



# Where Land and Water meet

*Emerging partnerships in the West  
address water conservation issues*

Water is the most critical resource issue of our lifetime and our children's lifetime. The health of our waters is the principal measure of how we live on the land.

—LUNA LEOPOLD

**T**he western United States is defined by water—or, more accurately, by its scarcity. Ribbons of green mark the riparian zones that sustain life in an arid landscape. Access to water shapes the patterns of human settlement, as it has since the Hohokam civilization constructed elaborate dams and canals to grow crops and survive in what is now the Phoenix valley, more than 1,000 years ago. Subsequent settlers discovered that crops grown on rainfall alone in the East required supplemental water west of the 100th meridian, the line that bisects the Great Plains and serves as a geographic marker of the transition to the West.

The rules that govern water use in the West emerged from the mining camps during the Gold Rush, reflecting the key role water played in settling this region and the importance of sorting out competing claims with a minimum of bloodshed.

Much has changed in the American West, but the value of water remains a defining feature of the region. Today, in addition to the pressures of thirsty newcomers moving to the driest cities in the country, water managers are contemplating much less certain future water supplies in light of projected impacts of climate change. Scientists are already observing trends that include reduced mountain snowpack,

earlier runoff and lower streamflows during the hottest months of summer and early fall.

Land trusts may play a key role in responding to this challenge. As Colorado biologist Susan Lohr notes, water is the thread that creates and sustains relationships in rural communities; protecting and strengthening the connection between water and working landscapes is an urgent task in coming decades.

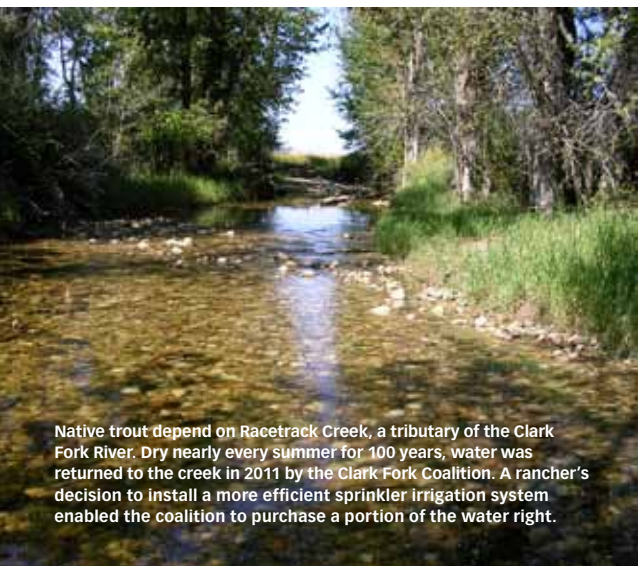
This article provides a brief overview of the rules that govern western water use, describes how water rights are addressed in conservation easements, and highlights innovative partnerships aimed at sustaining and restoring the health of rivers as an integral part of land conservation.

## Water Law 101

Distinct rules for water rights in the eastern and western states reflect different precipitation levels, land use patterns, cultures and other variances. Eastern states adopted the riparian rights approach, a rule based on shared use of streamflows by owners of adjacent lands. In the drier western states, a self-help rule based on the principle of “first come-first served” developed into what is now known as the prior appropriation doctrine.



"BEFORE" PHOTO/ANDY FISCHER, CLARK FORK COALITION



"AFTER" PHOTO/ANDY FISCHER, CLARK FORK COALITION

Native trout depend on Racetrack Creek, a tributary of the Clark Fork River. Dry nearly every summer for 100 years, water was returned to the creek in 2011 by the Clark Fork Coalition. A rancher's decision to install a more efficient sprinkler irrigation system enabled the coalition to purchase a portion of the water right.

committed to legally protected uses and develop these sources to meet new demands and uses, understanding the risk of being cut off in times of shortage.

Importantly, the prior appropriation doctrine separates water rights from land ownership, and allows water rights holders to lease or sell their rights to others. And, although a water right is a property right like land ownership, it can be lost by non-use—a rule sometimes referred to as “use it or lose it.” (This is not true for federal reserved water rights.)

