

CONSERVATION EASEMENTS AND SURFACE AND GROUNDWATER RIGHTS

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ABSTRACT

The popularity of conservation easements as a market-based tool for protecting private lands has led to interest in using easements to protect a wider range of natural resources, including groundwater. In Colorado's San Luis Valley, the Lead Author drafted first-in-kind language for a conservation easement to reduce groundwater pumping and provide a tailored program that allows farmers to conserve groundwater for future use while providing a "soft landing" for transitioning to grazing, pasture or dryland farming. This Article discusses the provisions necessary to facilitate groundwater conservation easements and outlines practical considerations for developing them.

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1. AM. AGRIC. L. ASS'N, 45TH ANNUAL EDUCATIONAL SYMPOSIUM 9 (2024), <https://www.aglaw-assn.org/wp-content/uploads/2024-Session-Descriptions-Agenda.pdf> [<https://perma.cc/3XLY-6ANZ>]; *see, e.g.*, PETER D. NICHOLS, CONSERVATION EASEMENTS AND WATER RIGHTS (2004) [hereinafter CONSERVATION EASEMENTS AND WATER RIGHTS], <https://www.arlis.org/docs/vol1/L/AlaskaWaterRights/Day3/H-4-Land-tenure->

a previously published book co-authored by Mr. Nichols.² Mr. Nichols acknowledges the co-authors of this work and their contributions to the *Water Rights Handbook*. This underlying publication helps to inform the knowledge and expertise of Mr. Nichols during presentations.

I. AN INTRODUCTION TO CONSERVATION EASEMENTS

An easement is a nonpossessory interest in the real property of another.³ An affirmative easement provides the holder of the easement with the right to use the easement area in a defined manner.⁴ A negative easement, on the other hand, is the right to prevent the property owner from using their land in an otherwise lawful manner.⁵ A conservation easement is generally a negative easement, i.e., an easement that permanently restricts the owner of the burdened land from developing or otherwise using their property in a manner inconsistent with the conservation of identified natural values, such as ecological diversity, the protection of open lands or scenic areas, or historic or cultural values.⁶ Conservation easements are perpetual unless otherwise identified at the time of their creation.⁷

While property law has long recognized easements, over the last three-quarters of the century their use has 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 irrigated agriculture, wildlife habitat, riparian areas, and wetlands.⁸

actions/Reference-material/18-Conservation-easements&water-rights.pdf [https://perma.cc/NNN7-8DGP].

2. PETER D. NICHOLS ET AL., *WATER RIGHTS HANDBOOK FOR COLORADO CONSERVATION PROFESSIONALS* (2011) [hereinafter *WATER RIGHTS HANDBOOK*].

3. JON W. BRUCE, JAMES W. ELY JR. & EDWARD T. BRADING, *THE LAW OF EASEMENTS & LICENSES IN LAND* § 1:1, Westlaw (databased updated July 2025).

4. *See id.*

5. 25 AM. JUR. 2D *Easements and Licenses* § 7, Westlaw (databased updated November 2025).

6. *See, e.g.*, COLO. REV. STAT. ANN. § 38-30.5-102 (West 2025); *Markus v. Brohl*, 412 P.3d 647, 650 (Colo. App. 2014); *What is a Conservation Easement*, NAT'L CONSERVATION EASEMENT DATABASE (Oct. 23, 2025, at 13:16 CT), <https://www.conservationeasement.us/what-is-a-conservation-easement/> [https://perma.cc/42NM-T966].

7. *See, e.g.*, COLO. REV. STAT. ANN. § 38-30.5-103(3).

8. *See* KATHERINE WRIGHT, TRAVIS BRAMMER & SHAWN REGAN, PROP. & ENV'T RSCH. CTR., *GROUND WATER CONSERVATION EASEMENTS: EVALUATING AN INNOVATIVE NEW TOOL FOR AQUIFER SUSTAINABILITY* 6–8 (2024), <https://www.perc.org/wp-content/uploads/2024/03/PR-Groundwater-032524-Web-Spreads.pdf> [https://perma.cc/WW9S-H3CE].

