

Forfeiture and Abandonment

New Mexico Acequia Association Fact Sheet*

There are two different ways in which water rights can be lost under New Mexico law: forfeiture and abandonment.

Forfeiture is non-use of a water right for four consecutive years, followed by a written notice from the Office of the State Engineer (OSE), and then followed by one additional year of non-use after the notice. Unless you receive a notice from the OSE regarding non-use of your water right, you are not in danger of forfeiture of your water right.¹ The OSE almost never issues notices of non-use, but if this occurs, you should make every effort to put your water right to use within one year. If you have defenses or legal excuses for non-use, you can raise them as arguments against forfeiture (see below).

Periods of non-use longer than four years can result in abandonment, even without notice from the OSE. New Mexico courts have not yet given a precise definition of abandonment in terms of the number of years of non-use. Courts find abandonment when they are convinced that someone has intended to give up their water right. For example, if someone constructs a house on irrigated land, a court would probably find that the water right holder intended not to use the water right on that land, and that the water right was abandoned for the area covered by the house. (You can abandon a portion of your water rights, but retain the water rights on that portion not affected by the construction or the non-use, as long as it is still irrigable and you continue to irrigate it.)

If there is no construction, and the land is simply left fallow for a period of time, New Mexico courts are developing a very complicated formula for determining whether this shows intent to abandon the water right. Part of the formula will allow a water user to come forward with any defenses or legal excuses for non-use, but the longer the period of non-use (for example, twenty-five consecutive years), the harder it will be for a water user to raise these defenses.

Who determines whether there has been forfeiture or abandonment?

Parciantes may not find out about any claim of forfeiture or abandonment of their water rights until their stream system is adjudicated. At that point, if the OSE has evidence of prior forfeiture or abandonment, it will ask the court to make a determination of no water rights on that tract. *A court determination is the only official determination of whether someone has lost his or her water right.* Outside of a court proceeding, the OSE may express an opinion about whether a water right has been lost, but that opinion is not determinative, and if there is disagreement about their opinion it must be resolved by a court.

¹ However, it is possible for the State to claim forfeiture without giving written notice if the four years of non-use occurred before 1964. 1964 was the year the state forfeiture law was changed to first require written notice by the OSE to the water user. Prior to that, forfeiture occurred automatically after four consecutive years of non-use, with no notice required. So in some instances, where the OSE has sufficient evidence of non-use prior to 1964, people have lost their water rights, even though that evidence wasn't brought forward until the present time.

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For technical or legal assistance, please contact the Taos Valley Acequia Association at 575-758-9461
or New Mexico Legal Aid at 1-800-373-9881.*

Because of these risks and uncertainties, we offer this advice to Acequias parciantes and Acequia leaders:

- **IRRIGATE YOUR LAND!!!** There is no better way to avoid the problem of claims of forfeiture or abandonment on your Acequia than to irrigate ALL your land on which you have water rights! If there has been a long period of non-use, irrigate your land right away to break the chain of years of non-use.
- Defenses and legal excuses for non-use: State law provides an excuse for non-use because of military service by the water right owner, lack of water reaching the land (in a dry year) or other reasons beyond the control of the water user. If any of these reasons apply, document them!
- If you have inactive parciantes on your Acequias, or lands that you are not currently irrigating, create a water bank so that those water rights are not forfeited or abandoned. (This is described below.)
- Avoid constructing or placing any other obstructions on irrigated land. For construction that has already occurred, create a water bank and place any affected water rights in the water bank.

Acequia Water Banking

The other major tool for avoiding forfeiture or abandonment of a water right, besides simply irrigating, is for your Acequia to establish its own water bank and place water rights that are not being used in the water bank. Although the phrase water bank can mean a number of different things, we refer here to a 2003 state law allowing individual Acequias to set up water banks. The key provision of this new law is that any water rights placed in the water bank are not subject to loss for non-use while they are in the bank. This law has nothing to do with marketing or selling water rights off the Acequia, which many Acequias are opposed to.

It is very easy for an Acequia to set up a water bank. No approval of any agency is required. The Acequia can simply adopt a policy or amend its bylaws. New Mexico Acequia Association and New Mexico Legal Aid have drafted a sample bylaw for water banking. It is also easy for a parciante to place his or her water right into the water bank and then remove it when he or she is ready to use the water right again. Contact NMAA or NMLA for more information about this very important tool for protecting water rights.

*Adapted from a fact sheet provided by the New Mexico Acequia Association