

Columbia-Snake River Irrigators Association Policy Memorandum

DATE: February 7, 2007

TO: Sen. Erik Poulsen, Chairman, Sens. Jim Honeyford and Bob Morton, and
Committee Members, Sen. Water, Energy, and Transportation Committee

FROM: Darryll Olsen, Ph.D., CSRIA Board Representative

SUBJECT: Follow-Up to the February 6, 2007, Hearing on Potential Relinquishment
Legislation.

A Summary Perspective: Understanding Water Right Relinquishment and
Beneficial Use Tests, Recommended Revisions to the Water Code:
RCW 90.14 Series and 90.03.380

Although existing water rights are affected often by the water code's current relinquishment and extent and validity (beneficial use) statutes, the code context and why it takes place are not broadly understood. This "summary perspective" defines the context for water right relinquishment (and beneficial use tests), identifies where relinquishment frequently occurs, and recommends specific statutory changes to enhance the use of existing water rights, while still respecting the basic intent for relinquishment provisions.

Why was "relinquishment" included in the water code?

- | The principal objectives of the relinquishment statutes are to: 1) prevent "speculation" by individuals who would hold water rights without putting them to beneficial use; and 2) allow for the issuance of additional water rights, when existing water rights are not being used or voluntarily abandoned.
- | The fundamental emphasis behind "relinquishment" is that a water right holder should either exercise the right to use water or allow another party to do so.

What is relinquishment of a water right?

- | Either full or partial relinquishment of a water right occurs when less than the full amount of the water right "nameplate" (stated amount on a water right) is used annually, over a five-year period. Non-use over a five-year period constitutes "relinquishment"--including extent and validity determinations for beneficial use.

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- Non-use is based on either voluntary abandonment or relinquishment without sufficient cause to prohibit use of the water right.

Under non-use conditions, are water rights “automatically” relinquished?

- No. A formal proceeding or review must take place to document the relinquishment by the state (WADOE). A water right is in good standing until formally determined to be in relinquishment.

For permits, the formal process for “*de facto* relinquishment” is equivalent in substance to “relinquishment” for a certificate, although the legal/administrative process differs. This can occur to a permit subjected to an extent and validity determination for proof of appropriation or for change/transfer. But the end effect is the same—loss of full or partial use of the water right. So being, the term “relinquishment” is often generically applied to several types water right reductions, including such measures affecting permits, and during extent and validity determinations of beneficial use.

- There exist many water rights that could be subject to relinquishment but have not been formally reviewed by the state. A majority of water right holders do not use the full amount of water, as stated on the claim, permit, or certificate nameplate.
- The state enforces relinquishment (or water right reduction through extent and validity tests) only when some type of action occurs, where the right is formally reviewed—such as for an amendment or certification (or re-certification) action; or formal adjudication proceeding.
- When reviewed, a water right is subjected to a “beneficial-use test” to determine extent and validity of use.

How is the beneficial-use test applied under an extent and validity determination?

- The commonly spoken phrase to describe the test is “use it or lose it.” Pragmatically, this means that some or all of the water right must have been put to actual beneficial use within the recent five-year period.
- For water rights undergoing amendments know as “changes or transfers,” the test is restricted further, particularly in the case of changes to place of use (where the physical area of use is expanded) or purpose of use.

What is the dominant focus for water right relinquishment? Where is it occurring?

- A huge majority (85% or more) of relinquishment (or extent and validity reduction) cases in the state are tied to water right changes and transfers. Usually, the water right being reviewed is using less than the nameplate amount allowed annually, for the most recent five-year period. When this occurs, some portion of

the original water right is reduced to correspond to the most recent five-year period of use.

- | A small number of water rights are being “relinquished” as part of the new water measuring rule implementation. A water right holder notifies WADOE that he does not need to install a measuring device, because he is not using the water or using less than the nameplate amount. This is effectively voluntary abandonment.
- | Some water rights are “relinquished” as they move from the permit stage to full certification. At this time, “proof of appropriation” is determined by WADOE. That portion of the water right not fully put to beneficial use is relinquished.
- | A very small number of water rights are being relinquished due to third-party complaints to WADOE that a water user does not have a water right (or some portion thereof), or that a water right holder is “wasting” water.