Recently, national concern about unsustainable pumping of groundwater that irreversibly depletes aquifers has led to growing interest in using conservation easements to conserve groundwater for future use.⁹ This concern is heightened in western states that are “mining” groundwater aquifers—depleting them faster than their natural recharge rate—fostering recognition of groundwater as a limited resource that will be exhausted within decades unless concerted conservation efforts are taken.¹⁰ Aquifer depletion can lead to severe consequences, including lowering the water table and causing land subsidence, effects that adversely impact wildlife areas, riparian habitats, and wetlands that are dependent on shallow groundwater.¹¹ Irrigated agriculture accounts for the largest use of groundwater across the United States.¹²

Conservation easements can offer an economically attractive way to reduce aquifer depletion, preserve open space, and protect wildlife and riparian habitats when converting irrigated agriculture to dryland farming and grazing. Conservation organizations, grantees, benefit by obtaining property below market value.¹³ The public benefits from the protection of important resource values by private landowners, non-profit land trusts, and governmental entities.¹⁴ Donors of conservation easements, grantors, may receive substantial income tax benefits from irrevocable dedications of real property for conservation purposes under federal and state tax laws.¹⁵

9. *See id.* at 6–7.

10. *See* PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., REPORT TO THE PRESIDENT: IMPROVING GROUNDWATER SECURITY IN THE UNITED STATES 2 (2024); Mira Rojanasakul et al., *America Is Using Up Its Groundwater Like There’s No Tomorrow*, N.Y. TIMES (Aug. 28, 2023), <https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html>.

11. *See generally* Water Sci. Sch., *Groundwater Decline and Depletion*, U.S. GEOLOGICAL SURV. (June 6, 2018), <https://www.usgs.gov/special-topics/water-science-school/science/groundwater-decline-and-depletion> [<https://perma.cc/EH2K-DR6W>] (describing various examples of aquifer depletion, land subsidence, loss of wildlife, and loss of riparian habitat).

12. *See id.*

13. Daniel Trousdale & Kyle Jenkins, *Valuing Conservation Easements for Charitable Contributions*, THE TAX ADVISER (Nov. 1, 2024), <https://www.thetaxadviser.com/issues/2024/nov/valuing-conservation-easements-for-charitable-contributions/> [<https://perma.cc/XY5A-DN67>].

14. *What is Public Benefit Under the Internal Revenue Code*, LAND TR. ALL. RES. CTR. (July 5, 2022), <https://landtrustalliance.org/resources/learn/explore/what-is-public-benefit-under-the-internal-revenue-code> [<https://perma.cc/584V-4VJX>].

15. *See* I.R.C. § 170(h) (West); *see, e.g.*, ARK. CODE ANN. § 26-51-1501 (West 2025); N.M. ADMIN. CODE § 3.13.20.6 (West 2025); *Income Tax Incentives for Land Conservation*, LAND TR. ALL. RES. CTR. (Sep. 27, 2022), <https://landtrustalliance.org/resources/learn/>

When creating a conservation easement, the grantor, a landowner, will make a charitable contribution of real property to the grantee, a qualified organization that is usually a certified land trust or a state or local government entity.¹⁶ In 1964, the federal Internal Revenue Service (IRS) first published a rule allowing a federal tax deduction for taxpayers who donated land adjacent to federal highways “to maintain the scenic view.”¹⁷ Pursuant to the IRS rule, a conservation easement constituted a charitable contribution if the grantee was a federal, state, or territorial entity, or a political subdivision of those entities.¹⁸ By the early 1980s, Congress had expanded the available tax deduction to include conservation easements made for the benefit of charitable organizations.¹⁹

II. LEGAL CONTEXT OF SURFACE AND GROUNDWATER RIGHTS

“Conservation easements developed and became popular in the eastern United States before spreading west.”²⁰ For example, Massachusetts is the “birthplace of the land trust movement.”²¹ East of the 100th Meridian, natural precipitation is generally adequate for agricultural purposes, though as climate change further exacerbates extreme weather patterns, agricultural producers in eastern states may increasingly look to groundwater supplies.²² In addition, the prevailing legal doctrine of riparian water rights in eastern states means that if the property owner “has land abutting a natural watercourse, they share the right to make reasonable use of the [surface] water” with other adjacent landowners.²³ In

explore/income-tax-incentives-for-land-conservation [https://perma.cc/GM4K-84AK] (explaining a total of 14 states offer some form of tax incentive for conservation easement donations).

