

Water Rights in the West: What every landowner needs to know



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Few things are as crucial to ranch operations as water. It is the key to crop yield, stock management, recreation, ecology and aesthetics. Yet water rights are often overlooked by new ranch purchasers or taken for granted by long-term operators. Overlooking water, even when there are no apparent issues (like a dispute with a neighbor over water in a ditch), can lead to expensive outcomes that may adversely impact a ranch's operations over the long term. Whether you have operated a property for generations or are new to ranching, it is a good policy to know both your own water rights and those of neighboring operations that use water from the same sources as you.

First, a quick primer on Western water from a non-lawyer.

Many people are surprised to learn that while they may own miles of river (in some states it may be river bed, in others just river frontage), it is rare that any private entity owns a single drop of the water in it. The water in nearly all western natural surface water systems like rivers, creeks, lakes and even springs, is owned by the people of their respective state and regulated by a state agency. This is also often the case for groundwater that is stored in aquifers, no matter how deep. What *is* owned by both private and public entities alike is the right to use that water in specified amounts, for specified uses, usually in specific places. This "usufructory right" is called a water right. Water rights thus grant their owners the exclusive right to use publicly owned water within a set of parameters. In nearly all cases, the specific details about amount of water, type of use, place of use, place where water is diverted from the natural system, period during which the water is diverted and used, and the age of the water right are critical aspects that cannot be adjusted without administrative and sometimes judicial approval. Using water outside the bounds of your water rights exposes you to fines, legal action and issues with other water users. In the small ranching communities of the West, such an outcome does you no favors over the long-term.

Most western states follow the doctrine of "prior appropriation" when it comes to distributing and managing their water. Prior appropriation effectively creates a pecking order for accessing water supply based on the first date that a water user can demonstrate the use of a water right on a given source. The older the provable first date of water-use, the higher the priority given to a water right, and the higher the priority, the surer the water right's owner can be that he will receive water when the source runs low. Priority date, the date that determines a water right's place in the pecking order, is generally the principal factor that is used to determine who may use water when supply is not enough to meet all the demand. Water is distributed to rights with older priority dates first, and junior priority water rights may be partially or entirely curtailed to ensure senior priority holders' supply. There are many court cases across the West that affirm this, meaning that even municipal supply and conservation flows have water rights and are subject to curtailment in the event of shortage if there are senior users that need water. Though priority date is a fundamental component of most water rights, the other attributes are also very important to know, and in most cases, are not easily alterable.

The main reason for such lack of flexibility in water rights management is that most sources in the West are over-appropriated, meaning that every last drop (and then some, when excess water got claimed in historical flood years) has been claimed with a water right. An implication of over-appropriation is that when anything changes the historical norm of how water has been used, be it amount, what the water is used for, when it is used, etc., it potentially affects the water available in the system for downstream users. There are a host of hydrological reasons that this is the case and it takes an engineering degree to understand them. What's important is that water rights doctrine generally prevents anyone from changing the status quo in a way that adversely impacts other water rights. Since some downstream water users may have senior water rights, any adverse result of changes upstream opens up a can of worms that usually ends in expensive court cases.

While prior appropriation provides the backbone to most western state's water rights systems (prior appropriation is written into some state constitutions), there is considerable nuance between them. For example, in some states, groundwater and surface water are administered and regulated together, in others they are separate. Some states manage changes through local water courts while others have a highly administrative system through a state engineer or agency.

Many states also have local agents—typically called commissioners or referees—installed to distribute and administer water supply. Within each state, there are also often sources like streams, aquifers or even whole regions that have their own specialized management rules. It behooves anyone with a stake in water or land to get to know the basic structure of water right administration in their respective state. A good place to start is with the Department of Natural Resources, which is the executive agency that typically houses the divisions tasked with protecting and managing a state's water. Don't stop there though—local water commissioners, irrigation companies and river conservancy districts can provide a wealth of practical, boots-on-the-ground knowledge about how water rights tend to work on specific sources.

History matters most.

Western water is rich in history—water rights claims tell the story of how the West was settled and tamed over the last century and a half. But the history of water rights and water-use is much more valuable than as fun dinner table trivia. In water, history dictates the present and the richer the body of records about water-use, the better. If the time comes when components of a water right are challenged or reevaluated by a state agency, historical evidence is essential. When it comes to resolving questions about distribution, conflicts that may occur on sources (water is for fighting over, after all) or desired changes to water rights, the bigger the body of records to provide evidence of robust use of water over as long a period as possible, the stronger the position of the holder of the rights. Anyone with a water rights portfolio should devote some time to finding as many of these records as possible. You can learn a lot about your ranch's history, and importantly, you can be more certain that your water rights, as you understand them, are defensible.

