interests because the holder of the right had the ability to prevent the termination and failed to do so. Courts and legislatures make it difficult to establish abandonment, generally requiring a showing of both intent to abandon and nonuse.[13]

Below is a summary of the general treatment of abandonment as more fully discussed in the § III survey:

- Intent is a *question of fact* to be determined from all the surrounding circumstances.
- The party claiming that another has abandoned a water right generally *bears the burden of proving abandonment*.
- Evidence of long periods of nonuse has varying degrees of *probative value* on the question of intent to abandon. Evidence of long periods of nonuse may be sufficient to establish *a rebuttable presumption* of intent to abandon. The burden then shifts to the water right holder to produce evidence of use or explain the reason for nonuse. Failure to maintain diversion and conveyance facilities used in connection with the right is considered in evaluating intent to abandon.
- A water right generally will not be considered abandoned if the nonuse of the right was caused by circumstances beyond the appropriator's control. Evidence that the water was not needed during the time of nonuse has been accepted as probative on the question of intent and a justification for nonuse may negate a

[13] Tarlock & Robison, *supra* note 10, § 5:91.

presumption of abandonment when the nonuse was the result of "economic, financial, or legal difficulties or natural calamities."[14]

E. Overview of Forfeiture

The significance of abandonment as a means of losing water rights has declined in most states due to the enactment of statutory forfeiture provisions. Sixteen western states have forfeiture statutes applicable to surface waters.[15] Below is a summary of treatment among the states as more fully discussed in the § III survey:

- Forfeiture of a water right is the involuntary loss of a water right caused by failure of an appropriator to beneficially use water.
- Forfeiture statutes typically identify a period of nonuse that results in relinquishment or forfeiture.
- Forfeiture is generally not automatic. In some states, notice and an opportunity to remedy is required.
- Forfeitures are not favored, and a heightened evidentiary standard is generally applicable where the outcome is one disfavored in the law.
- Forfeiture statutes are generally not operative where the nonuse results from causes beyond the control of the appropriator. Statutes in most states list specific circumstances (exclusive or non-exclusive) that constitute good or "sufficient cause" for nonuse.
- Some states have enacted specific exemptions from forfeiture provisions for certain types of water rights, reflecting the view of state legislatures that application of the forfeiture provisions to, and the resulting loss of, these types of rights will not promote the public's interests in the use of water.
- Several states allow for development extensions prior to vesting. In some states, after vesting, the water right holder may apply for successive extensions from forfeiture for nonuse up to 10 years.

III. SURVEYED STATES

What follows is a survey of Colorado, Idaho, Oregon, Washington, and Wyoming law regarding how the prior appropriation states balance the two dominant themes in western water law: the goal of full beneficial use of water and the need to afford vested water right holders certainty as to the value of their rights.

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[14] James F. Engelking & Peter H. Evans, "Maintaining Mining Permits/Government Authorizations and Water Rights," *Problems and Opportunities During Hard Times in the Minerals Industry* 10-1, 10-34 (Rocky Mt. Min. L. Fdn. 1986) (quoting Hallenbeck v. Granby Ditch & Reservoir Co., 420 P.2d 419, 426 (Colo. 1966)).

[15] Roe, Jr. & Brooks, *supra* note 1, § 23.02[2][a].

A. Colorado

1. Establishing a Water Right

Colorado follows the prior appropriation system of water rights, under which the first person to divert unappropriated water from a stream and apply it to beneficial use acquires a right to use that water.[16] A water right is "a special type of property right" that gives its owner the right to use, rather than possess, the resource.[17]

To establish an absolute water right that guarantees a specified volume of water in accordance with that right's priority, the water user first must obtain a conditional decree to divert water. After receiving a conditional decree, the water user must show reasonable diligence in putting the water to use without waste,[18] the measure of which "is the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner."[19]

Although the holder of a conditional decree must demonstrate reasonable diligence in the completion of the appropriation, the time for putting water to beneficial use is flexible. Both in the context of surface water and groundwater, Colorado law recognizes that development schedules may be extended, although failure to make a timely request for an extension may result in the loss of the conditional right.[20] If reasonable diligence to complete the appropriation is being exercised, economic conditions beyond the control of the applicant that adversely affect the feasibility of perfecting a conditional water right are not sufficient to *deny* a diligence application.[21]

Once the appropriation is complete, the water user must adjudicate the use of the water in water court. The appropriator can receive a judicially awarded final decree,[22] with a priority backdated to the time appropriation was initiated, provided that the work toward appropriation continued with reasonable diligence.[23] Once adjudicated, a water right is a vested usufructuary right that confers the right to *use* water, but does not constitute an ownership right in the water itself.

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[16] Colo. Const. art. XVI, § 6; Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

[17] Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377 (Colo. 1982).

[18] Colo. Rev. Stat. § 37-92-103(7); Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968).

[19] Colo. Rev. Stat. § 37-92-301(4)(b).

[20] *Id.* §§ 37-92-301(4)(a)(III), 37-90-137(3)(a).

[21] *Id.* § 37-92-301(4)(c).

[22] This is analogous to a license in other states.

[23] *Id.* § 37-92-305(1).

2. Nonuse of Water Rights in Colorado: Abandonment

Unlike many other western states, Colorado does not have a statutory forfeiture provision.[24] However, both the common law and the Water Right Determination and Administration Act of 1969 (1969 Act)[25] recognize that adjudicated water rights may be lost by operation of abandonment. Both vested and conditional water rights are subject to abandonment.

Under Colorado law, "abandonment of a water right" is "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 thereunder."[26] A finding of abandonment requires both a sustained period of nonuse and an intent to abandon.[27] Nonuse for an unreasonable amount of time gives rise to a presumption of intent to abandon. The determination of what constitutes an unreasonable amount of time varies with the facts of each case.[28] The Colorado Supreme Court has found:

> The presumption of abandonment *shifts the burden of going forward* to the water rights owner, but is insufficient in and of itself to prove abandonment. Rather, the element of intent remains the touchstone of the abandonment analysis, and the owner of the water right can rebut the presumption of abandonment by introducing evidence sufficient to excuse the non-use or demonstrate an intent not to abandon.[29]

Abandonment is not automatic. Instead, the 1969 Act creates an administrative and judicial process for extinguishing abandoned water rights. The 1969 Act directs the division engineer to compile decennially a list of all absolute water rights that he/she determines have been abandoned through nonuse.[30]

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[24] Neuman & Hirokawa, *supra* note 9, at 2 n.7.

[25] Colo. Rev. Stat. §§ 37-92-101 to -602.

[26] *Id.* § 37-92-103(2).

[27] E. Twin Lakes Ditches & Water Works, Inc. v. Bd. of Cty. Comm'rs of Lake Cty., 76 P.3d 918, 921 (Colo. 2003); Haystack Ranch, LLC v. Fazzio, 997 P.2d 548, 552 (Colo. 2000); Se. Colo. Water Conservancy Dist. v. Twin Lakes Assoc., Inc., 770 P.2d 1231, 1237 (Colo. 1989); Farmers Reservoir & Irr. Co. v. Fulton Irr. Ditch Co., 120 P.2d 196, 199 (Colo. 1941).

[28] *Haystack Ranch*, 997 P.2d at 553; Colo. Rev. Stat. § 37-92-402(11) (for 1978 tabulation, a period of 10 years of nonuse creates a rebuttable presumption of abandonment for purposes of creating the division engineer's abandonment list); Beaver Park Water, Inc. v. City of Victor, 649 P.2d. 300, 302 (Colo. 1982) (finding 20 years of nonuse created a rebuttable presumption of an intent to abandon).

[29] *E. Twin Lakes*, 76 P.3d at 921 (citations omitted) (emphasis added); *see also Haystack Ranch*, 997 P.2d at 552.

[30] Colo. Rev. Stat. § 37-92-401(1)(a); City & Cty. of Denver v. Middle Park Water Conservancy Dist., 925 P.2d 283, 286 (Colo. 1996).

Any person who wishes to object to the manner in which a water right or conditional water right is listed in the abandonment list or to the omission of a water right or conditional water right from such list may file a statement of objection in writing with the division engineer. A party claiming that another water user has abandoned his/her water right generally bears the burden of proving abandonment by a preponderance of the evidence.[31] Any question of the owner's intent to abandon a water right is a matter to be resolved by the trier of fact on the basis of the evidentiary record established at trial.[32] When a court decrees that a water right is abandoned, "the property rights adhering to the particular water right no longer exist."[33]

Whether water rights have been abandoned may also be considered in proceedings for a change of water right and for approval of reasonable diligence with respect to a conditional water right.[34]

3. Flexibility in Maintaining Water Rights in Colorado

Despite the abandonment doctrine, Colorado law provides for flexibility in use of water rights through mechanisms that allow for the avoidance of abandonment of a right during a time of nonuse. The flexibility suggests that strict adherence to "use it or lose it principles" is not always desirable, particularly when a water right holder is faced with circumstances outside of its control. A number of mechanisms allow for use of conservation practices, while protecting the water rights dedicated to such conservation or emergency purposes.

a. Statutory Exceptions

First, the need for flexibility in use over time and importance of water conservation is recognized through the circumstances statutorily exempt from abandonment. Water in the following conservation programs is not subject to abandonment: (1) a water conservation program approved by the state, a conservation district, or a conservancy district; (2) a water conservation program established through written action or municipal ordinance; (3) an approved land fallowing program; and (4) a water banking program.[35] Temporary and long-term land fallowing agreements

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[31] *Haystack Ranch*, 997 P.2d at 552 (some case law suggests that abandonment must be proven by clear and convincing evidence); Hallenbeck v. Granby Ditch & Reservoir Co., 420 P.2d 419, 426 (Colo. 1966).