16. See I.R.C. § 170(h).

17. Rev. Rul. 64-205, 1964-2 C.B. 62, 1964 WL 12623.

18. *Id.*

19. Tax Treatment Extension Act of 1980, Pub. L. 96-541, § 6, 94 Stat. 3204, 3206.

20. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 2.

21. *Id.* at 2; see Laura A. Johnson, *An Open Field: Emerging Opportunities for a Global Private Land Conservation Movement 2* (Lincoln Inst. of Land Pol’y, Working Paper No. WP14LJ1, 2014).

22. Brett Walton, *U.S. Irrigation Continues Steady Eastward Expansion*, CIRCLE OF BLUE (Apr. 17, 2019), <https://www.circleofblue.org/2019/agriculture/u-s-irrigation-continues-steady-eastward-expansion/> [https://perma.cc/EZC7-BH4Y]; R. AARON HROZENCIK & MARCEL AILLERY, ECON. RSCH. SERV., U.S. DEPT. OF AGRIC., TRENDS IN U.S. IRRIGATED AGRICULTURE: INCREASING RESILIENCE UNDER WATER SUPPLY SCARCITY 15 (2021); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 2.

23. Amanda Waters & Erica Spitzig, *Water Rights Based on State Law*, in WATER RIGHTS AND ENVIRONMENTAL REGULATION: A LAWYER’S GUIDE 4–8 (Robert H. Abrams & Latravia Smith, eds., 2018); WATER SYS. COUNCIL, WHO OWNS THE WATER? A SUMMARY OF EXISTING WATER RIGHTS LAWS 4 (2016), <https://www.umt.edu/media/wilderness/toolboxes/>

short, “if a land trust has a conservation easement in the East that requires [surface] water to fulfill its objectives, [it] generally [has] the perpetual legal right to the necessary water” without taking additional action.²⁴

The situation is different in the West, where the prior appropriation doctrine prevails for surface water.²⁵ The essential feature of this doctrine—which generally applies in all states west of the 100th Meridian—is that the legal right to use surface water is independently acquired by appropriation; use does not automatically accompany land ownership.²⁶ The prior appropriation doctrine was first codified in Colorado in the state constitution, and it is also known as the “Colorado Doctrine.”²⁷ For this reason, courts in other states often look to Colorado law when confronted with legal issues involving the appropriation and use of western water rights.²⁸ The remainder of this Article, therefore, will focus on Colorado because its water laws are more comprehensive than most states. It is the Author’s opinion that, generally, provisions on surface water rights and groundwater in easements that satisfy Colorado law will meet the legal requirements of other states. Practitioners in other states should become familiar with their state’s law when reviewing, drafting, or enforcing encumbrances on surface water rights and groundwater in conservation easements, as some variation among the states is inevitable.

In Colorado, as in most western states, a water right is a real property right.²⁹ Importantly, in the West, a water right is a separate and independent property right “from the land on which it is used.”³⁰ A water right is a usufructuary property right, that is, “a right to use beneficially a specified amount of water . . . that can be

documents/water-rights/Who%20Owns%20the%20Water.pdf [https://perma.cc/J7NC-5TZL]; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 2.

24. WATER SYS. COUNCIL, *supra* note 23, at 4; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 2.

25. WATER SYS. COUNCIL, *supra* note 23, at 6; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 2.

26. WATER SYS. COUNCIL, *supra* note 23, at 6; Gregory J. Hobbs Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 2 (1997).

27. GREGORY J. HOBBS JR., COLO. FOUND. FOR WATER EDUC., CITIZEN’S GUIDE TO COLORADO WATER LAW 5–6 (Kristin Maharg ed., 3d ed. 2009).

28. Theron Josephson, *Colorado Doctrine*, in ENCYCLOPEDIA OF THE GREAT PLAINS 851, 851 (David J. Wishart ed., 2004).

29. Santa Fe Trail Ranches Prop. Owners Ass’n v. Simpson, 990 P.2d 46, 53 (Colo. 1999).

30. Se. Colo. Water Conservancy Dist. v. Twin Lakes Assocs., Inc., 770 P.2d 1231, 1239 (Colo. 1989); WATER RIGHTS HANDBOOK, *supra* note 2, at 5.

captured, possessed, and controlled in priority under a [judicial] decree”³¹ In Colorado, a surface water right can be lost by nonuse—abandoned or forfeited, depending on the state.³² In contrast, the nonuse of groundwater and land does not necessarily result in the loss of the property.³³ “This essential distinction has important implications” for water rights in conservation easements.³⁴ In eastern states, however, groundwater may or may not be separately transferable from the land, depending on the state’s approach to allocating and regulating groundwater.³⁵

