CONSERVATION EASEMENTS AND WATER RIGHTS

Presented[1] by
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I. Conservation Easements in General

A. Introduction to conservation easements. In the last quarter century, conservation easements on land evolved into an established and widely used mechanism to protect the natural values of real property and historic buildings in perpetuity. Water rights often support conservation easements on open space and agricultural lands, and may be material to maintain associated conservation values such as wildlife habitat and wetlands.

B. Importance of water to wildlife. Obviously, water is essential to aquatic species, for example, endangered species such as the greenback cutthroat trout, boreal toad, whooping crane, and river otter. Wetlands are also essential to over one-quarter of Colorado's terrestrial species. In fact, aquatic habitat plays an essential role in the life cycles of nearly half the state's endangered, threatened, and special concern species. Colo. Div. of Wildlife, *Species Conservation*, http://wildlife.state.co.us/species_cons/list.asp (Apr. 2003). Species requirements in other states are similar.

C. Economic importance of conservation easements. Conservation easements also offer an economically attractive way to maintain irrigated agriculture, wildlife habitat, and wetlands. Donors of conservation easements receive substantial tax advantages from irrevocable dedications of real property for conservation purposes. Additionally, conservation organizations benefit by obtaining property below market value. The public benefits from the protection of important social values by private landowners and non-profit land trusts.

D. Extent of conservation easements. There are over 32 million acres of agricultural land in Colorado. USDA National Agricultural Statistics Service, *1997 Census of Agriculture* (1997). Nearly 10 percent of this land – over three million acres – is irrigated. Colo. Div. of Water Resources, Cumulative Yearly Statistics of the Colo. Div. of Water Resources, at page 3-11 (2001). The Land Trust Alliance (LTA) 2000 census reported almost 300,000 acres covered by conservation easements in Colorado.

[1] Land Trust Alliance, Southwest Land Trust Conference, Prescott, Arizona (May 22, 2004).

LTA, *National Land Trust Census*, http://www.lta.org/newsroom/census_summary.data.htm, at 3 (2000). However, many land trusts do not report lands under conservation easements to protect the privacy of their donors; and the actual figure is much around a million acres. If you are working with conservation easements in Colorado, you should be thinking about water rights.

II. Legal Context

A. Development of conservation easements. Conservation easements developed and became popular in the eastern United States before spreading west. Massachusetts, for example, is the birthplace of the land trust movement. LTA, at 1. Water is rarely a physical concern east of the 100th Meridian, where natural precipitation is adequate for agricultural purposes. James N. Corbridge Jr. and Teresa A. Rice, *Vranesh's Colorado Water Law*, at 2 (1999). In addition, the prevailing legal doctrine of riparian water rights means that if your client has land abutting a natural watercourse, they share the right to make reasonable use of the water. *Id.* at 1. In sum, if a land trust has a conservation easement in the east that requires water to fulfill its objectives, they generally have the perpetual legal right to the necessary water without doing anything.

B. Prior appropriation doctrine. The situation is different in the east than in the west, where the prior appropriation doctrine prevails. *Id.* at 3. And the doctrine is so refined in Colorado, it is also known as the "Colorado Doctrine." *Id.* at 8. The essential feature of this system is that the legal right to use water is independently acquired by appropriation and does not accompany land ownership.

C. A water right as a real property right. As in most western states, a water right is a real property right in Colorado. *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, at 53 (Colo. 1999). Importantly, a water right is a separate and independent property right from the land on which it is used. *Southeastern Colo. Water Conservation Dist. v. Twin Lakes Assocs.*, 770 P.2d 1231, at 1239 (Colo. 1989). A water right is also a usufructary property right, that is, "a right to use beneficially a specified amount of water, . . . that can be captured, possessed, and controlled in priority under a [judicial] decree." *Santa Fe Trail Ranches*, at 53. Thus, a water right can be lost by nonuse. *See, e.g.,* C.R.S. § 37-92-402 (2002). In contrast, the nonuse of land does not result in the loss of the property. This essential distinction has important implications for water rights in conservation easements.

