

Western states are creating water markets without compromising the prior appropriation doctrine

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For more than a century the prior appropriation doctrine has been the underlying principle for water law in the Western states. Based on the principle of "first in time, first in right," prior appropriation allows the first person who puts water to a beneficial use, a right to continue that use without interference from those with junior rights. Because the doctrine limits water claims to uses that require diversion, those who were quickest to divert water from rivers and streams were rewarded with the most senior rights.

Development of water rights under this concept typically came at the expense of instream uses and it has been difficult for anyone to assert a right that allows water to remain in a stream. Over the years though, people in the West have come to recognize the social, economic and environmental importance of instream flows.

As pressures grow to consider instream flow values in creating water policy, many Western states are changing their laws to authorize voluntary transfers for instream use through water markets.

Montana rancher Bob Hanson, White Sulphur Springs, helped make market transactions a reality in the Treasure State. Hanson, a board member of the Montana Farm Bureau Federation, feels landowners need an alternative to government regulation to protect fish. In an effort to provide that alternative, Hanson co-authored the state's innovative water leasing program, which allows farmers and ranchers to generate income by leasing their water rights to private organizations for fish habitat.

"Leasing water makes it possible for farmers and ranchers to market their water rights for fish," says Hanson.

Hanson saw the leasing program take effect in 1995 while serving as the Farm Bureau's representative in an unlikely partnership of environmental and agricultural groups. The two sides came together to address water right sales for instream flows with the hope the sales would benefit fish habitat.

Until that time, the groups had been opponents in the state legislature over water issues. The Farm Bureau opposed any legislation that would result in water being transferred out of agricultural production. Finally, the water leasing program was something both sides could agree on.

The Farm Bureau had good reason to support the leasing program because it was consistent with its fundamental commitment to protect private property rights. A basic principle for any property right is that it can be bought or sold. The bill solidified the idea that water rights are private property rights by allowing them to be traded.

The state's first private lease agreement was between Montana Trout Unlimited and eight landowners on Rock Creek, a stream in the western part of the state. The landowners agreed to a 10-year deal with Trout Unlimited to let 1.3 cubic feet per second of water flow past a diversion dam for six months of the year. In return, Trout Unlimited paid the removal cost of an old, unwanted diversion dam.

For the landowners, the lease was important because the earthen dam, which created a small pond along the creek, was a liability.

"It was failing and needed \$50,000 worth of repairs," says Ginny Larson, who with her husband Jim Larson, helped organize the eight families who leased their water rights to Trout Unlimited.

For Trout Unlimited, the lease restored flows in Rock Creek and now provides habitat for native cutthroat trout. "Jim and I wanted to see the fish have a healthy environment, and the lease was that opportunity," concludes Larson.

Like the agreement on Rock Creek, the marketplace is successfully drawing together other conservationists and agricultural users into mutually beneficial relationships. These historic adversaries recognize that the main advantage of markets are their voluntary nature. No one is forced to give up his or her water right, the terms of sales are negotiable, and farmers and ranchers are fully compensated for their water rights.

Conservationists are also realizing that they must have a better understanding of what farmers need in order to negotiate beneficial agreements.

"Some water right owners need flexibility, others need cash, and some are looking for tax breaks," says Andrew Purkey, director of the Oregon Water Trust (OWT). Markets allow the conservation organization to accommodate these different needs. The OWT, formed in 1993, has pioneered the market-base approach to maintaining instream flows.

"Water leases provide cash and flexibility, purchases offer large cash payments, and donations can provide tax relief," adds Purkey.

Market agreements, bolstered by new understanding and a spirit of cooperation, are working across the West. In 1997, farmers and ranchers throughout the region received more than \$10 million for 490,000 acre-feet of agricultural water that was subsequently used for flow enhancement. In addition, agricultural producers donated more than 28,000 acre-feet of water rights to help protect fish and wildlife.

"It shows that irrigators are interested in fish when given the right incentives and tools and we provide that," says Purkey. Incentives matter, and through water markets farmers and ranchers are realizing benefits from new demands for their water.

Ted Eady, who raises hay and registered horses near Sisters, Ore., is one such rancher. He agreed to sell 196 acre-feet of water of his water right, which was established in 1885, to the OWT for \$42,900. Eady had been using the water to irrigate what he describes as "marginal hay ground."