What records may exist? They can range from notes between neighbors at the turn of the century describing how they would split up water on a ditch, to records of hay or crop production, even grazing records. Literally any kind of evidence that water was put to beneficial use is important—maps, letters, old receipts for haying services or sales, family photos that show irrigation and grazing animals in the background, anything. This historical, institutional knowledge can also be captured from previous generations of land operators. There are many instances when it can be very valuable to do formal video depositions of stakeholders who can recollect how land was operated. For example, a now 90-year-old

child of homesteaders can provide an invaluable, robust historical account of how the land was brought into production and when, how much crop was produced, how many cattle fed, homes built, etc. This provides a credible history of water-use that can be put on a timeline and extrapolated to defend the amounts of water that have been claimed, the uses of the water and other important aspects of today's water rights. If water didn't get used for a period because of unforeseen factors like health or impoverishment, that is also critical to know. For example, if a historical operator was forced to stop irrigating for several years due to a string of health crises, but never intended to stop using water, those facts matter. This is not an uncommon dynamic to discover as you dig into the history of a property. As that generation is rapidly disappearing, sources of rich historical accounts of water and land-use vanish, too.

Some states have devoted significant resources to collecting and protecting historical records related to water. Colorado State University in Fort Collins has an amazing Water Library that houses a treasure trove of such documents. At the end of the day, however, these institutions only house what records have been donated and are not comprehensive. It behooves anyone with water rights to make the effort to find and aggregate as much of this information as possible. If you buy a ranch, ask for historical ledgers, operating notes, journals, etc., and if you happen to find them in a barn or old ranch house, keep them. Do your best to capture the boots-on-the-ground knowledge of land- and water-use from older generations before it is too late and they can no longer share it.

Use it, and use it all.

Having evidence that water was put to beneficial use at different points in time is useful, but what's more important is that a water right holder can demonstrate the full use of a water right over time. Many people have heard the mantra "use it or lose it" with respect to water, meaning that if you don't use a water right for a certain amount of time, you risk losing it. That is certainly the case when it comes to agencies deeming a water right abandoned, but there are some important nuances to understand. If you have a historical water right that says it irrigates 500 acres and you can only prove that it has ever been used to irrigate 200 acres, there is a real risk that upon review (for example if you want to change something about the right), it could be deemed that your water right is actually only enough for 200 acres, because that is the actual, historical use. As a result, you may lose a portion of the right because it cannot be demonstrated that the full amount has ever been used. The smaller the amount of use that you can prove, the weaker your footing to defend large face values on water rights. In most states, conservation flows or instream flows are exclusively managed by an agency, and claiming that you didn't divert water in order to preserve a stream outside of a designated conservation program will not suffice as water-use.

There are a number of programs being piloted across western states to allow water rights owners to temporarily leave water in streams for conservation without risk of abandonment or the implications of non-use. Each state has its own nuanced system and these instruments are not available everywhere, but state water resource agencies are a good place to start learning about options. There are pros and cons to being an early adopter with these kinds of programs; research them well.

As it relates to current operations, proving that a water right was diverted and used can help avoid abandonment, but proving that the full amount of the water right was diverted and used is more important. Understanding the implications on water rights of anything that may reduce the amount of water used, like more efficient irrigation methods, is critical. Sometimes this might mean it is advisable to engage a consultant or attorney. There are a host of measurement systems that can be used to modernize the

process of keeping these records, and in some places, it is done by commissioners and referees whose job it is to distribute water on a given source according to water rights. It is a good practice to interface with these individuals on distributed water sources to ensure that you understand what is happening and can review records.

Getting a handle on your water rights may seem akin to drinking from a fire hose, but it is wildly important. Western water is complex, contentious and rooted in rich history. For anyone who owns or operates a working landscape, making the investment to become an expert on your water rights can both give you an amazing window into the history of your property and region, and prove invaluable when the inevitable conflict arises.

About the Author: Kelly Bennett is a Colorado native whose great grandparents ranched north of Fort Collins. He is a co-founder of Ponderosa Advisors, LLC, a boutique firm focused on applying technology and analytics to natural resource issues. The company built and operates Water Sage, a web-based mapping and research platform for water and land information. Kelly's family operates the Hollowtop Ranch at the base of the Tobacco Root Mountains in Pony, Montana, where they raise registered Angus, wheat, and hay. His family is committed to supporting efforts to encourage and protect private conservation and the values of the West. Kelly has a strong interest in the intersection of resource issues, preservation of large landscapes, and private property. He holds a BS in Diplomacy and World Affairs from Occidental College, and serves on the Western Landowners Alliance Board of Directors.

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