Are all water rights reviewed for potential relinquishment (or extent and validity determinations) when they are amended under a change or transfer process?

- | Yes. The standard is rigorous. A valid and full water right must exist, or some portion of the right will be “relinquished” at the time a superceding certificate is issued, per the change/transfer.
- | If the change/transfer involves a change in place of use—such as expanding the existing acreage for place of use by implementing efficiency measures (water spreading)—or if a change in purpose of use is proposed, then the extent of the right is limited to the two-year peak water use average across the most recent five-year period (RCW 90.03.380).

How many water rights are amended each year? What percentage incur relinquishment?

- | The current rate of processing water rights for change or transfer is about 500 annually. This is done by both WADOE and the Water Conservancy Boards.
- | Experience suggests that about two-thirds of the water right changes/transfers involve some form of water right relinquishment (or reduction via extent and validity test).

What about exemptions for relinquishment? Do they prevent legitimate water rights from being degraded?

- | To some extent, but not always. Although it may appear reasonable that exemptions should apply to all water rights, their application to all water right changes or transfers (including permits) is often vague; or the exemptions do not adequately address water use involving long-term efficiency gains and some other circumstances.

Do the current relinquishment statutes reward or discourage water-use efficiency practices?

- | The current relinquishment statutes and their interpretation can lead to poor management practices, including, in many cases, water right holders' loss of water that has been previously put to full beneficial use.
- | There exist equity problems as well, where water right holders who have made efficiency gains in years past the most recent five-year review period are not allowed to "keep" their saved water for further use. No reward for previous efficiency gains.

If legislative changes are made, which provisions should be modified?

- | Specifically, two areas of the water code should be changed: 1) the RCW 90.14 series, 90.14.140-160-180; and 2) the RCW 90.03.380 section dealing with water right changes/transfers and the beneficial-use test (extent and validity determinations).
- | Both directly, or indirectly, these two areas govern the beneficial-use test and water right relinquishment.

What changes would improve the water right relinquishment standards? What are the so-called "bright-line" standards.

- | It could be argued that the best approach would be a "bright-line standard" for the period of beneficial use and the period for invoking the beneficial-use test. Also such an approach would largely eliminate the need for relinquishment "exemptions" that become a target for misinterpretation or inadequacy.
- | One bright-line standard for relinquishment would be to define beneficial use as being the peak-year use over the previous twenty-year period of the water right. This standard would replace the existing five-year period, as stated within the RCW 90.14 series and RCW 90.03.380.
- | Another approach would be to ensure that efficiency measures or changes to purpose of use are credited as beneficial use for the existing water right, over the full life of the water right. This was the direction taken by the Senate in ESB-5106 (2003 legislative session, changes to RCW 90.03.380). This measure could be coupled with some form of abandonment changes to the RCW 90.14 series.

What about proposals for a "statute of repose" or limitation for the water right review period? Would this be an effective, or adequate, change?

- | It would be a small, very limited correction to the code. The statute of repose would limit how far back in time (five, ten, or fifteen years) a water right would be reviewed, but such a limitation does almost nothing to deal with the major issues surrounding relinquishment/beneficial use tests (focusing on a five-year period).
- | Also, bright-line standards, such as the twenty-year beneficial use period, render the statute of repose a moot issue (as the repose period is equivalent to the beneficial use period), while dealing with the significant relinquishment/beneficial use test problems.

What does the CSRIA recommend?

- | Unjust or unfair water right relinquishment/beneficial use actions will be best stopped through “bright-line” statutory changes—the “bright-line” approaches identified above should represent a clear course of action to be pursued by legislators. Failure to resolve effectively this issue will continue to financially hurt water right holders throughout the state and discourage economic development, particularly in Eastern Washington.

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TO: Sen. Erik Poulsen, Chairman, Sens. Jim Honeyford and Bob Morton, and Committee Members, Sen. Water, Energy, and Transportation Committee

FROM: Darryll Olsen, Ph.D., CSRIA Board Representative

SUBJECT: Water Right Relinquishment/Beneficial Use Standard--Use it or Lose It

In light of the January 6, 2007, hearing testimony on potential water right relinquishment (beneficial use test) bills, the following review is provided for your consideration.

