

CONSERVATION EASEMENTS AND WATER RIGHTS

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Program Summary: Conservation easements have been used to conserve millions of acres of land in Colorado. Almost all of the conservation easements on agricultural or ranching lands include restrictions on the water rights which support those uses. This session will discuss the role of restricting water rights in conservation easements, the history of the legislative authorization, the role of land trusts as the holders of conservation easements, and current issues in the drafting of a water rights provision in a conservation easement.

- I. Program Goal: 1) to provide context for the role of water rights in conservation easements and 2) to discuss the current status of how land trusts deal with water rights and current issues.
- II. Conservation Easement Background
 1. An easement in gross pursuant to C.R.S. §38-30.5-101 et. seq.
 2. Must be held by a 501(c)(3) nonprofit or governmental entity
 3. Creates an enforceable real property interest
 4. Must be to protect conservation values
 - (a) Open space including agricultural lands

- (b) Wildlife habitat
- (c) Public recreation
- (d) Historic structures
- 5. Typical ranchland conservation easement would be 1,000 acres with 2 to 3 residential structures and additional agricultural structures

III. Legislative Authority

- 1. C.R.S. §38-30.5-102. The right to impose limitations on “water rights beneficially used” on the land being conserved.
- 2. C.R.S. §38-30.5-104(1). Must be created by the owners of the “water or water rights beneficially used thereon...”.
- 3. C.R.S. §38-30.5-104(5) “If a water right is represented by shares in a mutual ditch or reservoir company, a conservation in gross that encumbers the water right may be created or revoked only after sixty days’ notice and in accordance with the applicable requirements of the mutual ditch or reservoir company, including, but not limited to, its articles of incorporation and bylaws as amended from time to time.”
- 4. C.R.S. §38-30.5-111(2). “Any conservation easement in gross affecting water rights created prior to August 6, 2003 shall be a binding, legal, and enforceable obligation if it complies with the requirements of this article”
- 5. A conservation easement cannot encumber water as an independent property interest, only in connection with the land on which it is beneficially used.

IV. Economics of Conservation Easements

- 1. Conservation easement restrictions on the development of land typically result in a reduction in the value of the land
- 2. Water rights are not typically valued separately
- 3. That creates a federal charitable deduction
- 4. Sources of funding for conservation easements
 - (a) Federal charitable deduction
 - (b) Colorado Conservation Easement Tax Credit
 - (c) Public programs

- i. USDA Natural Resource Conservation Service
- ii. Great Outdoors Colorado
- iii. Colorado Parks and Wildlife
- iv. County Open Space Programs

V. Types of Land Conserved

- 1. Ranches and farms
- 2. Recreation Properties
- 3. Urban parcels
- 4. For some, but not all, of these, the water rights are central to the conservation values being protected.
 - (a) Irrigated hayfields on a ranch
 - (b) Central pivot system for farm crops
 - (c) Adjudicated wells supporting livestock
 - (d) Riparian areas

VI. Types of Land Trusts

- 1. National: The Nature Conservancy and The Trust for Public Land
- 2. Statewide: Colorado Cattlemen's Agricultural Land Trust and Colorado Open Lands
- 3. Local and Regional: LaPlata Open Space Conservancy, Colorado West Land Trust, Estes Valley Land Trust, Aspen Valley Land trust, Central Colorado Conservancy
- 4. Colorado Water Trust, whose mission is to "restore flow to Colorado's rivers in need". It does not hold conservation easements.

VII. Water and Water Rights in a Conservation Easement Project

- 1. Land trust staff will conduct due diligence on the water rights and include a description of all water rights and maps in the present conditions report of headgates, ditches, decrees, diversion records
- 2. The water rights identified as beneficially used on the property will be listed in an exhibit to the conservation easement.
- 3. The water provision of the conservation easement will then impose restrictions on the transfer of the water rights listed in the exhibit.

4. See Attachment 1 for an example of a water provision from a conservation easement. Key elements are:
 - (a) Preserve and retain all water rights used for irrigation
 - (b) Prohibition on a transfer of any irrigation water rights
 - (c) Not abandon any water rights
 - (d) Prohibits the transfer of any non-irrigation water rights
 - (e) Water rights may be temporarily leased or separated, with approval by the land trust in its sole discretion, based on impact on the conservation values
 - (f) If the land is being divided in ownership then the landowner may have to hire a water engineer to divide and allocate the water rights
 - (g) Landowner must provide notice of any legal proceedings involving the water rights

VIII. Abandonment

1. Restrictive covenants versus affirmative obligations
2. C.R.S. §37-92-103(2)(a): No intent to abandon for the duration that
“The land on which the water right has been historically applied is enrolled under a federal land conservation program”