III. Water Rights Issues in Conservation Easements

A. Is water associated with the land? Water rights are only a concern in a conservation easement if water rights are associated with the land. Therefore, the first thing to do is to obtain or develop an inventory of the water rights used on the property, if any.

B. Ownership issues. It is very important to understand that usual title insurance policies and title opinions on real estate exclude water rights. Thus, the fact that you have a title

insurance policy or a title opinion does not mean that you know anything whatsoever about the water rights associated with the land. While it is beginning to be possible to obtain title insurance specifically on water rights, it is complex, expensive, and time consuming. A title opinion on water rights is typically much more difficult and thus expensive than a title opinion on real estate. However, you may need at least some title investigation if the water is material to the conservation purpose, and is not represented by shares in a ditch and reservoir company or units in a state for federal reclamation project, which can be easily verified with the company or agency. The water rights situation may be somewhat simpler in a permit state, if the permitting agency has current ownership records that can be relied upon.

How to verify the ownership, value and yield of water rights is beyond the scope of this discussion, but are complex issues in their own right that require careful consideration. *See, e.g.,* Ward H. Fischer, "Water Title Examination," 9 Colo. Lawyer 2042 (Oct. 1980), Star L. Waring, Christina A. Fiflis, and David L. Kueter, "Water Rights Title and Conveyancing," 28 Colo. Lawyer 69 (May 1999). While Colorado specific, the issues are similar in other states. It is advisable to check with an experienced water attorney in your state before accepting a conservation easement with water to be sure the grantor in fact owns the water included.

C. Water rights issues. If there are water rights used on the land, there are four principle issues to consider with regard to a conservation easement. It is strongly recommended that these issues are addressed before and while drafting a conservation easement.

1. Are water rights material to the conservation purpose(s)?

a. Threshold issue. This is naturally the threshold issue. The answer may be clear, for example, if the conservation purpose is to preserve irrigated agricultural land because water rights are necessary for irrigation. In contrast, the need for water rights may not be apparent for a more general conservation objective, such as open space or wildlife habitat. For example, if the goal is to protect open space adjacent to a water body – a stream or lake – is a water right material or just desirable to the conservation purpose? Open space adjacent to a water body may provide more scenic enjoyment when water is present, but scenic enjoyment may not disappear when the water body is low or dry. An even more difficult situation involves wildlife habitat adjacent to a water body, for example big game winter range or waterfowl nesting areas. Water is certainly needed by wildlife, but may not be material to the conservation purpose if water is present in adequate quantities without any direct action by the grantee, for example if the state has a minimum stream flow water right(s) on the stream or lake, or downstream senior rights make water available.

b. Monetary value of water rights important. The water rights, if included, are a big percentage of the value of a conservation easement in much of Colorado, perhaps the majority in many transactions. Federal and state tax benefits from the creation of a conservation easement are key to financing many transactions. Obviously, if the water rights are part of the value for the federal tax

material to the conservation purpose(s), which purpose(s) will not be protected absent the water right(s) because of tax issues and enforcement considerations (discussed below).

d. Other considerations. Where water rights are not material to the conservation purpose(s), their continued use could be permitted if consistent with the conservation purpose(s). Such permission should include the right to maintain associated water facilities, like diversion structures, and could allow changes in the point of diversion, place or type of use that are not inconsistent with the conservation purpose(s).

2. If water is material to the conservation purpose(s), what is necessary to enforce its presence?

a. Interest in the water right(s). The foremost requirement for enforcement is an interest in the water right(s) itself. This may be some or all of the water right(s) used on the property, or a temporal interest therein. If the grantor retains all of the water rights without any restrictions in the conservation easement, she can strip the rights from the property and sell them separately, drying up the land and undermining the conservation purpose(s). Therefore, the conservation easement should include the water rights used on the land, with an exhibit listing the water rights, if possible. The exhibit should include the name and the amount of the water right(s). If available, include information from the water court or administrative decree(s) (court/agency, date entered, case/permit number, point of diversion, water source, amount, type of water right, appropriation date, and adjudication/permit date).

b. Use of water right(s). To support enforcement by the grantee, the conservation easement should dedicate and restrict the use of the included water rights on land consistent with the conservation purpose(s). The grantor should be affirmatively obligated to maintain and use the water rights, and not abandon them. Restrictions should prevent the change of use of the water rights to an incompatible purpose, and their sale, lease or encumbrance or other legal separation from the land under easement. In order to avoid loss of the water rights by abandonment and/or forfeiture, the grantee should obtain the right to enter the property to continue their historic use, or to change the water rights to another IRC-qualified "conservation purpose."

