
Colorado Water Law: Use It or Lose It, Fact or Fiction?

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Use It or Lose It. You've heard the phrase; it seems to apply to many facets of our life and for those of us intimately connected with water, or even those that are not, the phrase often is used to describe our system of water rights allocation and use. It's rather convenient because it is familiar phrase, it's poetic and short and sweet, and after all, it seems applicable to a system of water rights that is premised on beneficial use - consistent with other familiar water rights terms like: *first in time*, *first in right*; *anti-speculation*; *beneficial use*; and of course, *usufructuary*. What could be better?

That seemingly rhetorical question leads to a discussion of the applicability of the phrase in our system of water administration. It turns out, the advice that you had better use your water right or you'll lose it is correct in some cases. But in others, it may be that you do not use your water right, but you won't be at risk of losing it. Further, it could be that when you think you are using your water right you are still at risk of losing it. If a simple phrase can be turned upside down and sideways in several ways, it's best to be cautious about using it. It's probably not the first time that a simple phrase that rolls off the tongue so easily made things more difficult to understand.

Early in 2015, the Colorado Water Institute, led by Reagan Waskom, contacted then State Engineer, Dick Wolfe to ask for the State Engineer's Office assistance in facilitating a process with the objective of identifying the substance of that phrase, *Use It or Lose It*; and clarifying whether and when it is applicable in Colorado water law. The State Engineer's Office was happy to be a part of the effort and the Colorado Water Institute invited numerous stakeholders involved in water use and administration in Colorado to a series of meetings. The stakeholder group represented agricultural use, municipal and industrial use, recreational use, and environmental interests. The group included water users, attorneys, consultants, and representatives of the Governor's Office and the Department of Natural Resources. The outcome of this group's efforts, through three meetings and e-mail review of a developing document, was [Special Report No. 25](#) ("The Report"), available on the Institute website. The Report, titled *How Diversion and Beneficial Use of Water Affect the Value and Measure of a Water Right*, is a well-contemplated discussion that explains, through answers to frequently asked questions, the areas where *Use It or Lose It* is applicable, and where it is not.

It turns out that we can consider five areas for which *Use It or Lose It* is a consideration for water users, and a potential area of concern. Those five areas are: 1) Maintaining a conditional water right, 2) Administering an absolute water right, 3) Abandoning a water right, 4) Changing the use of a water right, and 5) and Intentionally applying a water right to conservation or another use through an administrative approval.

Five Areas of Concern

1. Maintaining a Conditional Water Right (Water Court)
2. Administering an Absolute Water Right (Division of Water Resources)
3. Abandoning a Water Right (Division of Water Resources, Water Court)
4. Changing the Use of a Water Right (Water Court)
5. Applying Intentional Conservation to a Water Right or Applying Water to an Undeclared Use (Division of Water Resources, Water Court)

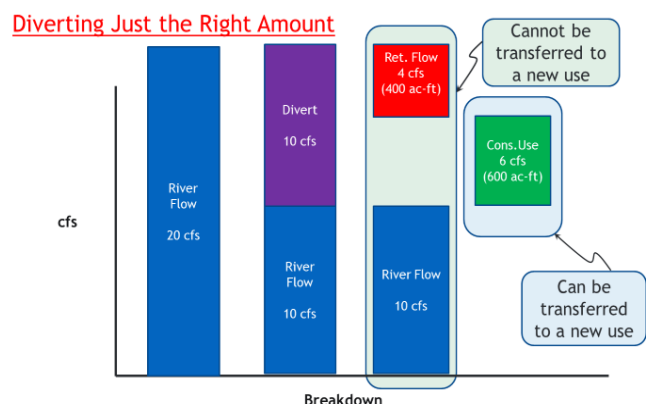
For each of these five areas, there is a greater or lesser potential to apply the *Use It or Lose It* principle. Consider first, the idea of maintaining a conditional water right. In Colorado, the law allows a water user to acquire a decree for a water right from the water court, including a priority date for administration purposes, before having the ability to put the water to beneficial use. However, the applicant must show the plan for the water use is not speculative and that the water can be put to beneficial use. This is a *conditional* water right. The applicant must also be diligent about developing the ability to put that water right to beneficial use and if the applicant cannot return to the water court at regular intervals and demonstrate reasonable diligence in developing that beneficial use, the water right can be canceled by the water court. This is a true case of use it or lose it.

Second, consider the potential to lose an absolute water right, that is, a right whose beneficial use has been affirmed by the water court and been made *absolute*. The extent to which that water right is used or not over a period of many years may vary. However, absent an abandonment proceeding, the Division of Water Resources will not, through its administrative authority alone, curtail the use and reduce the water right because of limited use in past years. The Division of Water Resources has no such authority. Therefore, in this case, the water right may have not been used to its full extent, but the owner of the water right will not lose it.