[32] Water Rights of Masters Inv. Co. v. Irrigationists Ass'n, 702 P.2d 268, 270 (Colo. 1985).

[33] *Haystack Ranch*, 997 P.2d at 553.

[34] Colo. Rev. Stat. § 37-92-301(5).

[35] *Id.* § 37-92-103(2); Adam Schempp, "Western Water in the 21st Century: Policies and Programs that Stretch Supplies in a Prior Appropriation World," 40 *Envtl. L. Rep. News & Analysis* 10394, 10399 (2010).

have become a means of supplying municipal water demands.[36] For example, "the Lower Arkansas Valley Water Conservancy District fostered the creation of the so-called 'Super Ditch,' a for-profit corporation formed by irrigators to coordinate rotational fallowing by many irrigators to supply water for growing needs in the state . . . ."[37]

b. Case Law Exceptions

In addition to the statutorily codified exceptions to abandonment, Colorado courts have identified a variety of factors that demonstrate intent *not* to abandon.

Notably, economic or legal obstacles to exercising the right, as well as need for the water, are probative on the question of intent to abandon, which suggests conservation is preferred over the use of water when water is not needed. Although two early cases suggested that economic considerations were not enough to overcome an intent to abandon, Colorado case law has evolved over time. In *In re CF & I Steel Corp. in Las Animas County*,[38] the question was whether water rights for a mine had been abandoned after 54 years of nonuse. CF & I Steel Corp. argued that its 54-year period of nonuse was excused because substantial economic and practical factors required that the use of these water rights be discontinued and those factors remained in force as compelling reasons for continued nonuse. The Colorado Supreme Court held that the economic realities of the mining industry were not enough to justify 54 years of nonuse of a water right. Similarly in *Southeastern Colorado Water Conservancy Dist. v. Twin Lakes Associates, Inc.*,[39] the water court ruled that from June 24, 1912, to the time of the case (77 years) there had been nonuse of the subject water rights, and that such a period of nonuse established a presumption of abandonment. Although the water rights holder presented testimony that placer mining for gold generally was economically unfeasible in the region from about 1920 until the early 1970s, and that there had been only small-scale mining in the area since the cessation of large-scale hydraulic mining, the court found an intent to abandon. Among others, the decision was based on the fact that the ditches and diversion structures were incapable of carrying water from the early 1920s and that, even with a few minor repairs in later years, they were never restored to a usable state.

Since those early cases, the courts' consideration appears to have evolved. In *Beaver Park Water, Inc. v. City of Victor*,[40] in concluding that

[36] Schempp, *supra* note 35, at 10399.

[37] *Id.*

[38] 515 P.2d 456 (Colo. 1973).

[39] 770 P.2d 1231 (Colo. 1989).

[40] 649 P.2d 200 (Colo. 1982).

water rights had not been abandoned after 20 years of nonuse, the court relied upon evidence that no need to use the water right existed during the period to rebut a presumption of abandonment. In *Water Rights of Masters Investment Co. v. Irrigationists Ass'n*,[41] although the Colorado Supreme Court ultimately upheld a conclusion that water rights had been abandoned, the court determined that evidence that the water rights were not used because they were not needed was probative of the question of intent to abandon. In *Hallenbeck v. Granby Ditch & Reservoir Co.*, the Colorado Supreme Court found that "a reasonable justification for non-use may very well exist where it can be shown that economic, financial or legal difficulties or natural calamities prevented the storing of all the water that was originally decreed."[42] Finally, in *People ex. rel. Danielson v. City of Thornton*,[43] the court suggested that *CF & I Steel* may be limited to its facts, explaining that in *CF & I Steel* there was no evidence of any efforts to lease, sell, or otherwise use the water rights during the long period of nonuse, and CF & I Steel Corp. had dismantled its diversion and transportation works, making it impossible to divert water at its decreed points.

Moreover, Colorado case law suggests that the investment in infrastructure may provide a basis for refuting a presumption of intent to abandon. In particular, courts consider and rely upon water right holders' continued maintenance of their diversion facilities to allow water to be put to some beneficial use as evidence that there is no intent to abandon.[44]

c. Conservation

Second, Colorado law promotes conservation of water and protects water rights dedicated to conservation purposes. For example, water right holders may loan their water rights to the Conservation Board for instream flow uses,[45] and such a loan is recognized as evidence of intent not to abandon.[46] Moreover, the instream flow statute allows the Conservation Board to keep water it owns within a streambed without losing its right to the water.[47]

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[41] 702 P.2d 268, 270 (Colo. 1985).

[42] 420 P.2d 419, 426 (Colo. 1966).

[43] 775 P.2d 11 (Colo. 1989).

[44] *Haystack Ranch*, 997 P.2d at 554; *Se. Colo. Water Conservancy Dist.*, 770 P.2d at 1237–38.

[45] Colo. Rev. Stat. § 37-83-105(2).

[46] *Id.* § 37-92-103.

[47] *Id.* § 37-92-102(3).

d. Storage Rights

Third, through the recognition of storage rights, state law contemplates that there are circumstances under which application of water to use on a continuous, or even regular, basis may not be desirable, or even possible. In 2013, Senate Bill 13-041 was signed by the Governor, expanding the term "beneficial use" to include the impoundment of water for firefighting or storage for any lawful purpose. A system with multiple water storage features may be granted an absolute water storage right without evidence of full utilization of all component water rights.[48] Importantly, a water right is not abandoned when the water is in long-term storage.[49]

e. Emergencies

Fourth, the Colorado legislature and the water courts recognize the need for adaptability in emergency circumstances. The Colorado Supreme Court found that leasing water rights as an emergency reserve indicated an intent to preserve the rights.[50] Moreover, the legislature has recognized the need for expediency in planning for water use, particularly in times of drought, by authorizing the state engineer to approve of certain water supply plans instead of requiring a water adjudication process.[51]

B. Idaho

1. Establishing a Water Right

Under Idaho's constitution, an appropriation of water must be for a beneficial use. During the nineteenth century, a water right could be perfected solely by the will to take possession of the water and the determination to keep it.[52] In 1903, the legislature established a permit-based procedure for the appropriation of water that, with limited exceptions, is now mandatory for both groundwater[53] and surface water.[54]

The first step is to apply for a "permit,"[55] typically before the applicant begins construction of the project.[56] A permit authorizes the holder to divert and use the water under specified terms. It is often described as an

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[48] *Id.* § 37-92-301(5).

[49] *Id.*

[50] *Beaver Park*, 649 P.2d at 302–03.

[51] Colo. Rev. Stat. § 37-92-308(7).

[52] *See* Jeffrey C. Fereday, Christopher H. Meyer & Michael C. Creamer, *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho* (2021).

[53] Idaho Code § 42-229.

[54] *Id.* §§ 42-103, -201.

[55] *Id.* § 42-202.

[56] *Id.* § 42-203A(5).

inchoate right.[57] Once the permit is issued, it secures the holder's priority date. The holder then may construct the project with the knowledge that a water right license, of known priority, will be available following investment in necessary infrastructure and acceptance by the Idaho Department of Water Resources (IDWR) of its proof of beneficial use.[58]

With the permit in hand, the holder is authorized to proceed with the project and put the water to beneficial use. Except for permits held by municipal providers for "reasonably anticipated future needs" (RAFN) water rights, IDWR requires that actual construction work and the application of the water to full beneficial use shall be completed within five years or less from the date of approval, with bases for requests for extension of time for completion specified by statute.[59] The holder must comply with the permit development schedule, as originally set or as extended, or "shall be deemed to have relinquished all rights under its permit."[60] In the case of a permit issued to municipal providers for RAFN water rights, the municipal permit holder will be "deemed to have relinquished all rights under any portion of the permit that has not previously been licensed or for which an incremental statement of completion showing proof of beneficial use has not been [timely] submitted."[61]

The timely and adequate "prove up" is needed for the IDWR to determine that the beneficial use is as intended and the conditions of the permit are met so that a license may be issued.[62] The effect of the license to the holder is that the license is *prima facie* evidence as to such right.[63] The ramifications of failure to timely submit either the "prove-up"

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[57] Hardy v. Higginson, 849 P.2d 946, 951 (Idaho 1993) (quoting Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45 (1927) ("By application for permit . . . the permittee secures an inchoate right which will ripen into a legal and complete appropriation by compliance with the statutory steps. Such right is merely a contingent right, which may ripen into a complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property. It is merely a consent given by the state to construct and acquire real property.").

[58] Idaho Code § 42-219.