3. If water is material to the conservation values, and the conservation easement contains appropriate provisions, what happens if the organization that holds the easement doesn't enforce it?

The consequences of non-enforcement may seriously affect both the grantor and grantee.

a. Loss of conservation purpose(s). The conservation purpose(s) intended for protection could be lost when the grantor simply stops exercising her water rights in a manner that maintains the conservation purpose(s).

b. Recapture of grants. Various instruments funding the conservation easement may contain recapture provisions if the grants are not used for conservation purpose(s). In other words, the grantee might find itself in the uncomfortable position of having to pay back the private foundations or public agencies that funded the acquisition.

c. Loss of right to enforce. Another concern is whether by failing to enforce water use provisions for conservation purpose(s) the grantee would lose its right to enforce such provisions, or even the entire conservation easement if the water right(s) is material to the conservation purpose(s). There are unfortunately no reported cases that address this issue. However, conservation easements are equitable servitudes, which are a subclass of servitudes (enforceable private arrangements for the use of land), which class also includes easements and real covenants. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261, at 1261-64 (1982). By looking at the treatment of other servitudes in analogous situations – where the beneficiary has failed to enforce a provision – some insight is possible regarding how the courts might react to this situation regarding water. In the case of restrictive covenants, which are analogous to conservation easements in the elements that matter here, the doctrines of abandonment, estoppel and waiver apply. *W. Alameda Heights Homeowners Assn. v. Bd. of County Comm'rs*, 458 P.2d 253, at 257 (Colo. 1969).

i. Abandonment. The law of abandonment requires proof by evidence of nonuse and intent to abandon. *Upper Harmony Ditch Co. v. Carwin*, 539 P.2d 1282, at 1285 (Colo. 1975). "Intention may be shown either expressly or by implication." *Id*. Thus, non-use for a long period of time is evidence of abandonment, although it is not conclusive, merely establishing a prima facie case that can be rebutted. *Id*. Nonuse of an easement does not constitute abandonment. *Gjovig v. Spino*, 701 P.2d 1267, at 1269 (Colo. App. 1985). To establish abandonment, the party asserting abandonment "must show affirmative acts manifesting an intention" by the owner of the dominant estate. *Westland Nursing Home v. Benson*, 517 P.2d 862, at 866 (Colo. App. 1974). Here, mere nonuse of water rights for

conservation purpose(s), even where accompanied by a failure on the part of the grantee to attempt to enforce such use, would not constitute abandonment. So long as the grantee makes no affirmative act manifesting an intent to abandon, the obligations and restrictions on the use of the water rights for conservation purpose(s) should be enforceable. Conversely, an affirmative act by the grantee manifesting an intent to abandon, accompanied by nonuse, could constitute abandonment and such obligations and restrictions would not be enforceable. Therefore, the grantee should avoid any affirmative manifestations of intent to abandon, such as telling the grantor, "we don't intend to enforce the provisions on the water rights."

ii. Estoppel. The elements of estoppel are full knowledge of the facts, unreasonable delay in the assertion of an available remedy, and intervening reliance by and prejudice to another. *Barker v. Jeremiasen*, 676 P.2d 1259, at 1262 (Colo. App. 1984). Estoppel could come into play in this situation where the grantee knew the grantor was not using the water rights for conservation purposes, unreasonably delayed seeking to enforce the conservation easement, and the grantor relied on that inaction to, for example, change the use of the water rights to another place of use. In that scenario, the grantee could be estopped from enforcing the obligations and/or restrictions on the use of water rights in the conservation easement. To avoid that result, the grantee should not unreasonably delay enforcing the conservation easement once it has some knowledge of the grantor's failure to use the water rights as required. This underscores the importance of not writing provisions into the conservation easement on water rights unless they are material to the conservation purpose(s), and the grantee has the intent and the resources to enforce the obligations and restrictions on the water rights.