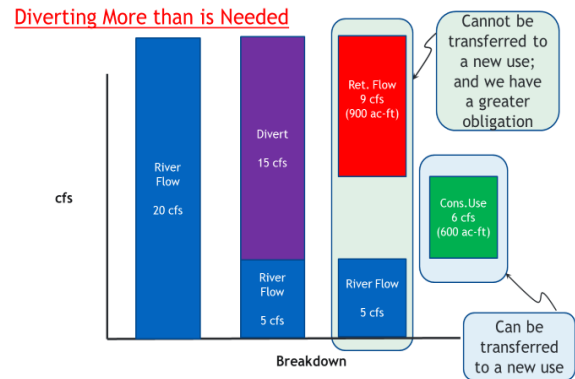
However, in regard to the third area of concern, the lack of use of a water right in this preceding scenario may lead to loss through an abandonment of the water right by the water court. A prolonged period of nonuse may lead to the water court's consideration of the abandonment of a water right if the owner of the water right has an intent to abandon. In this way, Colorado's system of water right management and allocation ensures that water users that have no intent to continue use of a water right into the future are not allowed to retain that right, in effect, influencing the ability for new appropriations to occur with certainty.

Consideration of the fourth area of concern is important, especially as water right owners consider the potential to change the use of their water right in the future. A common misperception of water users, especially when it comes to water rights used for agricultural irrigation, is the idea that diverting the full

amount of the water right, whether it's needed or not, will create a record of beneficial use that will enhance the value of the water right at the time the water court considers it in a change of use case. However, in so many situations, the law limits the amount of the water right that can be transferred to a new use to that amount that was consumed, not the amount that was diverted. Note the progression in the chart to the right. A certain amount of water flows in the river, 20 cubic feet per second ("cfs"). The owner of a water right then diverts half of that, 10 cfs. Of that 10 cfs, only a portion is consumed. The amount that was diverted and applied to the crop but not consumed, and instead returned to the stream through underground or surface flow cannot be transferred.



For this fourth area, one might suggest it's best to be safe. Why not divert all you can, 15 cfs instead of 10 cfs? Where is the harm? The harm occurs in two ways. First, the diversion impacts a stream reach by taking water from it, adversely impacting the riparian system and preventing junior water rights from putting water to beneficial use. Second, it creates a difficult obligation for the changed use. As seen in the chart to the right, due to required provisions in a change of water right case that the applicant maintain return flow, the applicant must develop the means of replacing a larger return flow amount both during the diversion season and in the winter.



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Recently, I was scheduled to speak at a conference on this topic and the night before the talk, I ran into an experienced water resource consultant who analyzed water right changes for clients. Without knowing the specific content of my talk, she remarked about how diversions that were in excess of the amount needed for the use made things difficult for her to achieve the best outcome for her clients. Therefore, this is not just a theoretical issue.

For the fifth area of concern, it is true that reducing diversions or diverting water for a beneficial use that is not part of its decreed water right may lead to the loss of the right in general situations. However, if the reduction is for deliberate conservation purposes or if the undeclared beneficial use occurs as part of an administrative approval, recent laws protect that reduction from leading to abandonment or an impact on the amount of water that can be transferred in a change of water right case. In this area, we can conclude that you may not use the water right, but under these circumstances, you also will not lose it.

Having looked at these five areas of concern, and just scratching the surface of the complexities inherent in each, it turns out that this phrase, *Use It or Lose It*, can be sound advice in some situations and in others, can lead to actions that are not effective, or worse, can create problems for the owner of the water right and other water users on the river. Through all this discussion, we don't want to lose sight of the fact that the time-tested system Colorado uses to allocate water rights is heavily premised on the required application of water to a beneficial use, without expanding that water right in, among other things, the amount or type of use. Our system prevents speculative appropriations of water, but does allow changes of a water right, preserving the priority of the right, as long as that change does not cause injury. After many discussions on this topic with water users around the state, it seems that perhaps a better phrase would be:

USE IT

by establishing and maintaining a pattern of beneficially using it for its decreed beneficial use over a representative period of time while in priority, without waste...

OR LOSE IT

Of course, that makes a helpful point, but is a little unwieldy as a helpful phrase. For now, I'll leave you with the thought that Colorado water users are smart and sophisticated in their use of water and can only be more effective by looking further into this topic. The Report from the Colorado Water Institute is a great start.

About the author: Kevin Rein was appointed to the position of State Engineer and Director of the Division of Water Resources by Governor Hickenlooper on July 13, 2017. Kevin has worked at the Division of Water Resources since 1998 as a Team Leader and Chief of Water Supply, and most recently as the Deputy State Engineer for intrastate water supply and water court matters. Kevin directs the performance of the division's responsibilities, which include administration of water rights in Colorado, issuing well permits, performing administrative approvals for water use, administering programs that ensure the safety of dams and the safe construction of water wells, and providing information and education resources to the public. Prior to coming to the Division of Water Resources, Kevin worked in utility engineering, business automation consulting, and water resources consulting. Kevin is a native of Colorado and a graduate of Colorado State University.