Squaw Creek, the source for his water right, is habitat for bull trout which are protected under the Endangered Species Act. In addition, the creek flows through the Sisters city park. Even during years with normal rainfall, the creek would run dry, damaging fish habitat and leaving the park without benefit of flowing water. Eady's deal with the OWT has changed all of that.

He still uses the land, but it now serves as a pasture for new horses he purchased with the money from the OWT.

"The water is helping bull trout, keeping the city park green, and the money has allowed me to make improvements on the ranch and, more importantly, in my family's life," he says.

Water sales to benefit fish continue to raise some concerns.

This is a good concept but it needs to be approached with caution; that's why we limited it to leases in Montana," says Hanson.

Some farmers and ranchers are particularly wary of permanent water sales, claiming these deals could make it difficult for other irrigators to get the water they need. Water rights contain limitations on how much water can be diverted. But just because a water right allows a landowner to divert a certain amount of water does not mean the landowners will withdraw that much water at all times. In practice, most farmers and ranchers irrigate intermittently, using water only when it is needed for their crops.

When landowners with senior water rights are not irrigating, other right holders are able to divert the remaining water. Some farmers and ranchers fear that their ability to divert unused water will be limited by instream water rights. With these particular water rights, the water must remain in the stream.

That means, when someone sells a water right for instream use, he or she potentially eliminates the opportunity for others to divert unused water when senior right holders are not irrigating.

Eady provides an alternative perspective on permanent sales.

"If there's going to be water permanently removed from the land to improve fish habitat, I feel it should come from land that is not the most productive," he says. "When this happens, pressure is taken off other irrigators who ranch or farm more productive land because water needed to restore stream flows won't have to come from their land."

Others fear that given enough time and money, organizations like the OWT could essentially dry up irrigated agriculture. However, that could happen only if large amounts of money were spent leasing and buying water rights. Considering these organizations operate with limited budgets and buy small amounts of water on small streams, this appears to be unlikely scenario, according to Purkey.

Purkey is convinced that by focusing on small streams, water purchases for fish do not have to jeopardize farmers and ranchers. "We're trying to improve flows on small streams where a little bit of water can make a big difference," said Purkey.

More than half of the agreements negotiated by the OWT are for less than 500 acre-feet of water. The organization's largest deal was a one-year lease for 1,135 acre-feet. The deals are improving fish habitat and are vital to the recovery of fish species such as steelhead trout and salmon, according to the Oregon Fish and Wildlife Department.

Speculation is yet another concern. Some landowners worry that they will be priced out of the market by speculators who will buy up water rights, keep the water in the stream, only to sell the rights later for large profits. A recent report by PERC (see sidebar) addresses that claim. On average, in the West, water rights for instream use are selling for about \$400 per acre-foot for permanent sales and \$30 per acre-foot for annual leases. These prices are on par with those of water rights traded between irrigators, according to PERC.

Of course the possibility of speculation exists, but states have addressed this concern by placing limitations on instream water rights. None of the prior appropriation states allow instream water rights to be sold and converted to other types of uses such as irrigation.

These limitations create their own problems, however. Such restrictions can remove the incentive for organizations like the OWT to pay attention to market signals. "Under such conditions, we aren't able to respond to changing water needs," says Purkey. For example, the OWT might have a permanent water right on a stream that is no longer in need of protection in the future. If the organization were able to sell the water right, it could then use the money to acquire water rights on a stream that needed more water. Ironically, the transfer restrictions on instream water rights today are quite similar to the restrictions imposed on irrigation rights 10 years ago. At that time, most Western states did not allow farmers and ranchers to sell water rights for instream uses.

Water markets are not likely to solve all of the West's stream flow problems nor will markets fit the needs of every agricultural producer. But they may be a move in the right direction.

"People in agriculture aren't against fish, it's just that you can't do anything in this business without irrigation," explains Hanson. "Water markets can help find a balance between these two uses."

Will the century-old doctrine of prior appropriation survive into the 21st century? Some think it will.

"For the doctrine to stand the test of time, it must continue to evolve to meet instream and other needs," says Purkey. "Using markets to meet these needs is a key part of this evolution."