iii. Waiver. The right to enforce a restrictive covenant may also be lost by waiver. 20 Am.Jur. 2d § 239. What constitutes waiver depends on the particular facts of each case. *Id.* Typical examples involve multiple lot owners violating subdivision covenants without objection before enforcement is attempted. See *Id.* In the water rights scenario here, an analogous situation could arise if the grantee did not object to the change in use of one of several water rights included in the conservation easement for the conservation purpose(s). Another example that might be a problem would be where the grantee owned multiple conservation easements with water rights for conservation purposes, and did not object or enforce against a majority of the grantors. Another

grantor might argue that the grantee had waived its right to enforce the obligations and restrictions on her water rights. As discussed above, it is important not to include provisions into the conservation easement on water rights unless they are material to the conservation purpose(s), and the grantee has the intent and the resources to enforce the obligations and restrictions on the water rights.

d. Tax consequences on grantor. The failure to enforce obligations and restrictions on water rights for conservation purpose(s) could have a direct financial impact on the grantor. For example, if the IRS concluded that the easement created a private rather than a public benefit, or was not perpetual, it would disallow the charitable deduction. Similarly, the state might withhold or withdraw its tax credit. Because tax deductions and tax credits are often key to funding conservation easements, this result is to be avoided.

The most significant issue for the grantor is that the tax deduction may be at risk during the period of its statute of limitations. While the Tax Court has yet to reject a conservation easement, the IRS has regularly objected to the value placed on a conservation easement. *See, e.g., Schwab v. Comm'r*, T.C. Memo 1994-232 (U.S. Tax Court 1994). An IRS contest of a charitable deduction for a donated conservation easement can take more than a decade to resolve. *Id.* There are anecdotal reports that both federal and state tax agencies are taking a closer look at conservation easements. The Colorado Department of Revenue apparently is planning to review every new easement in the Lower Arkansas River Basin, for example. Any adjustment to the claimed charitable value of the conservation easement, including the water rights, raises issues of tax liability, interest and penalties. And with carry-back and carry-forward provisions, the potential for lengthy, complicated tax problems increases. Thus, the grantor has a direct financial interest in enforcement of the water rights provisions of the conservation easement to ensure her tax benefits are realized.

e. Tax consequences for grantee. The grantee also has a direct interest in ensuring the tax federal deduction is allowed. If the conservation easement does not meet the standards for a charitable contribution, the grantee may have created a private rather than public benefit. The grantee's status as a charitable organization could then be at risk, with all the attendant consequences, including tax liability for contributions received. Thus, not only should the grantee not warrant the conservation easement, it is recommended that the land trust require the grantor to indemnify the grantee from any legal actions arising from the easement. The Trust may also wish to consider requiring the grantor to

obtain a private ruling from the IRS where the statute of limitations has not run and it feels the conservation easement is particularly questionable.

4. What happens if water rights material for conservation purposes are not exercised?

a. Abandonment. "The critical element of abandonment is intent." *Haystack Ranch v. Fazzio*, 997 P.2d 548, at 552 (Colo. 2000). Intent to abandon may be inferred by circumstances, and need not be proven directly. *Id.* Nonuse coupled with an intent to abandon may result in abandonment. *Id.* "Continued and unexplained nonuse of a water right for an unreasonable period of time creates a rebuttable presumption of intent to abandon." *Id.* What constitutes an unreasonable period of nonuse varies with the facts of each case, although ten years nonuse creates a rebuttable presumption of abandonment for the state's decennial abandonment list. *Id.* A presumption of intent to abandon shifts the burden to the owner of the water right. *Id.* Rebuttal requires more than "mere subjective declarations that the owner did not intend to abandon the water right, . . . the owner must establish some fact or condition that excuses the nonuse or shows the owner's intent not to abandon the water right." *Id.*

b. Forfeiture. Forfeiture, unlike abandonment, does not require that the appropriator intend to abandon rights by nonuse. Involuntary loss of all or a portion of one's water rights is triggered simply by nonuse for a period set by statute. Statutes that declare water rights "abandoned" without any requirement of intent are effectively forfeiture statutes. The burden of proving nonuse is on the State, or other party, asserting forfeiture. Forfeiture may be found where the evidence is inadequate to prove abandonment. Oregon, Idaho, New Mexico, Wyoming, Utah and South Dakota and other states have forfeiture statutes. Colorado does not.

