



**MEMO**

To: Interested Parties

From: Colorado Water Trust Legal Committee *YLN*

Date: October 21, 2005

Re: Conservation Easements Encumbering Water Rights

The Colorado Water Trust Legal Committee has concluded that the donation of a conservation easement that encumbers a water right, which can be abandoned under Colorado law, is a qualified property interest “granted in perpetuity” that meets such requirements of the Internal Revenue Code and Treasury regulations for a charitable contribution under the following circumstances:<sup>1</sup>

1. The water right has not been abandoned;
2. The water right has not been presumptively abandoned, that is, unused for 10 or more years;
3. The water right is an absolute right and not a conditional right; and
4. The grantee conservation organization has authority to address the possibility of abandonment under the conservation easement deed, such as the Model Language (discussed below).

Discussion

Appropriate language in the conservation easement deed can satisfy abandonment concerns with multiple, progressive provisions regarding the use of the encumbered water right. For example, the Colorado Water Trust’s Model Language on Water Rights (attached) requires the grantor to continue the historical use of the water right and not to abandon it or allow its abandonment. In most cases, this should prevent the issue of abandonment from ever arising. In addition, the Model Language requires the grantor to notify the grantee conservation organization if the water right appears on the decennial

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<sup>1</sup> Although there may be other circumstances where the donation of a water right may be a qualified property interest, this memo only addresses the most common situation. In other circumstances, the Colorado Water Trust Legal Committee recommends consultation with an experienced attorney on the specific facts of that transaction.

abandonment list.<sup>2</sup> In response to such notice or its own concerns about abandonment, the Model Language provides that the grantee conservation organization shall give the grantor written notice and an opportunity to cure, which should result in appropriate action in most situations where there is an actual threat of abandonment. Finally, the Model Language gives the grantee conservation organization the right to step in and employ four strategies to prevent abandonment and protect the use for conservation purposes. First, the conservation organization may enter the property and take any actions necessary to continue the use of the water rights. Second, the conservation organization can act to remove the water rights from the abandonment list, e.g., rebut the presumption of abandonment. Third, the conservation organization can change the use of the water right to another conservation purpose. Fourth, the conservation organization can sell or convey the water right for use for another conservation purpose. Should the grantor fail to act and the conservation organization have to protect the conservation purpose, the Model Language also requires the grantor to cooperate in any manner necessary to accomplish the conservation organization's chosen course of action, and appoints the grantee conservation organization as the grantor's agent and attorney-in-fact for this purpose.

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<sup>2</sup> The Division Engineer is required to mail a copy of his abandonment list to each water right owner or claimant. C.R.S. § 37-92-402(5).

## COLORADO WATER TRUST

### Model Water Rights Language Addressing Abandonment

Protection of Water Rights. In order to preserve and protect the Conservation Values of the Property, the Grantor shall continue the recent historical use of the Water Rights on the Property consistent with the Conservation Values and shall not abandon or allow the abandonment of any of the Water Rights, by action or inaction. Grantor shall annually report to the Grantee the nature and extent of use of the Water Rights during the prior year, which report need not be in writing, but shall include copies of any reports submitted to the State or Division Engineer or Water Commissioner. The Grantor shall provide the Grantee a copy of any written notice received by Grantor from any state water official concerning the use, or possible abandonment, of the Water Rights.

If the Water Rights appear on the decennial abandonment list or the Grantee determines that the Water Rights are otherwise subject to a threat of abandonment, the Grantee shall give the Grantor written notice of such threat of abandonment. If, and only if, Grantor fails to cure the threat of abandonment within 90 days of receiving such notice from the Grantee, the Grantee shall, in addition to any other remedies available to the Grantee under this Conservation Easement Deed or law, have the right to (i) enter upon the Property and undertake any and all actions reasonably necessary to continue the historical use of the Water Rights; (ii) seek removal of the Water Rights from the decennial abandonment list; (iii) seek to change the Water Rights to another Permitted Water Use; and/or (iv) sell or otherwise convey all or part of such Water Rights to the Colorado Water Conservation Board or other entity for the specific conservation purpose of protecting or enhancing instream flows and/or water levels in streams, rivers, lakes and/or reservoirs to preserve or improve the natural environment of such water body(s). Grantor agrees to cooperate in any manner necessary to accomplish the Grantee's election, and authorizes and appoints Grantee as its agent and attorney-in-fact to file for and obtain any administrative or judicial approvals required to effectuate Grantee's election.