The detailed rules that govern water use and management vary a good deal between states and even among local water supply organizations. All western states recognize that water is a shared resource subject to private use rights, and all now provide some level of protection for environmental flows, which allows innovative conservation efforts to protect and restore valuable western rivers.

### Tying Water to the Land

Colorado attorney David Kueter urges those negotiating conservation easements to pay close attention to water rights, both in the initial due diligence stage and during ongoing stewardship and monitoring phases. “Because water rights can be conveyed separately from the land,” he notes, “there is a risk that the landowner will sell the water after entering into the easement,” thus potentially endangering conservation values dependent on water such as wetlands, riparian habitat and fisheries. “The more you spell out up front, the less trouble you’ll have later,” he advises.

Because each state’s water laws are different, the model conservation easement language from Colorado or Arizona (see Resources ) would need to be adapted for inclusion in easements drawn up in another state. But, as a general matter, a land trust receiving a conservation easement covering a ranch that encompasses irrigated lands might include a deed provision explicitly providing that the grantors shall retain and reserve the water rights to maintain agricultural production and shall not transfer, encumber, lease, sell or otherwise separate the water rights from the ranch property.

When spelling out the water rights to be included in a conservation easement, experts advise land trusts not to overreach. “There’s a temptation to include all of a landowner’s water rights,” Kueter notes, “but the best approach is to encumber only those water rights that are necessary to protect the conservation values.” Lohr adds that a conservation easement should allow the landowner flexibility to engage in temporary leasing and other cooperative water sharing arrangements with neighbors during periods of drought.

Colorado rancher Bill Trampe worked with Susan Lohr to launch the Gunnison Ranchland Conservation Legacy program in the mid-1990s, when distant cities were offering high prices for agricultural water to meet their growing demands. “The outcry against water exports was strongest in our local communities,” recalls Trampe, “so the conservation easement looked like a good way to keep the water local by tying it to the land.”

Many ranchers have embraced this approach, adding up to an estimated value of \$50 million of water rights held in conservation easements in Colorado alone, according to a 2002 University of Denver *Water Law Review* article by attorney Peter Nichols.

### Partnering for Multiple Interests

Conservation easements are not the only legal tool to link land and water health (health meaning both water quality and quantity). Thanks to changes in western water laws and regulations over the past several decades, conservation organizations and state agencies can enter into a variety of agreements to protect and enhance streamflows, often in ways that protect the viability of working ranches at the same time.

Some states, such as Arizona and Montana, allow conservation organizations to acquire environmental flow rights through purchase or lease. Others, such as Colorado, only allow a state agency to hold such rights, although conservation groups frequently play an important role in identifying and facilitating the transfer. In some cases, landowners agree to modify their irrigation practices just enough to



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Arizona Land and Water Trust is working with landowners whose properties include key portions of the Aravaipa Creek, exploring both land conservation tools and water use agreements.

allow water to flow during critical periods for fish or recreation. All such arrangements are voluntary, and the variations are many.

The Arizona Land and Water Trust (ALWT) works with ranchers and farmers to link protection of both land and water resources through a combination of conservation easements and other voluntary agreements. The ALWT Desert Rivers Initiative provides landowners with incentives to protect and enhance streamflows and floodplain health while also sustaining productive agricultural lands and rural communities. For its part, the Rocky Mountain Elk Foundation includes language in conservation easements that empowers landowners to enter into such arrangements: “The Grantor may not sever any water rights from the Property except to legally designate those water use rights for instream flows.”

In Montana, the Clark Fork Coalition works with ranchers holding water rights in high-priority tributary streams to improve their irrigation efficiency; the coalition then leases the saved water to enhance streamflow during the late summer and early fall. Coalition Water Policy Director Brianna Randall remarks that these flexible contracts can be structured in any way necessary to meet the needs of landowners. “It’s not just a choice of having the water on the land or in the stream,” she says, “but instead, it allows continued irrigation *and* streamflow restoration.”

