

## Water Right Abandonment

The Kansas Water Appropriation Act says a water right may be considered abandoned after five successive years of nonuse when there is no due and sufficient cause for that nonuse.

### What constitutes due and sufficient cause?

Kansas does not promote a policy of “use it or lose it,” nor does it want water right holders to lose their water rights through nonuse. Both statute and regulation define due and sufficient causes for nonuse of water rights. To maintain your water right, it is essential that you understand the law and comply with its requirements.

Due and sufficient cause must be something that prevented, or made unnecessary, the authorized beneficial use of water. Some examples are provided here, but each case is reviewed on its own merit.

### In all cases, the owner must maintain the diversion works in a functional condition.

Exceptions may include:

- Temporary suspension of use for a definite period of time to permit soil, moisture and water conservation as documented through the filing of an approved water conservation plan prior to nonuse.
- Physical problems with the point of diversion, distribution system, place of use, or the operator, which may constitute due and sufficient cause only for a period of time reasonable to correct the problem.
- The water right is located in an area of the state that is closed to new water appropriation, either by regulation or order of the chief engineer, where means of diversion are available to put water to beneficial use within a reasonable time.

*Moisture from natural precipitation is adequate to produce grain, forage or specialty crops, as determined by the moisture requirements of the specific crop.* Staff may review rainfall, seed planting rate, crop type, ability to irrigate, land tax classification (dryland or irrigated tax rate) and other factors to determine if adequate moisture either prevented or made the beneficial use of water unnecessary. Water right holders should contact the Division of Water Resources to discuss what information is needed to demonstrate this due and sufficient cause.

*A right has been established, or is in the process of being perfected, for use of water from one or more preferred sources in which a supply is currently available but is likely to be depleted during periods of drought.*

*Water is not available from the water source for the authorized use at times needed.* An example would be if drought conditions exist and pumping from your well or stream is not possible.

*There is a physical problem with the point of diversion, distribution system, place of use, or the operator.* This circumstance constitutes due and sufficient cause only for a period of time reasonable to correct the problem.

*Conditions beyond the owner’s control prevent access to the authorized place of use or point of diversion, as long as the owner is taking reasonable affirmative action to gain access.*

*The water right relates to an alternate source of water that was not needed and was not used because the primary source was adequate to supply the needs of the water right owner.* In this case, the owner must maintain the diversion works on the alternate water source in a condition that will allow the owner to effectively use the alternate source in a timely manner.

## Proactive Measures

*Using management and conservation practices that require less water than is authorized.* To qualify, this must be documented by filing an approved water conservation plan prior to nonuse.

*The chief engineer has previously approved placing the point of diversion in standby status.* To qualify, the owner must request this status from the chief engineer before the nonuse. Standby status can be considered if the point of diversion is maintained in operable condition and can be hooked to a power source within a reasonable amount of time to allow it to function as a standby source. Both the primary well or wells and the standby well or wells must be metered by order of the chief engineer or as a condition of the water right or permit. Standby wells must be located close enough to the primary well that both withdraw water from the same local source.

*Enrolling the authorized place of use in a multiyear federal or state conservation program that has been approved by the chief engineer (such as the USDA Conservation Reserve Program) that can be adequately documented by the owner.*

*Enrolling a water right in the Water Rights Conservation Program protects an unused water right from being declared abandoned for nonuse during the contract period.* While the Water Rights Conservation Program has been retired, it still constitutes due and sufficient cause for nonuse during the remaining term of the contract for those water rights approved for enrollment.

### Notice After Three Years of Nonuse

If water use reports indicate there have been at least three consecutive years of nonuse, regardless of the cause, the Division of Water Resources will notify the water right holder(s) by certified mail. This is to make the owner(s) aware of what the law requires and to give the owner(s) ample opportunity to take proactive measures to prevent abandonment.

## Hearing

Before a water right is terminated for nonuse, the chief engineer must conduct a hearing to allow the water user to present evidence of due and sufficient cause to show that the water right has not been abandoned. Typically, the chief engineer's staff will carefully research the history of nonuse with the water right holder before reaching this step, but the burden of proving due and sufficient cause for nonuse ultimately rests with the water right holder. If available facts fail to show due and sufficient cause, the chief engineer will schedule a hearing and notify the water right owner(s) at least 30 days prior to the hearing date.

### Voluntary Closure of an Unused Water Right

If a water right holder intends to abandon a well that is tied to a water right, or no longer wishes to maintain a water right, he or she should contact the Division of Water Resources. Water rights may be closed voluntarily to avoid a costly hearing. Abandoned wells must be properly plugged and certain information filed with the Kansas Department of Health and Environment.

### How do abandonment statutes serve public interest?

A key tenet of Kansas law is that water is to be made available for beneficial purposes. Requiring the chief engineer to document and terminate water rights that have been abandoned by their owners ensures that individuals are not able to hold on to water rights that they do not intend to use. If they were allowed to do so, it could prevent water right development by others who have a legitimate use for this public resource. In areas that are fully appropriated, or are closed to new appropriations, the law protects the resource for those who hold legitimate water rights and recognizes proactive conservation measures as a due and sufficient cause for nonuse.