While the right to use groundwater is typically associated with ownership of the overlying land throughout the United States, there are several basic groundwater allocation systems that govern the owner’s use of the water.³⁶ Confusingly, not all states have pure systems that apply one legal approach to the allocation of all groundwater resources. Many apply a combination of approaches depending on the nature of the groundwater.³⁷ For example, Colorado applies different legal approaches based on whether the groundwater in question is tributary to a surface stream system or contained in an entirely separate aquifer.³⁸

The first system is the Doctrine of Correlative Rights, which requires the sharing of groundwater shortages by overlying landowners.³⁹ This is accomplished in some states by prorating the supply based on the overlying acreage.⁴⁰ The

31. *Santa Fe Trail Ranches*, 990 P.2d at 53; WATER RIGHTS HANDBOOK, *supra* note 2, at 9.

32. *See, e.g.*, COLO. REV. STAT. ANN. § 37-92-402 (West 2025) (listing special procedures for water rights determined to have been abandoned); WATER RIGHTS HANDBOOK, *supra* note 2, at 22.

33. *Id.* § 37-90-107(7), -109; WATER RIGHTS HANDBOOK, *supra* note 2, at 22.

34. WATER RIGHTS HANDBOOK, *supra* note 2, at 22.

35. *See* M.D. Smolen, Aaron Mittelstet & Bekki Harjo, *Whose Water is it Anyway? Comparing the Water Rights Frameworks of Arkansas, Oklahoma, Texas New Mexico, Georgia, Alabama, and Florida*, OKLA. STATE UNIV. EXTENSION (Apr. 2017), <https://extension.okstate.edu/fact-sheets/whose-water-is-it-anyway.html> [<https://perma.cc/27BM-4B8A>].

36. *See* ABIGAIL ADKINS ET AL., *GROUNDWATER LAWS AND REGULATIONS: SURVEY OF SIXTEEN U.S. STATES VOLUME II 6* (Gabriel Eckstein & Amy Hardberger eds., 2022), <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1011&context=nrs-publications> [<https://perma.cc/8C69-6KRC>]; WATER RIGHTS HANDBOOK, *supra* note 2, at 17.

37. Joseph W. Dellapenna, *A Primer on Groundwater Law*, 49 IDAHO L. REV. 265, 268 (2013).

38. *Colorado*, STANFORD WATER IN THE W. (Oct. 23, 2025, at 13:19 CT), <https://groundwater.stanford.edu/dashboard/colorado.html> [<https://perma.cc/BN4T-AMUT>]; *see* WATER RIGHTS HANDBOOK, *supra* note 2, at 16–17.

39. Dellapenna, *supra* note 37, at 267.

40. *Id.* at 276; *see* WATER SYS. COUNCIL, *supra* note 23, at 5.

doctrine of Correlative Rights is essentially an extension of riparian water law to groundwater.⁴¹ The second system is the doctrine of Absolute Dominion, which gives the overlying landowner unbridled access to the resource.⁴² Eleven states either follow or have indicated a preference to this approach, including Connecticut, Georgia, Indiana, Maine, Massachusetts, Minnesota, and Rhode Island.⁴³ A variation on this system applies in Texas, known as the Rule of Capture.⁴⁴ The rule generally gives landowners the right to capture and use groundwater beneath their land without a permit, even if it causes problems for neighboring landowners, as long as they do not act maliciously or waste the resource.⁴⁵ The third system is the Reasonable Use Doctrine, which allows a landowner to withdraw groundwater for reasonable uses on the overlying land without liability for harm to adjoining landowners.⁴⁶ Under this doctrine, any beneficial use on the overlying land is considered reasonable.⁴⁷ The fourth system is the doctrine of Prior Appropriation for surface water rights.⁴⁸ Thirteen states in the West follow this system.⁴⁹ The fifth system is the most recent development in groundwater regulation and is referred to as Regulated Riparianism.⁵⁰ Groundwater users in these states must obtain a permit from the state based on the reasonableness of their proposed use.⁵¹ Permits must be renewed for continued use and are reconsidered periodically.⁵²

III. WATER RIGHTS ISSUES IN CONSERVATION EASEMENTS

Surface and ground water rights are material to a conservation easement if water rights are necessary to protect the conservation values, such as conserving groundwater to allow aquifer recharge, stemming the depletion of the resource, and preserving irrigated agriculture.⁵³ Therefore, the first step in developing a conservation easement to conserve water is to obtain or prepare an inventory of the

41. See KENNETH R. WRIGHT, WATER RIGHTS OF THE EASTERN UNITED STATES 114, 143 (Kenneth R. Wright, ed. 1998); WATER SYS. COUNCIL, *supra* note 23, at 5.