Specific Issue:

Under the current RCW, water right relinquishment and beneficial use statutes should be changed to acknowledge *at least a 20-year period* for nonuse to trigger relinquishment (affecting all beneficial use, including water right extent and validity determinations), rather than the existing 5-year period.

The statutes should be changed to take into account the following issues and needs:

- **Long-Range Business Planning and Investment:** Industry and agribusiness firms make long-range decisions affecting water use that can, and do, affect 15-20-year operations, with new operational changes made thereafter. Business needs to be able to make long-term operational changes that will not lead to a relinquishment of the water right.

From a business perspective, a water right represents a fixed capital asset that should not be changed due to state relinquishment provisions. The asset must be real and not subject to diminishment over a financial investment period (usually 15-20 years for most capital projects).

- **Equity Considerations and Efficiency Improvements:** Equity considerations also should be taken into account for parties that have made water use efficiency improvements during the past 20-year period, but under the existing state water code cannot retain their allotted water right (consumptive use) for additional applications. They are not being treated fairly relative to parties making more recent efficiency improvements, as the water code now exists. This is particularly important in dealing with water right changes/transfers.

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In general, water right holders will have little or no incentive to use less water per unit of production (or benefit), if they cannot have assurances that the “saved” water they pay for (or have paid for) cannot be retained for further use or sale to another party. Current relinquishment statutes are a significant disincentive.

- Avoid Regulatory Overload: Rather than add additional provisions to the exempt status for water right relinquishment conditions, for specific cases of merit, make a “clean” change to the code by recognizing the 20-year period. Invoke simplicity.
- “It’s the Economy:” Water rights translate into real economic activity. This being reality, an ability to utilize fully existing water rights is paramount, if any real concern for proactive economic development is to exist within Eastern Washington.

The Eastern Washington economy needs a foundation to pay for state services and infrastructure. The failure to take full advantage of existing water rights—based on past, and demonstrated, consumptive use—is to ignore hundreds-of-millions of dollars in existing and potential economic income for state residents. More income means more state tax dollars.

Next Steps—Legislative Changes to RCW:

Existing RCW:

Several existing sections of the state water code provide for water right relinquishment provisions, including: 90.14.043, 90.14.130, 90.14.160, 90.14.170, and 90.14.180. Within these sections, the controlling reference to relinquishment is:

- “Waters of the state have been applied to beneficial use continuously (with no period of nonuse exceeding five consecutive years”...).
- Or, “Any person hereafter entitled to divert or withdrawal water of the state...who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to withdrawal for any period of five successive years shall relinquish such right or a portion thereof...”

Relinquishment and beneficial use provisions affect both surface and groundwater sources and water rights based on claims, permits, and certificates.

Recommended Change To:

All code references to relinquishment would insert new text, stating approximately:

- “Beneficial use will be based on the peak-year of water use, as applied over the most recent twenty-year period.”

- Or, “Any person hereafter entitled to divert or withdrawal water of the state...who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to withdrawal for any period of twenty successive years shall relinquish such right or a portion thereof...”

Section 90.03.380 (1) deals with water right changes/transfers--that involves a “relinquishment or beneficial use test”--and should be modified to be equivalent with the relinquishment statutes within the 90.14 series.

- “For purposes of this section, ‘annual consumptive quantity’ means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, based on the peak-year of water use, as applied over the most recent twenty-year period, or as stated within the water right certificate when less than twenty-years of water use has occurred since the issuance of the certificate.”

Further, relinquishment (and beneficial use tests) indirectly affects inchoate water rights for all water use sectors. Water right permits and certificates, for both groundwater and surface water, should be allowed to be transferred or changed, regardless of purpose or place of use (point of diversion would remain within the same body of water). Water right holders should be allowed to change the place of use or purpose for lands adjacent to or owned by the water right holder--and without an elaborate change/transfer process required.

An added section to 90.03.380 would state:

- “A person may change the place of use, purpose of use, or point of diversion for a water right, where the land is contiguous to the place of use of the water right, or if the land is owned or leased by the holder of the water right, and where the total amount of the water right is not increased. The water right holder will notify Ecology of such change at the time of the action”