[59] *Id.* § 42-204(3). Idaho Code § 42-204 was amended in 2020, effective on July 1, 2020, to modify the process for issuing permits and licenses to municipal providers for RAFN water rights by causing the development period for RAFN rights to correspond to the planning horizon and by authorizing IDWR to license RAFN water rights in incremental steps based upon actual beneficial use up through the end of the development period. SB 1316, S.L. 2020, ch. 164, § 1.

[60] Idaho Code § 42-204(6).

[61] *Id.*

[62] *Id.* § 42-219(1). Idaho Code § 42-219 was amended in 2020 to authorize the issuance of a license incrementally for RAFN water rights. SB 1316, S.L. 2020, ch. 164, § 4.

[63] Idaho Code § 42-220.

(the proof of beneficial use) or to request an extension for such proof is the lapsing of the permit and loss of the original priority date.[64]

In addition to the bases for extension requests provided in Idaho Code § 42-204(3), whenever a shorter time is granted, the IDWR may, upon a proper and timely showing, extend the period for proof of beneficial use to the full five years.[65] The statute provides various extensions of the deadline for submission of proof of beneficial use.[66]

2. Nonuse of Water Rights in Idaho: Abandonment and Forfeiture

Once a water right is established and a license is issued, it may be lost due to failure to beneficially use the right, in whole or in part. In Idaho, a water right—lost through either abandonment or forfeiture—reverts to the state as unappropriated water and is either subject to further appropriation or to satisfy the rights of existing junior appropriators from the same water source.[67]

a. Abandonment

In Idaho, abandonment of a water right is a common law principle, requiring (1) an intent to give up the right, and (2) actual nonuse.[68] It rarely is encountered because the requisite proof of the intent to abandon is high, requiring "clear and convincing evidence of unequivocal acts."[69] Mere nonuse of a water right is not sufficient to establish intent.[70]

b. Forfeiture

Since 1903, Idaho's Water Code has contained a provision declaring that if a water right is not placed to beneficial use for a period of five years, it is "forfeited"—regardless of the owner's intent, except under circumstances specified in the Idaho Code. In Idaho, statutory forfeiture (and its exceptions) applies to the use of water whether represented by a license issued by the IDWR, by claims to water rights, or by decree of the court.[71]

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[64] *Id.* § 42-218a. Idaho Code § 42-218a was amended in 2020 to protect from lapse the increment of the RAFN water rights permit that has been previously licensed. SB 1316, S.L. 2020, ch. 164, § 3.

[65] Idaho Code § 42-218.

[66] *See, e.g.*, *id.* § 42-204(3)(b) (irrigation), (c) (reservoirs), (e) (U.S. or Idaho Water Resources Board permits).

[67] Jenkins v. State Dep't of Water Res., 647 P.2d 1256 (Idaho 1982).

[68] *Id.*; Sears v. Berryman, 623 P.2d 455 (Idaho 1981); Gilbert v. Smith, 552 P.2d 1220 (Idaho 1976).

[69] *Jenkins*, 647 P.2d at 1260–61.

[70] *Id.* at 1261.

[71] Idaho Code § 42-222(1).

The forfeiture question arises most often in disputes between right holders, in an adjudication, or where transfer of a water right is sought. In a transfer proceeding, the IDWR typically will investigate whether there has been a forfeiture or abandonment of the right sought to be transferred; however, it is not required to do so in all circumstances, such as when an adjudication court will review the issue.[72]

Forfeitures are not favored, and clear and convincing proof is required to support a forfeiture.[73] This is a heightened evidentiary standard applicable in special cases such as forfeiture, where the outcome is one disfavored in the law.[74]

3. Flexibility in Maintaining Water Rights in Idaho

Idaho's exceptions to abandonment and forfeiture reflect the legislature and court's disfavor of abandonment and forfeiture doctrines. These exceptions, again, suggest that Idaho recognizes the need for flexibility in maintaining water rights, even during times of nonuse.

a. Statutory Avoidance of Forfeiture

The Idaho legislature provided a process by which a water right holder could avoid forfeiture by applying for an extension of time, as long as the extension was applied for during the five years of nonuse and upon a showing of "good and sufficient reason for nonapplication."[75] However, the time may not be extended further than a total of 10 years under this provision.[76]

b. Statutory Exceptions to Forfeiture

The Idaho legislature enacted 12 self-executing exceptions to forfeiture, which are listed in Idaho Code § 42-223(1)–(12). Several of these exceptions suggest a preference for flexibility towards those who have invested in the development of water rights facing circumstances beyond their control, and for conservation where appropriate. For example, the statute provides that water rights are not forfeited if:

- the water right is placed in the water supply bank or is retained in or rented from the water supply bank;
- the nonuse results from circumstances over which the water right owner has no control;

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[72] Fereday, Meyer & Creamer, *supra* note 52, at 46–47.

[73] Idaho Code § 42-222(2).

[74] McCray v. Rosenkrance, 20 P.3d 693, 699 (Idaho 2001); *Jenkins*, 647 P.2d at 1260–61.

[75] Idaho Code § 42-222(3).

[76] *Id.* § 42-222(4).

- the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right;
- the nonuse results from the water right being used for approved mitigation purposes;
- the nonuse of any water right relates to mining, mineral processing, or milling if the nonuse results from a closure, suspension, or reduced production of the mine, processing facility, or mill, due in whole or in part to mineral prices, and the water right owner has maintained the property and mineral rights for potential future mineral production; and
- use of the water right has resumed, even after five years of nonuse, as long as no third party has made a claim to the right. This exception, added in 2020, codifies the resumption doctrine discussed below.

The legislature intended for a water right to avoid forfeiture during a change application process pursuant to these 12 exceptions and also recognized that the Idaho Supreme Court has developed its own forfeiture exceptions.[77]

c. Resumption of Use

The Idaho courts carved out another special exception to forfeiture and abandonment, known as the resumption doctrine.[78] Under this doctrine, forfeiture may be avoided despite a period of nonuse, if the use of the right is resumed before any third party obtains rights that would be impaired by the resumption. In *Sagewillow, Inc. v. IDWR*,[79] the Idaho Supreme Court clarified that although a water right may have gone unused for a significant period (in *Sagewillow*, nonuse continued for over 20 years), it may be resumed with the original priority date and to the original extent if it can be shown that junior water users did not obtain a determination of forfeiture or directly benefit from the forfeiture. The court placed the burden of disproving resumption on the party asserting that the water right was forfeited.[80] In 2020, the Idaho legislature codified this resumption of use exception to forfeiture, providing that even after five years of nonuse, a right is not forfeited if use resumes prior to a third party claiming the right.[81]

[77] *Id.* § 42-223.

[78] Zezi v. Lightfoot, 68 P.2d 50 (Idaho 1937); Carrington v. Crandall, 147 P.2d 1009, 1011 (Idaho 1944); *In re* Boyer, 248 P.2d 540 (Idaho 1952).

[79] Sagewillow, Inc. v. IDWR, 70 P.3d 669 (Idaho 2003); *see also Zezi*, 68 P.2d 50.

[80] *Sagewillow*, 70 P.3d at 680–81.

[81] Idaho Code § 42-223(12).

d. Tolling of “Forfeiture Clock” in General Stream Adjudication

The Snake River Basin Adjudication (SRBA) court ruled that the forfeiture statute is tolled for water rights once a claim for them is filed in the SRBA, and that the tolling continues until a partial decree is issued for that right. The IDWR adheres to this policy of restarting the forfeiture clock after the partial decree enters.[82]

e. Storage Rights and Carryover Storage

Idaho law recognizes rights to store water and storage as beneficial use.[83] Storage of water in a reservoir is beneficial, as long as the storage water is appurtenant to an identifiable area and used, either within the reservoir or after release, for a beneficial use, such as irrigation, hydropower, municipal, or recreation purposes. Storage rights are licensed with multiple “purpose of use” components, such as storage, stream flow maintenance storage, and wildlife storage.[84] The holder of a storage right may retain stored water for future years, as carry-over storage, subject to IDWR’s discretion to determine whether the carryover water is reasonably necessary for future needs.[85]

f. Municipal Water Rights

Water rights held for municipal purposes to meet reasonably foreseeable future needs may be exempt from relinquishment.[86] In the Municipal Water Rights Act of 1996, the Idaho legislature had affirmed the growing community doctrine’s role in Idaho water law,[87] protecting RAFN water rights consistent with the objectives of maximum use and conservation of water resources.[88] The Idaho Code § 42-202B(8) definition of “reasonably anticipated future needs” is derived from the common law

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[82] Anderson & Kraft, *supra* note 2, at 439; Fereday, Meyer & Creamer, *supra* note 52, at 385.

[83] Robert E. Beck, *Waters and Water Rights* § 13.03 (1991) (“Initially, the system relented on this proposition [requiring immediate use] only with reference to the building of reservoirs to catch otherwise unusable seasonal flows and floodwaters. . . . Now, of course, municipalities are allowed to acquire supplies for projected future use; indeed, in many instances are required to, for long-term growth.”).