42. Dellapenna, *supra* note 37, at 271.

43. WATER SYS. COUNCIL, *supra* note 23, at 4.

44. Dellapenna, *supra* note 37, at 270.

45. WATER SYS. COUNCIL, *supra* note 23, at 4, 52.

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 6.

49. *Id.*

50. Dellapenna, *supra* note 37 at 302.

51. *Id.* at 305.

52. *Id.* at 306.

53. WRIGHT, BRAMMER & REGAN, *supra* note 8, at 6.

water rights used on the property or present under the property, if any.⁵⁴ If there are water rights used on the land, there are several principal issues to consider regarding a conservation easement.

A. Materiality of Water Rights to the Conservation Purpose

The first question is whether surface water rights or groundwater are material to the conservation purpose. The answer may be clear if the conservation purpose is to preserve irrigated agricultural land or reduce groundwater withdrawals to preserve water for future use. In contrast, water rights may be desirable but not necessary to achieve a more general conservation objective, such as open space or wildlife habitat.⁵⁵ “For example, if the goal is to protect open space adjacent to a water body,” while the presence of water may provide more scenic enjoyment, “scenic enjoyment may not disappear when the water body is low or dry.”⁵⁶ Similarly, conservation objectives may include protecting wildlife habitat involving riparian areas or wetlands adjacent to a water body or dependent upon aquifer fed springs, such as “big game winter range or waterfowl nesting areas[;]” however, obtaining water rights “may not be material to the conservation purpose if water is present in adequate quantities without any direct action by the grantee.”⁵⁷ In these instances, natural precipitation or water rights held by other entities may be sufficient for the conservation purpose, such as if the state holds a minimum instream flow water right on the stream or lake or downstream senior rights make water available.⁵⁸

54. See INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, PUBL’N NO. 5464, CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE 95–96 (2021) [hereinafter CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE]; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 2.

55. WATER RIGHTS HANDBOOK, *supra* note 2, at 6.

56. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3.

57. *Id.*

58. See *Instream Flow Program*, COLO. WATER CONSERVATION BD. (Oct. 22, 2025, at 12:54 CT), <https://cwcb.colorado.gov/focus-areas/ecosystem-health/instream-flow-program> [<https://perma.cc/PG5H-9Z3T>]. An instream flow right is a right to maintain a certain flow rate (measured in cubic feet per second) in the stream or river. *Id.*; *Instream Flow Program*, CAL. DEP’T OF FISH & WILDLIFE (Feb. 10, 2026, at 09:12 CT), <https://wildlife.ca.gov/Conservation/Watersheds/Instream-Flow> [<https://perma.cc/L28F-TJ68>]. These are non-consumptive water rights for ecological or recreational purposes. COLO. WATER CONSERVATION BD., *supra*. In Colorado, only the state, through the Colorado Water Conservation Board, can own instream flow rights. *Id.* Under the prior appropriation doctrine, the call of a downstream senior water right during dry months may prevent diversions upstream of the conservation easement, resulting in sufficient instream flows for the conservation purpose, *see id.*

The recommended practice is to first inventory all water rights and groundwater available for use on the land and map their decreed and actual place of diversion, place of use, and type of use, and determine their historic use, if any.⁵⁹ Next, consider the relationship between the use of the water and the conservation purpose.⁶⁰ This relationship, or lack thereof, should be included in the easement documentation, so-called “baseline report,” which should specify which water is material to which conservation purpose.⁶¹ Unless water is necessary to achieve the conservation purpose, water rights should not be tied to the land under a conservation easement because of tax issues and enforcement considerations, as explained below.⁶²

Alternatively, where water is not material to the conservation purpose, the easement should contain provisions allowing for the grantee’s continued use of the water rights consistent with the conservation purpose.⁶³ Such provisions should include grantee’s “right to maintain associated water facilities, like diversion structures” and wells, “and could allow changes in the point of diversion, place or type of use that are not inconsistent with the conservation [purpose].”⁶⁴ Easement provisions permitting the grantee’s use of water rights not material to the conservation purpose should be discretionary, rather than mandatory, for the reasons outlined below.⁶⁵

B. Ownership of the Water Rights

The usual title insurance policies and title opinions on real estate exclude surface water rights and groundwater.⁶⁶ Thus, the fact that a grantor has a title

59. WATER RIGHTS HANDBOOK, *supra* note 2, at 39, 43.

60. *Id.* at 5.

