

Use it or Lose It - Water Law, Exhibitionists, and Parting the Red Sea.

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If you have a water right, make sure not only to use it, but use it properly. Failing such, under Washington's "Use It or Lose It" laws one of three things happens:

1. Your right is gone,
2. Your right is now smaller than you thought it was, or
3. Your right is exactly the smaller of (a) the amount it would be if you were a reasonably efficient water user taking the average of the highest prior two years water use during the most recent prior five year period of water use and (b) the amount of water allocated to you under your water right certificate. Clear?

This loss of your water right happens without warning, and no one tells you your valuable water right is about to evaporate (actually relinquished is the correct term). No one that is until you need to do something different with your right, seek to amend the Water Right Certificate to allow a new use or new place of use, or try and sell some of your water. It is at this time you face the Department of Ecology, take off your clothes, and are reminded of some of your less than flattering features. Well, actually everyone stays dressed, but when proving to the Department of Ecology the historic use or, as is sometimes the case, non-use, of water under your right, your less than flattering use records shine, ultimately defining how much water you legally have the right to use. Once it is determined that some or all of your right is relinquished, it cannot ever be recovered.

Sure you can apply for a new water right, but with the funding and staffing limitations at Washington State Department of Ecology, you will have to stand in line behind the billions of other pending applications to be considered about the time my two year old goes to college.

Sure you can buy someone else's extra water rights and move them to your property, if you can find some extra water which has not itself been relinquished, you can afford it, if the transfer is downstream, if

the transfer will not affect anyone else's rights, and if you can part the Red Sea.

So what do you have to do? Water users should carefully monitor their water use, clearly understand their water rights, and know the history behind the use of their water rights.

The first thing to be done is ensure you are acting within the scope of your existing Certificate of water right. Confirm the place of use and type of use for the water is consistent with the underlying Certificate. Determine how much water you can use under your Certificate and calculate how much water you are using. This can be roughly calculated using irrigation records, orchard records, aerial maps, or water meters. Remember, the amount of water you can legally use is the amount of water historically used, so long as it is not more than what your Certificate allows, and so long as your historic use was a reasonably efficient use of the water.

Next you need to understand and maintain a detailed history of the use of your water. Remember that you purchased the water right from your seller in exactly the condition he had it, together with the good, bad and ugly. So you must determine and document the historic use of the water to know what it is that you bought and own. If your seller relinquished the water right for non-use, then even though you have a water right certificate, you do not have a valid water right, something like holding a deed to beachfront property in Arizona.

Key points to remember:

1. Your right is relinquished (gone) if it is not properly used for any period of 5 years. (Note: there are a few exceptions to this rule).
2. Your right to the water is limited to the place of use, time of use, type of use and quantity of use defined under your water right certificate.
3. Your right to the use of water is limited to the two highest years use of the water during the prior five year period of use.
4. You must use the water in a reasonably efficient manner with reasonably efficient delivery and application methods.

5. If you are a buyer of property with a water right, you may want to require supporting factual data from your seller to confirm the validity of your water right.

6. If you must seek a change or transfer to a water right, you will work through the county water conservancy boards, which consist of local knowledgeable individuals who can help you through the process.