[84] Fereday, Meyer & Creamer, *supra* note 52, at 30; “Water and Growing Cities: A Survey of Western State Water Requirements for Urban Development” (Dividing the Waters, Nat’l Judicial Conf., 2017).

[85] Am. Falls Reservoir Dist. No. 2 v. IDWR, 154 P.3d 433, 451 (Idaho 2007).

[86] Idaho Code § 42-223(2).

[87] Municipal Water Rights Act of 1996 (codified as amended at Idaho Code §§ 42-202(2), (11), -202B, -217, -219(1), (2), -222(1), (2)).

[88] *See* Fereday, Meyer & Creamer, *supra* note 52, at 30 (for Statement of Purpose, R.S. 06104, which became S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws ch. 297).

growing communities doctrine. RAFN rights are unlike typical water rights insofar as they are intended to be put to use in the future and are needed for long-term community planning purposes. Therefore, RAFN rights are not subject to forfeiture unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.[89]

However, in 2020, the Idaho legislature clarified how the exemption from relinquishment is applied during the permitting phase. In the case of RAFN water rights, the municipal permit holder will be "deemed to have relinquished all rights under any portion of the permit that has not previously been licensed or for which an incremental statement of completion showing proof of beneficial use has not been [timely] submitted."[90]

g. Water Supply Bank

Idaho's Water Supply Bank was created by the legislature to provide a mechanism to facilitate the movement of "excess" water rights to those who could put them to use, particularly on a short-term basis. The water bank is intended to provide a convenient and efficient clearinghouse function, to streamline the approval process, and to provide a degree of state oversight.[91]

The Water Supply Bank is administered by the Idaho Water Resource Board through the IDWR under rules adopted by the Board.[92] To be eligible for lease, the water right must be decreed, licensed, or permitted.[93] Among the criteria considered by the Board to accept an offered water right, the Board will consider "[w]hether the information available to the Board indicates that the water right has been abandoned or forfeited."[94] Once the water rights are accepted, the forfeiture provisions of Idaho Code § 42-222(2) are tolled during the time period the water right is in the Board's water supply bank.[95]

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[89] Idaho Code § 42-223(2).

[90] *Id.* § 42-204(6).

[91] *See* Fereday, Meyer & Creamer, *supra* note 52, at 342.

[92] Idaho Admin. Code § 37.02.03.

[93] *Id.* § 37.02.03.025.02(a). Technically, a water permit is not a water right, but they may be traded through the water bank nonetheless.

[94] *Id.* § 37.02.03.025.06(c).

[95] *Id.* § 37.02.03.025.08(e); *see* Idaho Code §§ 42-223(5), -1764.

h. Drought Emergency

The IDWR has the authority to issue temporary approval of transfers in a drought emergency.[96]

C. Oregon

1. Establishing a Water Right

Oregon follows the prior appropriation system of water rights.[97] Under Oregon's prior appropriation system, the first person to divert unappropriated water from a stream and apply it to beneficial use acquires a right to use that water.[98] Beneficial use is the basis, the measure, and the limit of all rights to use water in Oregon.[99] Beneficial use implies that water is used without waste.[100]

Generally, any person intending to acquire a right to appropriate surface water first must apply to the Oregon Water Resources Department (OWRD) for a permit to make the appropriation.[101] The OWRD must approve a proper application that contemplates the beneficial use of water, unless the proposed use conflicts with existing water rights.[102]

The OWRD permit allows the permittee to begin construction of the diversion project and the appropriation of water.[103] Generally, the permittee must begin construction with "reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the [OWRD]."[104] This time period is not to exceed five years (or 20 years for a municipal water right permit holder) from the date of the approval.[105] For good cause shown, the OWRD may allow extensions beyond the five-year limitation.[106] The 20-year deadline to complete construction or to perfect a municipal water right may be extended if the applicant satisfies four statutory requirements: (1) good cause; (2) submission and approval of an

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[96] Idaho Code § 42-222A.

[97] *See* Fort Vannoy Irr. Dist. v. Water Res. Comm'n, 188 P.3d 277, 284 (Or. 2008) ("[T]he enactment of the Water Rights Act in 1909 (Or. Laws 1909, ch. 216) mark[ed] the ascendancy of the appropriation doctrine as the prevailing water law of Oregon.").

[98] Or. Rev. Stat. § 537.120.

[99] *Id.* § 540.610(1).

[100] Hennings v. Water Res. Dep't, 622 P.2d 333, 335 (Or. Ct. App. 1981) (holding that "unreasonable waste of all or part of the water constitutes 'non-beneficial use'").

[101] Or. Rev. Stat. § 537.130(1).

[102] *Id.* § 537.160(1).

[103] Teel Irr. Dist. v. Water Res. Dep't of State of Or., 919 P.2d 1172, 1174 (Or. 1996) (citing Or. Rev. Stat. § 537.130).

[104] Or. Rev. Stat. § 537.230(2). There are separate specific time limits for the holder of a permit for municipal use. *Id.* § 537.230(3).

[105] *Id.* § 537.230(2), (3).

[106] *Id.* § 537.230(4).

OWRD-approved water management and conservation plan; (3) the maximum rate diverted after the extension approval is subject to a water management and conservation plan; and (4) the permit is conditioned to "maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law."[107]

After completing construction and applying the water to a beneficial use, the permittee hires a certified water right examiner to survey the appropriation,[108] and prepares a "final proof survey" as "proof" of a perfected water right.[109] Once the OWRD finds, based on the final proof survey, that the permittee has appropriated the water for a beneficial use in accordance with the law, the OWRD issues a water right certificate to the user.[110] The water right is only perfected or vested when the water is actually put to a beneficial use.[111] The certificate represents a vested, perfected water right that continues so long as the water is applied to a beneficial use in accordance with the terms of the certificate.[112]

2. Nonuse of Water Rights in Oregon: Abandonment and Forfeiture

In Oregon, there is a common law doctrine of abandonment.[113] Abandonment requires proof of intent to abandon.[114]

Oregon also has a forfeiture statute, Or. Rev. Stat. § 540.610, that provides: "Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of *five* successive years, the failure to use shall establish a *rebuttable presumption* of forfeiture of all or part of the water right."[115] In Oregon, forfeiture is not automatic; the Water Resources Commission may upon its own determination or evidence submitted by any person, initiate proceedings when it appears that a perfected and developed water right has been forfeited and would not be rebutted.[116] There is no requirement that a water user be notified of alleged nonuse until forfeiture proceedings

[107] *Id.* § 537.630(3).

[108] *Id.* § 537.230(5). The OWRD may waive the requirement that a permit holder hire a certified water right examiner for a supplemental water right that shares the same distribution system and same place of use. *Id.* § 537.230(6).

[109] *See Teel Irr. Dist.*, 919 P.2d at 1175.

[110] Or. Rev. Stat. § 537.250(1).

[111] *Teel Irr. Dist.*, 919 P.2d at 1174–75.

[112] Or. Rev. Stat. § 537.250(3).

[113] Tudor v. Jaca, 164 P.2d 680, 689 (Or. 1945).

[114] Rencken v. Young, 711 P.2d 954, 956 (Or. 1985).

[115] Or. Rev. Stat. § 540.610(1) (emphasis added).

[116] *Id.* § 540.631.

begin.[117] If, after receiving notice of the proposed cancellation of the water right the owner fails to protest within 60 days, the Water Resources Commission may enter an order canceling the water right.[118] However, if the water right owner files a protest, the Water Resources Commission sets a time and place for a hearing.[119]

3. Flexibility in Maintaining Water Rights in Oregon

a. Statutory Exceptions

Upon a showing of five years of nonuse, the appropriator bears the burden of rebutting the presumption of forfeiture.[120] Oregon law outlines 14 ways the appropriator can do so.[121] Several exceptions suggest that flexibility in use of a water right is desirable, particularly in circumstances beyond the appropriator's control. One such exception is for the appropriator to demonstrate that the owner of the property to which the water right is appurtenant is unable to use the water due to economic hardship.[122] The Water Resources Commission defines "economic hardship" as "a financial burden of an extraordinary nature."[123] Specific examples include that an entity is required "to report on an unusually large number of diversions or locations, the costs of measuring and reporting for a diversion or location greatly exceed the normal costs associated with a similar volume of water, or the costs of measuring and reporting threaten the entity's fiscal ability to continue operating."[124]

Similarly, water right holders can avoid forfeiture by demonstrating they were unable to make full beneficial use of the water because the water was not available and that they were otherwise ready, willing, and able to use the water had it been available.[125] The appropriator can also avoid a finding of forfeiture by demonstrating that the nonuse occurred during a time when the exercise of all or part of the water right was not necessary due to climatic conditions and where the water right holder was otherwise ready, willing, and able to use the entire amount of water allowed under the water right.[126]

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[117] *Id.* § 540.631.

[118] *Id.* § 540.641(1).

[119] *Id.* § 540.641(2). If the Water Resources Commission cancels or modifies the water right, the portion of the right not canceled or the portion that has been modified will receive a new water right certificate. *Id.* § 540.650.

[120] *Id.* § 540.610(2).

[121] *Id.*

[122] *Id.* § 540.610(2)(d).