61. *See id.* at 3; CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 95–97.

62. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3–4.

63. *See* WATER RIGHTS HANDBOOK, *supra* note 2, at 78.

64. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3–4; *see* WATER RIGHTS HANDBOOK, *supra* note 2, at 78. A diversion structure is a mechanism installed at a legally decreed location—the point of diversion—in a river or stream to efficiently divert the decreed amount of water from the streamflow with minimal disturbance to the waterway. *See* DAN S. AXNESS & KIM CLARKIN, FOREST SERV., U.S. DEP’T OF AGRIC., PLANNING AND LAYOUT OF SMALL-STREAM DIVERSIONS 2 (2013). Examples of diversion structures include headgates, weirs, dams, rock spurs, and in-channel pumps. *See id.* at 3. Diversion structures are usually accompanied by a water conveyance mechanism, such as a ditch or pipe, to transfer the water from the mainstem of the waterway to its place of use. *See id.*

65. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 12.

66. *Water Rights and Title Insurance*, LAND TITLE GUARANTEE CO. (Oct. 23, 2025, at 13:56 CT), <https://www.ltgc.com/resources/water-rights/> [<https://perma.cc/RF93-XSGC>].

insurance policy, or a title opinion, does not mean anything whatsoever about the surface water rights or the groundwater associated with the land.⁶⁷ A title opinion on surface water rights and or groundwater “is typically much more difficult and thus expensive than a title opinion on real estate.”⁶⁸ At least some title investigation is warranted if the water is “material to the conservation purpose” and “is not represented by shares in a ditch and reservoir company,” a contract with a local water or irrigation district, or “units in a state [or] federal reclamation project.”⁶⁹ “The water rights situation may be somewhat simpler in a permit state,” if the permitting agency has reliable up-to-date ownership records.⁷⁰

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.⁷¹ “While Colorado specific, the issues are similar in other states.”⁷² “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[;]”⁷³ there are far too many examples of people selling “paper rights” that do not turn out to be “wet water” that the buyer can use.

C. Enforceability

If water is material to the conservation purpose, the easement must contain sufficient provisions to enable the grantee to enforce its presence.⁷⁴ The foremost

67. *See id.*; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3.

68. *See Water Rights and Title Insurance*, *supra* note 66; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3.

69. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3.

70. *Id.* Most western state administrative agencies have online databases that can be used to verify ownership records. *See, e.g., Colorado’s Decision Support System*, COLO. DEP’T OF NAT. RES. (Dec. 20, 2025, at 17:04 CT), <https://dwr.state.co.us/Tools/WaterRights/Transactions> [<https://perma.cc/77BC-NKA3>] (providing public access to Colorado water-rights ownership and transaction records). Practitioners should rely on such records at their peril, however, which are often incomplete, out of date, or rife with errors.

71. *See, e.g.,* Ward H. Fischer, *Water Title Examination*, 9 COLO. LAW. 2043, 2044 (1980); Star L. Waring, Christina A. Fiffis & David L. Kueter, *Water Rights Title and Conveyancing*, 28 COLO. LAW. 69, 76 (1999).

72. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3.