c. Avoiding abandonment or forfeiture. Obviously the best course of action is to avoid a presumption of abandonment or forfeiture. Simply diverting and using the water pursuant to its decree or permit is sufficient. Note, however, that diverting and using the water in a manner not authorized may not be sufficient. *Santa Fe Trail Ranches*, at 59 (holding that the undecreed use of water cannot be a basis for changing those water rights). As discussed above, an affirmative obligation on the grantor is the basic provision to place in a conservation easement to avoid abandonment or forfeiture. A secondary line of defense is for the grantee to have the right to enter the property to use the water

right(s) for specified conservation purpose(s) pursuant to decree or permit.

d. Related concerns. Similar to failure to enforce, abandonment or forfeiture of water rights material to a conservation easement could place the grantee's status as a charitable organization at risk because it might create a private rather than public right. This is another reason the grantee may want to have the right to use the water rights for conservation purpose(s), or change them to another conservation purpose if the grantor fails to comply with the obligations and restrictions regarding water rights in the conservation easement.

IV. Enforceability of water rights provisions in conservation easements

A. Common law. Conservation easements are negative servitudes in gross, that is, restrictions on the use of land enforceable by, for example, a land trust that does not own any benefited land. Peter D. Nichols, *Do Conservation Easements and Water Mix (in Colorado)?* 5 U. Den. Water L. Rev. 540, at 508-09. This historically posed an enforcement problem because the courts disfavored both easements in gross, and negative easements. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 Denv. U. L. Rev. 1077, 1080-81 (1996). This uncertainty led many states, including Colorado, to adopt specific authorizing legislation for conservation easements. Nichols, at 515-16. The Colorado statute, however, did not clearly encompass water rights. C.R.S. §§ 38-30-101 to 111 (2002). *See* also, *Id.* at 516-20. Although state courts have not addressed conservation easements on water, the Colorado Supreme Court is likely to uphold a conservation easement on water associated with land. *See Id.* at 515. Greater certainty exists with regard to conservation easements that meet the requirements of new legislation.

B. House Bill 03-1008. The Colorado Coalition of Land Trusts, with the support of an informal working group of water and land trust attorneys loosely associated with the Colorado Water Trust, proposed legislation in 2003 to explicitly address water rights in conservation easements. H.B. 03-1008, 1st Reg. Sess., 64th Colo. Gen. Assem. (Colo. 2003). The bill passed, and the Governor signed it into law.

1. The amended statute explicitly allows the creation of conservation easements that include the water rights beneficially used on the land or water area that is the subject of the easement. *Id.* at § 1, codified at C.R.S. § 38-30.5-102.

2. The law requires 60 days notice when encumbering shares in a mutual ditch and reservoir company. *Id.* at § 3, codified at C.R.S. § 38-30.5-104(5). The conservation easement must be 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." *Id.* Whether this means the requirements, articles and bylaws in existence at the time the owner obtained the shares, or at the time the conservation easement is created is an open question. *See, e.g., Fort Lyon Canal Co. v. Catlin Canal Co.*, 762 P.2d 1375 (Colo. 1988). Note that notice is required whether or not there are or you suspect restrictions.

3. The new law also validates conservation easements that include water rights created prior to its enactment. *Id.* at § 7, codified at C.R.S. § 38-30.5-111(2). This is an important provision because it removes the uncertainty regarding the enforceability of existing conservation easements with water rights.

Obviously, it would not have been possible to comply with the notice provisions for mutual ditch and reservoir companies prior to the enactment of H.B. 03-1008. And while the effect of a lack of notice is not obvious, this may only be a hypothetical question. It is unlikely any companies had restrictions on conservation easements before H.B. 03-1008. In addition, existing conservation easements would comply with the most likely general restrictions, that is, against transferring shares out of the company. Although the lack of notice is probably harmless, a simple fix may be to amend the conservation easement in compliance with the current statute. Otherwise, the validity of the easement may fall back to common law. Nichols, at 515.