[123] Or. Admin. R. 690-085-0008(7).

[124] *Id.*

[125] Or. Rev. Stat. § 540.610(2)(j).

[126] *Id.* § 540.610(2)(L).

In 1997, the Oregon legislature added a sweeping exception for partial beneficial use.[127] This section exempts rights that are not fully used but still accomplish their original purpose with an observed result of water conservation.[128] Additionally, Oregon law provides flexibility in time of drought. If the Water Resources Commission declares that a severe or continuing drought exists, the Commission can allow a temporary change in use, place of use, or point of diversion of water without complying with the usual notice and waiting requirements.[129]

b. Instream Flow and Temporary Conversion

Finally, Oregon's Instream Water Rights Act[130] allows private appropriators to purchase, lease, or gift a water right for instream use.[131] Existing water rights may be leased for temporary conversion to an instream flow for terms not exceeding five years.[132] During the time the water right is used for instream flow purposes, permanently or temporarily, it is held in trust by the state and is considered to be beneficially used.[133] This allows water right holders not using water, and at risk of forfeiting their right, to stop the clock on forfeiture by putting the water right to use.[134]

The tension between instream flow leases and the ability to avoid forfeiture is evident in a recent Oregon Court of Appeals decision, which interpreted Or. Rev. Stat. § 543A.305(3) as requiring that a hydroelectric water right be converted to a permanent instream right five years after the use of water under the hydroelectric right ceases.[135] The court of appeals held that the holder of a hydroelectric right can avoid conversion of the hydroelectric right to a permanent instream right as long as it temporarily leases the water to the state once every five years for instream use.[136] On appeal, the petitioner has argued that the "ruling will allow long-dead dams to stagger on, like zombies, through a limitless string of once-every-five-

[127] *Id.* § 540.610(3).

[128] Schempp, *supra* note 35, at 10398.

[129] Or. Rev. Stat. § 536.750.

[130] *Id.* §§ 537.332–.360.

[131] *Id.* § 537.348(1).

[132] *Id.* § 537.348(2); Or. Admin. R. 690-077-0076(1).

[133] Or. Rev. Stat. § 537.348(2); *see also* Schempp, *supra* note 35, at 10402.

[134] Or. Rev. Stat. § 537.348(2); *see also* Robert D. Pilz, *At the Confluence: Oregon's Instream Water Rights Law in Theory and Practice*, 36 Envtl. L. 1383, 1388 (2006).

[135] WaterWatch of Or. v. Water Res. Dep't, 468 P.3d 478 (Or. Ct. App. 2020).

[136] *Id.* at 485.

year leases, awaiting eventual reanimation" and denying the public a permanent right to instream use of the water.[137]

c. Groundwater Mitigation Banking

Further, Oregon law allows for groundwater banking for the Deschutes Groundwater Mitigation Bank. There, a shortage of available surface water supplies and a moratorium on further groundwater use led to the development of a water banking system. Legislation[138] and a set of rules[139] now authorize a water bank and mitigation credits for the Deschutes River Basin.[140] There are five-year, one-year, and split-season lease options that allow a water right holder to lease water for instream flow, which meets the beneficial use requirement necessary to avoid statutory forfeiture in Oregon.

D. Washington

1. Establishing a Water Right

Washington follows the prior appropriation system of water rights.[141] The Washington State Department of Ecology (Ecology) administers water rights in Washington. The modern Washington water right[142] development process consists of the following: (1) file an application for a water right with Ecology; (2) receive a permit from Ecology; (3) develop the water right by diverting water and putting the water to beneficial use; (4) perfect the water right by putting to beneficial use the maximum instantaneous quantity and annual quantity claimed; (5) submit a report of proof of development to Ecology; (6) obtain a water right certificate from Ecology; and (7) adjudicate the water right.

To have a water right that is superior to a water right of other later appropriators, the water right must be "perfected." A water right is perfected by diverting or withdrawing water from the source and applying

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[137] Petition for Review of the Decision of the Court of Appeals, *WaterWatch of Or.*, SC No. S067938 (Jan. 1, 2021).

[138] Or. Rev. Stat. § 537.746.

[139] Or. Admin. R. ch. 690, divs. 505, 521, 522.

[140] Deschutes River Conservancy's website provides additional information on the Deschutes River Basin Water Bank programs. *See* https://www.deschutesriver.org.

[141] Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 734 (Wash. 2000).

[142] Prior to the adoption of the Water Code, persons seeking to establish a water right would post a notice of appropriation, typically near where they sought to divert water, specifying the instantaneous quantity and annual quantity claimed. After the Water Code was adopted, water users relying on rights established before the Water Code was adopted were advised to register a claim to a water right. Wash. Dep't of Ecology, "Frequently Asked Questions About Water Right Claims" (Pub. #97-2022-S&WR, rev. Feb. 2006). Ecology acknowledged receipt of the claims but did not determine the validity of the claim. *Id.*

it to a beneficial use,[143] all in compliance with the water right's terms and conditions.[144]

A water right permit establishes a development schedule for construction of the works and the use of the water. Construction work must be commenced "within such reasonable time as shall be prescribed" by Ecology, must be prosecuted with diligence, and must be completed within the time frame prescribed by Ecology.[145] The time allowed for construction of the works and application of water to a beneficial use is set by Ecology based on a number of factors, including the cost and magnitude of the project, the engineering and physical features to be encountered, and the public welfare and public interests affected.[146]

Failure to meet the water right development schedule does not necessarily result in the loss of the right to put water to use. Instead, Ecology can "for good cause shown" extend the time for development. The Water Code directs Ecology to grant a further period or periods of time for development as may be reasonably necessary, having due regard to the good faith of the applicant and the public interests affected.[147] Washington

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[143] Washington law recognizes one exception to the beneficial use requirement of perfection. For many years, Ecology applied a "pumps and pipes" policy to municipal water rights, which quantified such vested (certificated) rights based on the capacity of the system rather than on actual beneficial use. Ecology later came to doubt the legality of the "pumps and pipes" policy. Ecology's refusal to apply the pumps and pipes policy to a developer's permit renewal gave rise to the case of *Washington State Department of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998). In that case, the Washington Supreme Court held that a water right must be based on "actual application of water to beneficial use and not upon system capacity. . . . Perfection of an appropriative right requires that appropriation is complete only when the water is *actually applied* to a beneficial use." *Id.* at 1246. The Washington legislature partially undid *Theodoratus* by adopting a statute upholding the validity of existing certificates issued under the pumps and pipes policy. The statute provides that a water right is "in good standing" if it is "represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes . . . where the certificate was issued based on an administrative policy" to administer such certificates after construction of the municipal water supply system, "rather than after the water had been placed to actual beneficial use." Wash. Rev. Code § 90.03.330(3). Certificates issued after September 9, 2003, must be based on "actual beneficial use of water." *Id.* § 90.03.330(4).

[144] Wash. State Dep't of Ecology v. Acquavella, 935 P.2d 595, 600 (Wash. 1997) ("basis, measure, and limit" of a water right is governed by the doctrine of beneficial use, under which an appropriated water right is created and maintained by purposefully applying the water to a beneficial use upon land); Haullauer v. Spectrum Props., Inc., 18 P.3d 540 (Wash. 2001) (perfection of an appropriative water right requires that appropriation is complete only when the water is actually applied to a beneficial use).

[145] Wash. Rev. Code § 90.03.320.

[146] *Id.*.

[147] *Id.*

courts recognize that Ecology has authority to condition any extension to satisfy public interest concerns that arise.[148]

Water right holders seeking to perfect a water right after the establishment of the Washington Water Code begin the administrative perfection process by filing a proof of appropriation form with Ecology and then completing the process of proof. Ecology will then issue a certificate. A certificate represents a vested property right.[149] Unless appealed, the certificate has the effect of res judicata on the issue of whether the water was put to beneficial use.[150]

Although water rights are vested property rights once certificated, a general adjudication, pursuant to Wash. Rev. Code § 90.03, is required to determine water rights and priorities between claimants.[151]

2. Nonuse of Water Rights in Washington: Abandonment and Relinquishment

Even where a water right has been fully put to a beneficial use at one point in time, if the water right goes unused or substantially unused, it may be deemed abandoned or relinquished.[152]

a. Abandonment

The abandonment doctrine holds that a water right may be lost when two elements are met: long-term nonuse of water and intent to abandon.[153] Intent may be gleaned from a party's statements and conduct. In addition, nonuse of water for a lengthy period raises a rebuttable presumption of intent to abandon. For example, the Washington Supreme Court found that a town's neglect of the water works needed to divert water was evidence of intent to abandon a water right. In *Okanogan Wilderness League, Inc. v. Town of Twisp*,[154] the town was held to have abandoned a water right that it had not used for at least 40 years, had not identified in any planning documents or other official records, and for which it had not maintained any facilities needed to exercise the water right. There is no bright-line rule

[148] *Theodoratus*, 957 P.2d at 1248–49.

[149] *See id.* at 1251–52 (Sanders, J., dissenting).

[150] Kuhnle v. Dep't of Labor & Indus., 130 P.2d 1047, 1048 (Wash. 1942).

