‘Use it or lose it’ not always the case for water right holders

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Dry Creek

“Relinquishment.” Few words in the vernacular of Western water law elicit more disdain, fear and anger on the part of water right holders. This article seeks to clarify the concept of relinquishment, and inform water right holders of actions they may take to protect their rights.

A bit of background

Water rights in most cases are documented by water right certificates, which authorize a maximum instantaneous rate (gallons per minute/cubic feet per second) at which the holder may withdraw water; the annual duty, or volume (acre-feet), that may be withdrawn over the course of a year; and in the case of irrigation, the number of acres that may be irrigated. These listed quantities are maximums that cannot be exceeded; the actual water right is defined by those
quantities put to beneficial use. It is the difference between the actual beneficial use of water under a water right, and the maximum quantities authorized on the water right, that is potentially subject to relinquishment.

In Washington state, relinquishment — otherwise known as “use it or lose it” — refers to a law enacted in 1967 under Chapter 90.14 RCW (online, see ubne.ws/2b1pcmz). This law holds that any water right, or portion of a water right, not put to beneficial use for a period of five consecutive years, without sufficient cause, is relinquished to the state.

The intended purpose of this law is to provide maximum net benefits through the allocation of public waters, and to prevent hoarding of water rights for some future use. If a water right holder does not put the water to beneficial use for a period of time, that right should revert back to the state for re-allocation to someone who would put the water to beneficial use. In river basins such as Walla Walla, where water is fully or over-allocated and instream flows are not being met, relinquished water is not being reallocated to new rights, but goes back to the source to service existing rights.

The relinquishment law does provide potential relief in the form of statutory exceptions (21 currently) to relinquishment, which constitute sufficient cause for non-use. These exceptions include reduced water use through normal crop rotation practices, and drought or other unavailability of water. These exceptions have been narrowly interpreted by the courts, and the applicability of any exception is very case specific.

As water use has evolved, there have been unintended consequences of this law. A prime example is that relinquishment can serve as a disincentive to water conservation, whereby a water user employing more-efficient irrigation practices, and using less water, could potentially have that saved water relinquish to the state.
Efforts to update the law to have it reflect current conditions are proposed nearly every legislative session, but proposed changes to the law are extremely contentious and normally fail to pass. Fortunately, there are programs available through which water right holders can proactively protect their water rights from relinquishment.

Walla Walla Watershed Partnership

The Partnership is a local entity created through legislative action in 2009. One of several programs the Partnership offers is a local water bank. Water right holders may deposit all, or some portion, of their water right into the bank. While in the bank, the part of the right that is valid is protected from relinquishment; the five-year “use-it-or-lose-it clock” is stopped for the duration of the time the right remains in the bank. There is no fee for placement of a right in the bank, and it is very flexible in terms of being able to pull the right out of the bank when desired. There is no review of historic use of water as part of the banking process.

Depending on the particulars of the water right and the objectives of the water right holder, there are also water leasing options available through the Partnership.

For more information regarding the bank and other Partnership programs, you may contact Ross Hyatt at 509-524-5216 or Chris Hyland at 509-524-3365.
State of Washington Trust Water Right Program

The state, through the Department of Ecology, has a trust water right program through which a water right holder may donate or lease a water right. These programs, like the Partnership’s, statutorily protect an enrolled right from relinquishment. There is a cursory review of use of water under the right for a donation, and the terms of the donation are negotiated with Ecology.

For more information you may contact Eric Hartwig, Ecology watermaster, at 509-540-7680.

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