73. *Id.*

74. James L. Huffman, Hertha L. Lund & Christopher T. Scoones, *Constitutional Protections of Property Interests in Western Water*, 41 PUB. LAND & RES. L. REV. 27, 36, n.70 (2019); SARAH BATES ET AL., *LAND TRUSTS AND WATER: STRATEGIES AND RESOURCES FOR ADDRESSING WATER IN WESTERN LAND CONSERVATION 4* (Sylvia Bates & Mary Burke eds., 2014).

requirement for enforcement is an interest in the water right itself.⁷⁵ Thus, the easement must expressly convey an interest in the subject water rights to the grantee.⁷⁶ This interest may be in some or all of the water rights used on or present under the property, or a temporal interest therein.⁷⁷ If the grantor retains all of the water rights without any restrictions in the conservation easement, the grantor could strip the rights from the property and sell them separately, undermining the conservation purpose.⁷⁸ “The conservation easement should include the water rights used on” or present under the land, “with an exhibit listing the water rights”⁷⁹ The exhibit should include both “the name and the amount of the water [right].”⁸⁰ “If available, include the information from the water court or any administrative decree” or permit, such as: court or agency; date entered; case or permit number; legal point of diversion; water source; amount; type of water right; appropriation date (if applicable); and adjudication or permit date.⁸¹

“To support enforcement by the grantee, the conservation easement should dedicate and restrict the use of the included [surface] water rights” and groundwater “consistent with the conservation purpose.”⁸² “The grantor should be affirmatively obligated to maintain and use the water rights” and to not abandon or forfeit them.⁸³ The easement should contain restrictions to “prevent the change of use of the water rights to an incompatible purpose,” and prevent “the sale, lease, encumbrance, or other legal separation” of the water rights from any land under

75. See HOBBS, *supra* note 27, at 4; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5.

76. See Huffman, Lund & Scoones, *supra* note 74, at 36; CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 95.

77. *Id.*

78. See Huffman, Lund & Scoones, *supra* note 74, at 31–32; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5. In states that follow the prior appropriation system, a water right is an exclusive right of use, and, in most states, the right is severable from the land and freely alienable. Huffman, Lund & Scoones, *supra* note 74, at 38–39. This is especially pertinent if the water rights associated with the underlying land derive from shares in a ditch company. Thus, if the grantor retains the water right without necessary restrictions enumerated in the easement, a transfer of that right risks undermining the conservation purpose. *See id.*

79. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5.

80. *Id.*

81. *Id.*; see HOBBS, *supra* note 27, at 6–8, 13–14.

82. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5; see WRIGHT, BRAMMER & REGAN, *supra* note 8, at 12–13.

83. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5; WATER RIGHTS HANDBOOK, *supra* note 2, at 99; WRIGHT, BRAMMER & REGAN, *supra* note 8, at 13; see Huffman, Lund & Scoones, *supra* note 74, at 34.

easement.⁸⁴ “In order to avoid loss of the water rights by abandonment [or] forfeiture,⁸⁵ the grantee should obtain the right to enter the property to continue their historic use,⁸⁶ or to change the water rights to another [qualified] ‘conservation purpose[,]’” particularly if claiming a charitable deduction under the Internal Revenue Code (I.R.C.), discussed below.⁸⁷

D. Legal Consequences of Non-Enforcement of Material Water Rights

If water is material to the conservation values, “The consequences of non-enforcement may seriously affect both the grantor and grantee.”⁸⁸ It is important not to include mandatory provisions in the conservation easement on use of water rights unless those rights are material to the conservation purpose and “the grantee has the intent and the resources to enforce the obligations and restrictions on the water rights.”⁸⁹

The first concern is that non-enforcement of the material water rights will defeat the conservation purpose of the easement.⁹⁰ This would occur when grantors

84. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5; Peter D. Nichols, *Do Conservation Easements and Water Mix (in Colorado)?*, 5 U. DEN. WATER L. REV. 504, 520 n.144 (2002).

85. To prevent waste and ensure the most efficient use of the resource, many western states have statutory provisions by which appropriated water rights that have not been put to beneficial use—including conditional rights that have not been developed with reasonable diligence—are considered abandoned. *See, e.g.*, COLO. REV. STAT. ANN. §37-92-103 (West 2025); WYO. STAT. ANN. § 41-3-401 (West 2025).

86. COLO. REV. STAT. ANN. § 37-92-305. To prevent injury to other water users, when seeking to change the decreed use of a water right, the amount of water that may be changed to the new use is determined by the historical consumptive use of the decreed right at issue. *See id.* This amount must be quantified by a water court judge based on the analysis of a representative study period that includes wet, dry, and average years. *See id.*

87. WATER RIGHTS HANDBOOK, *supra* note 2, at 81; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 5. I.R.C. § 170(h) contains four categories of qualified conservation easement purposes: (1) preservation of land for outdoor recreation or education of general public; (2) protection of ecosystem of natural habitat of fish, wildlife or plants; (3) open space for scenic enjoyment or pursuant to a state or federal conservation policy, and that will yield a significant public benefit; and (4) preservation of historically significant lands or structures. I.R.C. § 170(h) (West); *What is Public Benefit Under the Internal Revenue Code*, *supra* note 14.