[151] Wash. State Dep't of Ecology v. Acquavella, 674 P.2d 160, 161 (Wash. 1983); Rettkowski v. Dep't of Ecology, 858 P.2d 232, 238 (Wash. 1993).

[152] *Rettkowski*, 858 P.2d at 238.

[153] Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732, 738–39 (Wash. 1997). *But see* Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. State, Dep't of Ecology, 51 P.3d 744 (Wash. 2002) (no intent to abandon even after decades of nonuse where the District continued to engage in studies on how to use water for hydropower generation, acquired and changed water rights for purposes of power production, sought federal license for power production, and tried to develop projects for hydropower production).

[154] 947 P.2d 732 (Wash. 1997).

for how many years constitutes a long enough time for the presumption to arise or for application of the doctrine, but the *Twisp* facts provide an example for comparison.

Abandonment applies to both water right claims that precede the development of the Water Code and water rights established under Washington's Water Code.[155] Both perfected and inchoate water rights are subject to abandonment for nonuse.[156]

b. Relinquishment

Relinquishment is "[t]he failure 'to beneficially use all or any part' of the right for five years, without sufficient cause."[157] In Washington, a perfected water right is subject to relinquishment for nonuse.[158] Unlike common law abandonment, intent to relinquish is not required.

Water rights may be voluntarily relinquished if the water use has diminished or completely stopped for five or more successive years. Alternatively, when it appears to Ecology that a person entitled to the use of water has not beneficially used his or her water right or some portion thereof, the relinquishment statute requires that Ecology notify such person by order.[159] The order will state that all or a portion[160] of a water right has been relinquished unless sufficient cause for not using the water is shown either to Ecology or through an appeal to the Pollution Control Hearings Board. If sufficient cause is not shown, the water right will be relinquished.[161] Relinquished rights revert to the state and become available for appropriation by others. Quantification of the right and whether the right has been relinquished or abandoned in whole or in part are matters that Ecology addresses in deciding whether to approve a transfer or change application.[162] Relinquishment applies equally to pre-code claims and to vested water rights.[163] Permits are not subject to relinquishment, but instead remain subject to regulation by Ecology under a development schedule.

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[155] Wash. Rev. Code § 90.14.160.

[156] *Acquavella*, 935 P.2d at 601.

[157] *Theodoratus*, 957 P.2d at 1247 (citing Wash. Rev. Code §§ 90.14.160, .170, .180).

[158] Wash. Rev. Code §§ 90.14.160–.180.

[159] *Id.* § 90.14.130.

[160] Water rights may be relinquished in whole or in part. Only complete use of the water right will protect the entire water right from relinquishment.

[161] *See* Wash. Dep't of Ecology, "Focus on Water Right Relinquishment" (Jan. 2013).

[162] *Okanogan Wilderness League*, 947 P.2d at 737–38.

[163] Wash. Rev. Code § 90.14.160.

3. Flexibility in Maintaining Water Rights in Washington

Washington's program is instructional in demonstrating the flexibility in approaching the use of water rights in light of growing needs to conserve water.

Under the relinquishment law, nonuse may be excused upon a showing of "sufficient cause."[164] In some instances, sufficient cause includes when the nonuse is driven by the cyclical need for water in the industry. For example, in the agricultural context, the statute excuses nonuse of a water right where the need for the water was temporarily reduced due to varying weather conditions, including but not limited to precipitation and temperature. Other exceptions permit nonuse of water that is driven by conservation practices, including reduced use of irrigation water from the implementation of crop rotation practices and the reduced use of water from the implementation of conservation measures under the Yakima River Basin Water Enhancement Project.

In addition to excusing nonuse for sufficient cause, the statute provides several exceptions to relinquishment, which are discussed below.[165] Exceptions to relinquishment are narrowly construed.[166] These exceptions also recognize scenarios where flexibility in the use of the water is deemed desirable.

a. Municipal Water Supply Purposes Exception

The relinquishment statute excepts from relinquishment a water right claimed for municipal water supply purposes.[167] The Washington Supreme Court has found that municipal water supply purpose rights "are not subject to relinquishment."[168] Special treatment of municipal water rights illustrates a recognition by the legislature that it may be desirable to allow more flexibility with respect to the beneficial use of certain types of water rights because of the special circumstances surrounding the demand for the water and the need for long-term certainty regarding water supply.

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[164] *Id.* § 90.14.140.

[165] *Id.* § 90.14.140(2).

[166] Pac. Land Partners, LLC v. State, Dep't of Ecology, 208 P.3d 586, 592 (Wash. Ct. App. 2009) ("As stated in RCW 90.14.020(3), the requirement that a person establish a strong beneficial use as a condition precedent to continued ownership of a water right 'is essential to the orderly development of the state.' The legislature intended 'that water be beneficially used, and, if not, that water rights be returned to the state so that the water will be available for appropriation by others who will put the water to beneficial use.'" (citations omitted)).

[167] Wash. Rev. Code § 90.14.140(2)(d).

[168] Lummi Indian Nation v. State, 241 P.3d 1220, 1224 (Wash. 2010); *see also* Cornelius v. Dep't of Ecology, 344 P.3d 199, 209 (Wash. 2015) (municipal water supply rights are "immune" from relinquishment).

Notably, recent efforts by Ecology have illustrated its intention to limit the use of the municipal water supply exception.[169]

b. Determined Future Development Exception

Wash. Rev. Code § 90.14.140(2)(c) provides for an exception from relinquishment for a "determined future development to take place . . . within fifteen years . . . ." The Washington Supreme Court interprets this exception as requiring a firm, definitive plan of a future development that will take place within 15 years. The Washington Supreme Court has found that the purpose of the determined future development exception is "to avoid relinquishment only where fixed development plans will take longer than five years to come to fruition,"[170] recognizing that large scale projects may require a lengthy development schedule.[171]

c. Water Right Leasing

Section 90.14.140(2)(f) provides for an exception from relinquishment if a right or portion of the right is leased to another person for use on land other than the land to which the right is appurtenant as long as the lessee makes beneficial use of the right.

d. Trust Water Rights Program

The legislature created authority for a state water trust to protect conserved water from relinquishment. This provision was enacted in 1989 for the Yakima River Basin (Wash. Rev. Code ch. 90.38) and subsequently expanded statewide with the adoption of Wash. Rev. Code ch. 90.42 in 1991.[172] The program provides a mechanism for transferring or reallocating existing water rights to serve as sources of water for new uses.

Water rights placed into the trust program are managed by Ecology and may be authorized for use by Ecology for instream flows,[173] irrigation, municipal, or other beneficial uses consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply

[169] Crown West Realty, LLC v. Pollution Control Hearings Bd., 435 P.3d 288 (Wash. Ct. App.), *review denied*, 447 P.3d 165 (Wash. 2019).

[170] R.D. Merrill v. Wash. Pollution Control Hearings Bd., 969 P.2d 458, 471 (Wash. 1999).

[171] *Id.* at 472.

[172] Wash. Dep't of Ecology, "The State Water Trust and Water Banking: History and Function" (Jan. 2020).

[173] Wash. Rev. Code ch. 90.22 authorizes Ecology "to establish, by rule, minimum instream flows or levels to protect fish, game, birds, other wildlife resources, and recreational and aesthetic values." Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 735 (Wash. 2000); *see also* Wash. Rev. Code § 90.22.030 (providing the establishment of minimum instream flows "shall in no way affect *existing water and storage rights* and the use thereof, including but not limited to rights relating to the operation of any hydroelectric or water storage reservoir or related facility" (emphasis added)).

problems.[174] Water in trust can be used for either instream or out-of-stream purposes.

Water rights may either be transferred or donated. Water rights *transferred* (through sale or lease) into the state trust are processed under Wash. Rev. Code § 90.03.380, which requires Ecology to make a determination as to the extent and validity of the right and confirm that no existing rights will be impaired. Permanent transfers into trust are deeded to Ecology. Temporary transfers into trust for leases revert to the original water right holder under the original terms of the right following the end of the lease. If water rights are *donated*, Ecology does not produce a determination of the extent and validity of the water right but rather reviews the most recent five years of beneficial use to assess the quantity of water available for donation. Water rights held in the Trust Water Rights Program are not subject to relinquishment[175] and maintain their original priority dates while in trust.

e. Water Banking

Various formal and informal water banking efforts have been pursued in Washington. Water rights in an approved local water plan created under Wash. Rev. Code § 90.92.090 and banked under Wash. Rev. Code § 90.92.070 are exempt from relinquishment.[176]

To qualify for banking purposes, a water right must be designated for mitigation use as the right is transferred into trust. The trust water right may then be used for mitigation. The water banking provisions in Wash. Rev. Code ch. 90.42 enable Ecology to use trust water rights to provide mitigation for new and existing uses that would otherwise impair existing rights. In enacting the statute that permits Ecology to use trust water rights for water banking purposes, the Washington legislature found that water banking can:

> Provide critical tools to make water supplies available when and where needed during times of drought; improve streamflows and preserve instream values during fish critical periods; reduce water transaction costs, time, and risk to purchasers; facilitate fair and efficient reallocation of water from one beneficial use to another; provide water supplies to offset impacts related to future development and the issuance of new water rights; and facilitate water agreements that protect upstream community values while

[174] Wash. Rev. Code § 90.42.040.