The Clark Fork Coalition is able to enter into such win-win agreements with irrigators using mitigation funds available through the Columbia Basin Water Transactions Program, an important funding source that also sustains streamflow restoration activities in Oregon

and Washington states. Landowners are partly motivated by the payments, and also by the promise that their water rights will be protected throughout the lease period from any challenge for non-use.

More recently, the coalition has been engaged in conversations with the Bitter Root Land Trust and other conservation partners about coordinated strategies to pursue collaborative land and water conservation efforts in the Bitterroot Valley. Bitter Root Land Trust Director Gavin Ricklefs notes that the partnership is at an early stage but expresses optimism for joint land and water conservation work, perhaps through phased efforts: “After we have a conservation easement in place, our stewardship work might include helping landowners implement infrastructure improvements that benefit agricultural productivity and restore streamflows.”

Ricklefs cautions that it takes time to build the necessary trust for such partnerships, both among conservation partners and with individual landowners. “We have to get to know each other,” he says, “but beyond that, we need to talk about shared priorities and opportunities for overlap in our conservation efforts.” Similarly, Colorado rancher Bill Trampe urges partners to strive for mutually beneficial and flexible arrangements. “We don’t know what the future holds,” he says, noting the increasingly large fluctuations in supply and demand, “but protecting agricultural land has to include protecting water as well.”

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## Working to Set Precedent

“In recent years, a handful of water right holders in the western United States have received a federal tax deduction for the permanent charitable contribution of entire and partial interests in water rights,” says attorney Thomas Hicks. “However, these deductions have been individual, one-off tax transactions that create no precedent regarding the various rights, interests and values implicated at the intersection of state water and federal tax laws.”

A new coalition hopes to change this. The Resource Renewal Institute—founded by Trust for Public Land co-founder Huey Johnson, and based in California—has formed a regional *Instream Water Transfers Coalition* comprised of leading-edge western water law and tax experts, as well as an existing network of nonprofit water transfer organizations to focus on establishing precedent that gifts of western appropriative water rights are charitable gifts.

“Coalition partners have already identified at least two individual conservation champions in Oregon and Montana who are willing to donate portions of their full water rights, maintain productive ranches, and ultimately achieve a favorable IRS precedent for the tax deductibility of a water right donation,” says Hicks. “This precedent will be a powerful and timely new tool for river conservation.”

FOR INFORMATION, CONTACT **TOM HICKS** AT [TOMHICKS@RRI.ORG](mailto:TOMHICKS@RRI.ORG).

## RESOURCES

- ◆ “Benefiting Landowners and Desert Rivers: A Water Rights Handbook for Conservation Agreements in Arizona”: [www.alwt.org/misc/DesertRiversHandbook.shtml](http://www.alwt.org/misc/DesertRiversHandbook.shtml)
- ◆ “Working With Water”: [www.clarkfork.org/images/stories/publications/vitalrivers/cfc\\_flow\\_2011-final.pdf](http://www.clarkfork.org/images/stories/publications/vitalrivers/cfc_flow_2011-final.pdf)
- ◆ “Water Rights Handbook for Conservation Professionals”: [www.coloradowatertrust.org/technical-assistance/water-rights-handbook](http://www.coloradowatertrust.org/technical-assistance/water-rights-handbook)
- ◆ Model conservation easement language and other resources: [www.coloradowatertrust.org/technical-assistance/resources-for-land-trusts](http://www.coloradowatertrust.org/technical-assistance/resources-for-land-trusts)
- ◆ “Stories From the Field”: [www.cbwtp.org/jsp/cbwtp/stories/stories.jsp](http://www.cbwtp.org/jsp/cbwtp/stories/stories.jsp)
- ◆ Law and Policy library, including links to resources on state-specific water laws: [www.cbwtp.org/jsp/cbwtp/library/show\\_all\\_section\\_items.jsp?section\\_id=10](http://www.cbwtp.org/jsp/cbwtp/library/show_all_section_items.jsp?section_id=10)
- ◆ *Protecting Surface Water Quality with Conservation Easements*: [www.lta.org/publications](http://www.lta.org/publications)