V. Past practices

A. Example. There are probably nearly as many examples of water language for conservation easements as there are conservation easements with water rights. For the sake of discussion, a simple published approach for an agricultural easement is the following:

> Water Rights. Grantor shall retain and reserve the right to use any presently owned water right sufficient for use in present or future agricultural production on the Property, and shall not transfer, encumber, lease, or otherwise separate such quantity of water from title to the Property itself. Grantor may transfer, encumber, lease, sell or otherwise separate from the Property water rights which Grantor has demonstrated to Grantee's reasonable satisfaction are not necessary for present or future agricultural production on the Property. 2 Colorado Practice, Methods of Practice 314 (4th ed. 1998).

Virtually identical language exists in conservation easements written by well-known Colorado water lawyers. *See, e.g.,* Deed of Conservation Easement (Mesa Ranch) 4

(appears of record in the office of the Delta County Clerk and Recorder under Reception No. 501406).

B. Analysis. For the sake of illustration, it may be useful to see how the above language addresses the four issues discussed initially.

1. Are water rights material to the conservation purpose(s)?

   The example provides that the grantor shall retain and reserve the right to use any presently owned water rights sufficient for use in present or future agricultural production. While this is only a reservation by the grantor, the conservation easement elsewhere provides that one of the conservation purposes is agricultural productivity. *Colo. Methods of Practice.* at 311. Thus, the water rights are material to the conservation purpose if historically used for agricultural production.

2. If water is material to the conservation purpose(s), what is necessary to ensure its availability?

   The example requires the grantee's approval to transfer, encumber, lease, sell or otherwise separate the water rights from the property. Thus, the grantor may not remove the water rights from the land under easement without permission. However, the grantor is not required to use the rights for the conservation purpose.

   Provisions for enforcement of the conservation easement are in another section of the document, and provide "[I]f Grantee finds what it believes is a violation [of the easement], it may at its discretion take appropriate legal action. . . . Grantee may obtain an injunction to stop it [the violation], temporarily or permanently, in addition to such other relief as the court deems appropriate." *Id.* at 315. To achieve the conservation purpose in this example, the grantee will want the grantor to affirmatively use the water. Thus, the grantee must resort to common law remedies, i.e., an injunction, rather than any specific rights under the conservation easement.

3. If water is essential to the conservation values, and the conservation easement contains appropriate provisions, what happens if the organization that holds the easement doesn't enforce it?

   The conservation purpose could be lost if the grantor fails to use the water rights for agricultural production. If so, the grantee may be exposed to a repayment obligation if it acquired the conservation easement with restricted grant funds. The grantee's status as a charitable organization may also be at risk.

The grantee could lose the water right through abandonment or forfeiture, estoppel or waiver to object to transfers, encumbrances, leases, sales or other separations of the water rights from use for agricultural production on the Property if it did not enforce this restriction.

4. What happens if water rights material for conservation purposes are not exercised?

The easement does not require the use of the water rights, but permits the grantor do so. Thus, they could be lost through abandonment. The grantee lacks any specific right to step in to use the water to avoid abandonment.

VI. Recommended practices

A. Colorado Water Trust model language. Attached as Appendix A is the language recommended by the Legal Committee of the Colorado Water Trust,[2] following passage of H.B. 03-1008. This is the recommended approach for dealing with water rights associated with land in a conservation easement. Although written specifically for Colorado, this may provide a useful starting point for drafting appropriate language in other states since the issues and common law are generally similar throughout the west. Obviously, you will need the assistance of an experienced water attorney in your state to draft an appropriate model to follow.

VII. Drafting provisions of a conservation easement on water rights

To summarize, the first thing is to understand the water rights issues and how they relate to your client's objective. From that base, it is possible to craft an appropriate conservation easement to avoid the potential pitfalls and meet your goals. A good starting place is the Colorado Water Trust's model language, however, if you are reviewing what someone else has drafted, look critically at the language and how it does or does not address the issues discussed above. As with any legal drafting, there really is no one right way to do this, and different attorneys will have different preferences and styles.