[175] *Id.* § 90.14.140(h).

[176] *Id.* § 90.14.140(i).

retaining flexibility to meet critical downstream water needs in times of scarcity.[177]

f. Storage Rights

The relinquishment statute applies to water rights to "withdraw" (groundwater rights) and "divert" (surface water rights) but does not apply to a third category of water right available in Washington: storage rights.[178]

By excluding storage rights from the rights subject to relinquishment, Washington law appears to contemplate that there are circumstances under which application of water to use on a continuous, or even regular, basis may not be desirable, or even possible.

g. Emergencies

Finally, various provisions of Washington law recognize that emergency situations may call for different uses and treatment of water rights, and that flexibility in the use of water rights is needed to best prepare for and accommodate emergency situations. First, sufficient cause for nonuse of water under the relinquishment statute includes "drought, or other unavailability" of water.[179] Second, Washington law recognizes a class of water rights, known as standby or reserve water rights, that are used only in times of drought or other low flow periods. Such standby or reserve water rights are exempt from relinquishment as long as withdrawal or diversion facilities remain in good operating condition.[180] Third, the state may declare drought conditions in the state, and under such circumstances water rights may be used more flexibly. In particular, upon the issuance of such a drought declaration by the state, Ecology is empowered to: "[a]pprove a temporary change in purpose, place of use, point of diversion, or point of withdrawal, consistent with existing state policy allowing transfer or lease of waters between willing parties . . . ."[181]

E. Wyoming

1. Establishing a Water Right

In 1890, Wyoming was the first state to adopt a comprehensive water code that provided for state agency administration of all aspects of water rights.[182] Wyoming's constitution specifies that the state follows the prior

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[177] *Id.* § 90.42.100 note.

[178] *Id.* § 90.14.160.

[179] *Id.* § 90.14.140.

[180] *Id.* § 90.14.140(2)(b).

[181] *Id.* § 43.83B.410.

[182] Lawrence J. MacDonnell, "The Development of Wyoming Water Law," 14 *Wyo. L. Rev.* 327, 333 (2014).

appropriation system.[183] Further, the constitution provides the framework for its water law, including creating a "board of control," composed of the state engineer and the superintendents of the water divisions.[184] The board of control has supervisory authority over the "appropriation and diversion" of state waters.[185] The constitution also directs the legislature to divide the state into four water divisions, each with a superintendent.[186]

In order to acquire a certificate of appropriation in Wyoming, an appropriator must first apply to the state engineer for a permit.[187] This temporarily reserves the state's waters, while the applicant works to obtain a certificate of appropriation for a water right.[188] The state engineer must approve all applications that comply with the statutes and that "contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare."[189] If the state engineer approves the application for a permit, the applicant may proceed to construct the necessary works to apply the water to beneficial use and to perfect the proposed appropriation.[190]

Perfecting a water right requires: "(1) the intent to appropriate water, (2) notice to others of the appropriation, (3) compliance with state prescribed formalities, (4) a diversion of water, and (5) application of the water to a beneficial use."[191] While acknowledging that Wyoming's statutory scheme regulating the appropriation of water has contemplated an actual physical diversion of water, the Wyoming Supreme Court has concluded that actual diversion is neither constitutionally required nor an essential element of the prior appropriation doctrine.[192] The court recognized that "beneficial use" is an "evolving concept" that can be "expanded to reflect changes in society's recognition of the value of new uses of . . . resources."[193]

After the state engineer approves an application for a water permit, the applicant must complete the actual construction to use the water within the

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[183] Wyo. Const. art. VIII.

[184] Wyo. Const. art. VIII, § 2.

[185] *Id.*

[186] Wyo. Const. art. VIII, § 4.

[187] Wyo. Stat. Ann. § 41-4-501(a).

[188] Green River Dev. Co. v. FMC Corp., 660 P.2d 339, 348–49 (Wyo. 1983).

[189] Wyo. Stat. Ann. § 41-4-503.

[190] *Id.* § 41-4-504.

[191] *Green River*, 660 P.2d at 346.

[192] *In re* Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 835 P.2d 273, 279 (Wyo. 1992).

[193] *Id.*

time set in the permit, which cannot exceed five years.[194] The state engineer can cancel the permit if the time limits are not met.[195] Alternatively, the state engineer may grant an extension for good cause shown.[196] After the appropriator perfects the water use, the appropriator submits final proof of the appropriation.[197] If there are no conflicts, then the appropriation is perfected and certificated.[198]

2. Nonuse of Water Rights in Wyoming: Abandonment and Forfeiture

The Wyoming loss-of-water-rights statute covers "abandonment" in Wyo. Stat. Ann. § 41-3-401 and "forfeiture" in Wyo. Stat. Ann. § 41-3-402.[199] The statutory language of both abandonment and forfeiture are nearly identical. For abandonment, the statute provides that

> [t]he holder of an appropriation of water from a surface . . . water source 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* . . . .[200]

For forfeiture, the statute states that an appropriator who has failed "*intentionally or unintentionally*, to use any portion of . . . water appropriated by him . . . *for a period of five (5) successive years*" may face forfeiture proceedings initiated by the state engineer.[201] Both abandonment and forfeiture of a water right only occur when the water right is not used during any five successive years.[202]

The primary difference between abandonment and forfeiture is who initiates the proceedings.[203] For abandonment, the person claiming abandonment must show: (1) that water was not used for a beneficial purpose, (2) that water was available for diversion during the period of

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[194] Wyo. Stat. Ann. § 41-4-506; *see also id.* § 41-3-401(a) (allowing the holder of an appropriation to a reservoir to apply for five-year extensions for applying water to beneficial use for use).

[195] *Id.* § 41-4-506.

[196] *Id.* § 41-4-506. For example, in *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, the Wyoming Supreme Court sustained an order granting an extension after considering that unavoidable litigation delayed the construction and completion of the reservoir, and finding that this was good cause for the extension of time to construct the reservoir. 578 P.2d 1359, 1364–65 (Wyo. 1978).

[197] Wyo. Stat. Ann. § 41–4–511.

[198] *Id.*

[199] *Id.* § 41-3-401.

[200] *Id.* § 41-3-401(a) (emphasis added).

[201] *Id.* § 41-3-402(a) (emphasis added).

[202] *Id.* § 41-3-401(a) (abandonment); *id.* § 41-3-402(a) (forfeiture).

[203] *Id.* § 41-3-401(a) (abandonment); *id.* § 41-3-402(a) (forfeiture).

nonuse, and (3) that the contestant will benefit from a finding of abandonment.[204] For forfeiture, the state engineer initiates the proceedings; however, the state engineer cannot initiate proceedings after the use of the water right has resumed, even if the water right holder had previously gone five successive years without applying the right to a beneficial use.[205]

3. Flexibility in Maintaining Water Rights in Wyoming

Wyoming's water law program is instructional in demonstrating flexibility in approaching perfecting and retaining water rights. While Wyoming courts have stepped back from earlier broad pronouncements that "[a]bandonment and forfeiture are not favored,"[206] courts still apply a level of flexibility in determining whether a water right is abandoned or forfeited.

Under Wyoming law there are a number of exceptions to forfeiture. As the case law in Wyoming at times seems to use the terms for abandonment and forfeiture interchangeably, it is possible that an exception under one could also be an exception under the other.

A water right holder can rebut a claim of abandonment due to nonuse by demonstrating that the nonuse was due to unavailability or to factors outside the appropriator's control.[207] The appropriator has the burden of explaining the nonuse by proving a lack of control over the circumstances, including non-availability.[208]

Further, there are specific exceptions for abandonment and forfeiture of water rights for irrigation use. The time frame for an appropriator's nonuse of water when there is no water to divert during an irrigation season is not included in the five-year successive nonuse period for loss.[209] Additionally, a water right for irrigation use is not subject to partial abandonment for failure of the appropriator to irrigate part of the lands described in the permit or certificate if the facilities to divert and apply the

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[204] *See* Matter of N. Laramie Land Co., 605 P.2d 367, 370 (Wyo. 1980).

[205] Wyo. Stat. Ann. § 41-3-402(a), (f).

[206] Sturgeon v. Brooks, 281 P.2d 675, 683 (Wyo. 1955).

[207] Scherck v. Nichols, 95 P.2d 74 (Wyo. 1939) (finding that where physical conditions, like low stream flow, that are beyond the appropriator's control and caused the nonuse, and where the appropriator used all the water available from the stream for irrigation, the involuntary nonuse of the remaining water right did not constitute abandonment of the water right); *see also* Scott v. McTiernan, 974 P.2d 966, 970–71 (Wyo. 1999) (abandonment not voluntary where circumstances beyond appropriator's control prevented exercise of the water right).

[208] Yentzer v. Hemenway, 440 P.2d 7, 13–14 (Wyo. 1968); *see also* Lewis v. State Bd. of Control, 699 P.2d 822, 829 (Wyo. 1985) (finding nonuse of a portion of a water right due to inadequate supplies due to drought or inability of the state agency in charge of administering water rights does not result in abandonment).