BIOGRAPHIES

Larry Kueter is an attorney in Denver, Colorado. Since 2011 his law practice has been limited to land conservation, and since 1990, he has been involved in over five hundred conservation transactions conserving over a million acres of land. For 30 years he was with the law firm of Isaacson and Rosenbaum, a firm nationally known for its conservation practice. He has been legal counsel to the Colorado Cattlemen's Agricultural Land Trust since its creation in 1995. With his involvement with CCALT and the Partnership of Rangeland Trusts, he has been at the center of the movement in the Rocky Mountain West to create land trusts that are affiliated with statewide cattlemen's and stock growers associations. In 2004 and 2005, he co-chaired the Land Trust Alliance's Standards and Practices Program Design Steering Committee and he was a member of the Board of Directors of the Land Trust Alliance from 2006 through 2015. He was the founding chair of the Land Trust Accreditation Commission and served in that role from 2006 through 2014. In September, 2013 he was awarded the Kingsbury Browne Conservation Leadership Award by the Land Trust Alliance and the Lincoln Institute of Land Policy

David Kueter has over twenty-five years of experience in water law and land conservation, including 20 years at Harvey Curtis and Associates and the last three years with Holsinger Law. In addition to his water litigation and transaction practice, David has represented the Colorado Cattlemen's Agricultural Land Trust and other land

trusts on water and other matters since 2008. He has also presented workshops and educational lectures on the intersection of water and land conservation at the Colorado Conservation Excellence conference and the Land Trust Alliance Rally.

COLORADO CATTLEMEN'S AGRICULTURAL LAND TRUST CONSERVATION EASEMENT WATER PROVISION

Water Rights. The parties agree that it is reasonable that certain water rights beneficially used on the Property are encumbered by this Deed.

A. Irrigation Water. Grantor shall retain and reserve the right to use any and all water and water rights beneficially used for irrigation on the Property and all ditches, headgates, springs, reservoirs, water allotments, water shares and stock certificates, contracts, wells, easements and rights of way associated therewith or reasonably necessary for such beneficial use of irrigation (the "Irrigation Water Rights"), including, but not limited to, those water rights or interests specifically described on Exhibit D attached hereto for use in present or future agricultural production and to support the Conservation Values on the Property. Grantor shall not transfer, lease, sell, or otherwise separate the Irrigation Water Rights from title to the Property itself; provided that Grantor may lease or temporarily separate from the Property such portion of the Irrigation Water Rights which Grantor demonstrates to Grantee, and Grantee determines in its sole discretion, will not substantially diminish or impair the present or future agricultural production or the Conservation Values and provided said Irrigation Water Rights must be returned to the Property. To the degree abandonment of any portion of a water right would adversely impact the Conservation

Values, Grantor shall not abandon or allow the abandonment of any portion of the Water Rights, by action or inaction.

B. Non-Irrigation Water. Grantor shall not transfer, lease, sell or otherwise separate from title to the Property other water rights which are beneficially used on the Property, or any ditches, headgates, springs, reservoirs, water allotments, water shares and stock certificates, contracts, wells, easements and rights of way associated therewith (the "Additional Water Rights"), including, but not limited to, those water rights or interests specifically described in the Baseline Inventory Report; provided that Grantor may lease or temporarily separate from the Property such portion of the Additional Water Rights which Grantor demonstrates to Grantee, and Grantee determines in its sole discretion, will not substantially diminish or impair the present or future agricultural production or the Conservation Values and provided said Additional Water Rights must be returned to the Property.

C. Partition of Water Rights. [Where appropriate, add the following: The Irrigation Water Rights and the Additional Water Rights are collectively referred to herein as the "Water Rights." If any of the Water Rights described on Exhibit D are, as of the date of this Deed, being used both on the Property and on property not encumbered by this Deed, Grantee and Grantor agree to partition the Water Rights. Grantor agrees not to convey any portion of said Water Rights with a sale of any of the unencumbered property, or otherwise, without prior notice to Grantee of the same, and Grantee reserves the right to require Grantor to hire a water engineer approved by Grantee to determine the proper allocation of all water rights encumbered by this Deed prior to any conveyance by Grantor. Any partition of the Water Rights must ensure the Water Rights currently being used on the Property remain on the Property and encumbered by this Deed.]

D. Water Infrastructure. The Irrigation Water Rights and the Additional Water Rights are collectively referred to herein as the

“Water Rights.” The maintenance, expansion, or relocation of infrastructure associated with the beneficial usage of the Water Rights that does not substantially diminish or impair the Conservation Values is permitted. Hydroelectric power generation in accordance with subparagraph 4.G(2) (Hydroelectric, Geothermal, and Other Alternative Energy Generation) and other lawful uses that do not substantially diminish or impair the Conservation Values are permitted. Grantor must provide Grantee with notice of any legal proceedings involving the Water Rights that have the potential to affect the Property within 30 days of Grantor’s discovery. Grantee must be notified of any action to be initiated by Grantor 30 days before Grantor files any legal proceeding involving the Water Rights or the development of new water rights on the Property.