[2] The Legal Committee consists of Mike Browning, Chair, (Porzak Browning & Bushong, Boulder), Barney White (Petros & White, Denver), David Getches (C.U. School of Law), Robert Wigington (The Nature Conservancy, Boulder), Larry Keuter and Bill Siberstein (Isaacson, Rosenbaum, Woods & Levy, Denver), and the author.

VIII. Conclusion

Water rights add another layer of complexity to conservation easements that should not be underestimated. Although most real estate attorneys are generally familiar with water rights, where water is material to conservation values, it is recommended that you obtain the assistance of an experienced water attorney to review the water rights, ownership issues, and conservation easement language.

APPENDIX A

COLORADO WATER TRUST
MODEL LANGUAGE REGARDING WATER RIGHTS
FOR LAND CONSERVATION EASEMENTS
THAT INCLUDE HISTORIC IRRIGATION WATER RIGHTS

REVISED 5/15/03

Section _____. Water Rights.

A. Water Rights Included. The "Property" *[or other defined term used for the property subject to the conservation deed]* includes any and all water and water rights beneficially used on the land described in Exhibit A *[or whatever exhibit describes the land subject to the conservation deed]* that are owned by the Grantor, and all ditches, headgates, springs, reservoirs, water allotments, water shares and stock certificates, contracts, units, wells, easements and rights of way associated therewith (the "Water Rights"). The Water Rights include surface water rights and groundwater rights, whether tributary, nontributary or not-nontributary, decreed or undecreed [*where specific water rights are known add the following*; ", including, but not limited to, those water rights or interests specifically described on Exhibit ____ attached hereto."] The parties agree that it is appropriate to include the Water Rights in this Conservation Deed pursuant to C.R.S. §38-30.5-102.

B. Permitted Water Right Uses. The Water Rights are included in this Conservation Deed *[or other name by which the conservation easement is called]* in order to retain or maintain the Water Rights predominantly for agricultural, wildlife habitat, horticultural, wetlands, recreational, forest or other uses consistent with the protection of open land, environmental quality or life-sustaining ecological diversity (the "Permitted Uses"). The Water Rights are hereby dedicated and restricted to support, enhance and further the Permitted Uses. The Permitted Uses include, but are not limited to, the continuation of the historic use of the Water Rights on the Property. Grantor shall have the right to use and enjoy the Water Rights on the Property consistent with historic practices and this Conservation Deed. Grantor shall have the right to maintain, repair, and if destroyed, reconstruct any existing facilities related to the Water Rights (such as ditches, wells and reservoirs) unless the Conservation Values of the Property would be adversely impacted thereby, as determined by the Grantee in its sole judgment.

C. Restrictions On Water Rights. The Water Rights may never (i) be changed to or used for municipal, industrial, commercial or any other new uses, (ii) be changed for use other than on the Property, (iii) be sold, leased, encumbered separately from the Property or otherwise legally separated from the Property, or (iv) have their points of diversion, or their type or place of use within the Property changed, except after a written determination by Grantee that such changes are consistent with the Permitted Uses and do not impair the Conservation Values of the Property. Grantor shall not construct, or permit others to construct, any new water diversion or storage facilities upon the Property, shall not develop any conditional water rights for use on the

Property, and shall not otherwise undertake any new development of water resources for use on the Property, without the prior written approval of the Grantee.

D. Protection of Water Rights. The intent of the parties is that the Grantor will continue the historic use of the Water Rights on the Property. Grantor shall provide Grantee annually a report on the nature and extent of use of the Water Rights on the Property during the prior year, including any report submitted to the State or Division Engineer or local water commissioner. If Grantor fails to maintain the historic use of the Water Rights, or the Water Rights are otherwise subject to a threat of abandonment, Grantee shall have the right, but not the obligation, to (i) enter upon the Property and undertake any and all actions reasonably necessary to continue the use of the historic Water Rights, or (after 90 days written notice to Grantor) to (ii) seek to change the Water Rights to another Permitted Use.

E. Effect of Loss. No loss of any or all of the Water Rights through injury or abandonment, or conversion of the Water Rights as set forth above, shall be considered a severance or other transfer of the title to the Water Rights from the Property for federal or state tax or other purposes.