[209] Wyo. Stat. Ann. § 41-3-401(b) (abandonment); *id.* § 41-3-402(b) (forfeiture).

water existed in usable form during the period of nonuse and there was a not a sufficient supply of water available.[210]

a. Instream Flow/Leasing

The Wyoming legislature declared that both the storage or drainage for the purpose of providing a recreational pool and the "release of water for instream flows to establish or maintain new or existing fisheries" are beneficial uses of water that are not subject to loss.[211] The state of Wyoming can acquire existing water rights by transfer or gift for the purpose of providing instream flows.[212] Any right acquired and changed shall be in the name of the state of Wyoming and shall be administered by the state engineer and the board of control.[213] The board of control limits any water rights acquired for instream use to a specified stream segment, with the priority date intact.[214]

IV. SUMMARY OF TRENDS

Historically, the surveyed states struggled with maintaining the goal of full beneficial use when confronted by the necessity of protecting water right permittees and vested holders from loss due to nonuse because of excusable circumstances. These five states demonstrate the trends of protection of water rights despite nonuse:

- Flexibility in protection from loss before vesting process using standards of "reasonable diligence," extensions, long development periods, the opportunity for "good cause shown," and/or use of determined future development plans.
- Flexibility and protections from loss after vesting using standards of "res judicata" and "prima facie evidence," disfavoring loss, notice requirements, shifting burdens of proof, statutory and case law exceptions, diligence in marketing, resumption doctrine, tolling, investments refuting intent, and/or recognition of lack of control and economic hardship.
- Flexibility and protections from loss through management and emergency programs such as reservoir, underground, and carryover storage, municipal development periods, conservation programs, conservancy districts, water banking, trust water right programs, instream flow and temporary conversion programs, mitigation,

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[210] *Id.* § 41-3-401(f). While the forfeiture provision does not address partial nonuse of irrigation water during periods of insufficient supply, the same principle likely applies.

[211] *Id.* § 41-3-1001(a).

[212] *Id.* § 41-3-1007(a).

[213] *Id.*

[214] *Id.* § 41-3-1007(b).

marketing sale or lease facilitation, drought planning and temporary use, and/or source substitution and conjunctive use.

Loss of a water right is much less likely today because of these protections. As a result, the capital investment necessary to place water to beneficial use is also more likely to be protected by ensuring that when water cannot be diverted or withdrawn, the water is allowed to support other beneficial purposes without the risk of loss by the water right holder. In some instances, state water agencies or legislatures are direct and explicit in protections of water rights in these circumstances. For example, in Idaho, water use in mining operations is expressly exempted from forfeiture based upon the erratic nature of demand and pricing of the mineral product.[215] Other states have steadily expanded the list of exemptions from forfeiture or abandonment beyond the exemptions contemplated in the early days of the appropriation doctrine.[216]

When the water codes were first adopted, the tension was between the need for certainty in water rights (vesting) and the desire to maximize beneficial use of water through the application of forfeiture and abandonment laws. Today, there is a need to promote social, economic, and environmental objectives for greater resilience to inevitable water crises and to improve sustainability of water supplies and the environment. As water supply scarcity and uncertainty increase, so too does the incentive to waste or hoard water rather than reduce use at the risk of loss. This creates a disincentive to look for opportunities to conserve water.

This survey suggests a priority on conservation in achieving the balance between use maximization and water right certainty. The mechanisms for ensuring that scarce water supplies serve other purposes, when not diverted by the original appropriator, take many forms, including within a state's definition of "beneficial use," and facilitating allowed uses of the water right to include leasing, banking, instream uses, and other innovations.[217] The following examples of those mechanisms avoid waste by tempering the tenet of "use it or lose it."

Underground Storage: When storage space is available in an aquifer, there is potential to use it like available space behind a dam. Aquifer storage and recovery adds flexibility in the use of existing water rights, such as storing water unused because of crop rotation and then using it in a dry year.[218]

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[215] Idaho Code § 42-223(11).

[216] See descriptions of Oregon statutes in § III.C.3 and of Washington statutes in § III.D.3, above.

[217] *See* Schempp, *supra* note 35.

[218] Wash. Rev. Code § 90.03.370(3).

Carryover Storage: The storage right holder may retain such stored water for future years with the state retaining discretion to determine whether the carryover water is reasonably necessary for future needs.[219]

Water Conservation and Allowed Use or Sale of Water Conserved: States can include water conservation within the definition of "beneficial use" or exclude it from forfeiture to incentivize conservation. Additionally, some states allow a right holder to sell or lease conserved water and avoid losing the right for nonuse.[220]

Instream Flow: Several states classify recreation and fish or riparian area preservation as beneficial uses. Some states also exempt instream flow uses from forfeiture. Where instream flow rights may be temporarily donated, they can offer a means of meeting emergency environmental needs.[221]

Trust Right: States classify as beneficial use or exempt from forfeiture or abandonment the temporary water right transfers to the state for instream flow.[222]

Water Banks: Water banks have the potential to expedite water transfers, temporarily or permanently filling needs as they arise. Exempting from forfeiture water rights that are deposited in the water bank facilitates and encourages participation in the bank.[223]

Marketing—Sale or Leasing: In addition to facilitating temporary transfers through water banking, facilitating the sale or lease of water rights through expedited review programs promotes beneficial use while the right holder preserves certainty that its investment in infrastructure for use remains purposeful.[224]

Mitigation: Defining the use of water for mitigation purposes as beneficial or exempting it from forfeiture can allow more options for the use of water while encouraging greater responsibility in water management.[225]

Drought and Temporary Use: Many states provide flexibility in time of drought with statutory protections for nonuse and by allowing a

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[219] Am. Falls Reservoir Dist. No. 2 v. IDWR, 154 P.3d 433, 451 (Idaho 2007).

[220] Colo. Rev. Stat. § 37-92-103(2); Or. Rev. Stat. § 540.610(3); Idaho Code § 42-250; Schempp, *supra* note 35.

[221] Colo. Rev. Stat. § 37-92-103(2).

[222] Or. Rev. Stat. 537.348(2); Wash. Rev. Code chs. 90.38, .42; *id.* §§ 90.14.140(2)(h), .215.

[223] Colo. Rev. Stat. § 37-92-103(b); Idaho Code §§ 42-223(5), -1764; Wash. Rev. Code §§ 90.14.140(2)(i), .92.070.

[224] Colo. Rev. Stat. § 37-92-103(b); Or. Rev. Stat. § 540.610(2)(m); Wash. Rev. Code § 90.14.140(1)(*l*).

[225] Idaho Code § 42-223(10).

temporary change in use, place of use, or point of diversion, without complying with the usual notice and waiting requirements.[226]

Source Substitution: Defining source substitutions, such as recycled water, desalinated water, and wastewater, as a beneficial use or exempting them from forfeiture removes the threat of losing the right to the old water source and makes these opportunities more viable.[227]

V. CONCLUSION

The prior appropriation system was well-suited for a time when the West was sparsely populated. The system proved useful in promoting the productive settlement and development of land and resources. The task of water appropriations, however, is essentially complete. Now, the system must be adjusted to ensure that existing appropriations address current and future needs and values.

If one were to characterize the nineteenth century as an era of regime adjustments to foster the use of water for the public good, the current century will be characterized by disruption. Disruption caused by climate change, which will be unpredictable in severity, location, and duration, and will impact regional economies and entire water-using sectors.[228] The past, always so useful in water management, is no longer an accurate predictor of the future.[229] In this era of climate-based disruption, policy makers, water managers and the courts will be challenged by water users' need to adapt, that is, to become resilient in the face of unknown change.[230]

Fortunately, over the last decades, states have already faced periods of disruption and nonuse. While not perfectly aimed at climate-based disruption, western water law is composed of the legal means to recognize and reward investments needed to withstand climate challenges while ensuring certainty of water rights, including the programs summarized above: underground storage, carryover storage, water conservation and use and sale of conserved water, water banking, trust water right, instream flow, mitigation, marketing-sale or lease, drought and temporary use, and source substitution. This will go a long way in providing the flexibility

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[226] Colo. Rev. Stat. § 37-92-308(7); Idaho Code § 42-222A.

[227] Idaho Code § 42-223(3); Or. Rev. Stat. § 540.610(2)(h), (i); Wash. Rev. Code § 90.14.140(1)(j), (2)(g).

[228] *Climate Change Impacts in the United States: The Third National Climate Assessment* (U.S. Global Change Research Program, Jerry M. Melillo, Terese (T.C.) Richmond & Gary Yohe eds., 2014).

[229] Robin K. Craig, "'Stationarity Is Dead'—Long Live Transformation: Five Principles for Climate Change Adaptation Law," 34 *Harv. Envtl. L. Rev.* 9 (2010).

[230] Aris Georgakakos et al., ch. 3: "Water Resources," *in Climate Change Impacts in the United States: The Third National Climate Assessment*, *supra* note 228.

needed for adaption to the physical and economic disruption of a changing climate.