88. *See* WATER RIGHTS HANDBOOK, *supra* note 2, at 94–95; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6.

89. Richard Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever...And Should It Be?*, 52 UIC J. MARSHALL L. REV. 677, 691 (2019); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6.

90. WATER RIGHTS HANDBOOK, *supra* note 2, at 94; *see* Roddewig, *supra* note 89, at 695, 705.

simply stop exercising their water rights in a manner that maintains the conservation purpose.⁹¹ Similarly, “various instruments funding the conservation easement,” such as a condition subsequent, “may contain recapture provisions if the grants are not used for conservation purpose[s].”⁹² By failing to enforce the use of the water rights, grantees might find themselves “in the uncomfortable position of having to pay back the private foundations or public agencies that funded the acquisition” of the easement.⁹³

If the conservation easement does not contain non-waiver provisions, another significant concern is that, by failing to timely enforce water use provisions for conservation purposes, the grantee could lose its right to enforce such provisions entirely and potentially lose the entire conservation easement.⁹⁴ Unfortunately, there are no reported cases that address this issue specific to water rights. Conservation easements are equitable servitudes—enforceable private arrangements for the use of land.⁹⁵ By looking at the treatment of other such servitudes, such as real covenants, “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.”⁹⁶ In the case of restrictive covenants, “the doctrines of abandonment, estoppel[,] and waiver apply.”⁹⁷

91. WATER RIGHTS HANDBOOK, *supra* note 2; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6; *see* Roddewig, *supra* note 89, at 705.

92. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6; *see Condition Subsequent*, LEGAL INFO. INST., CORNELL L. SCH. (July 2022), https://www.law.cornell.edu/wex/condition_subsequent [<https://perma.cc/J3C2-TWDE>]. If the easement is subject to a condition subsequent—i.e., the existence of the conservation purpose—the grantor retains an interest in the easement; in the event the condition subsequent occurs, the easement terminates. *Id.*

93. Roddewig, *supra* note 89, at 706; WATER RIGHTS HANDBOOK, *supra* note 2, at 94; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6.

94. While an easement can be abandoned, generally it cannot be terminated by nonuse alone. April D. Hendricks, *An Overview of Colorado Easement Law*, COLO. LAW. (Sep. 2020), <https://cl.cobar.org/features/an-overview-of-colorado-easement-law> [<https://perma.cc/F3HV-34TP>]. However, the if the easement owner becomes aware of actions taken by the landowner that are inconsistent with the conservation purpose and fails to take remedial steps to enforce their right to the subject water rights and preserve the conservation values of the easement, the easement may be terminated by estoppel. *Id.*

95. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261–62 (1982).

96. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6.

97. *W. Alameda Heights Homeowners Ass’n. v. Bd. of Cnty. Comm’rs.*, 458 P.2d 253, 257 (Colo. 1969); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 6.

1. *Abandonment or Forfeiture*

Western states follow different rules when it comes to the loss of water rights by “abandonment” or by “forfeiture.”⁹⁸ The law of abandonment for water rights requires proof by evidence of nonuse and intent to abandon.⁹⁹ “Intention may be shown either expressly or by implication.”¹⁰⁰ Although not conclusive, continued and unexplained nonuse of water rights for a long period of time may be evidence of abandonment and establish a prima facie assumption of intent to abandon that can be rebutted.¹⁰¹ Nonuse of an easement does not constitute abandonment.¹⁰² To establish abandonment, “the party asserting that the easement was abandoned must show affirmative acts manifesting an intention” by the owner of the dominant estate.¹⁰³ “Mere nonuse of water rights for conservation purposes, even where accompanied by a failure on the part of the [grantee] to attempt to enforce such use,” would not typically constitute abandonment.¹⁰⁴ So long as the grantee does not make an affirmative act manifesting an intent to cease use of the water, “the obligations and restrictions on the use of the water rights for conservation purposes should be enforceable.”¹⁰⁵ Conversely, an affirmative act by the grantee

98. KELLY BENNETT, *WATER RIGHTS IN THE WEST: WHAT EVERY LANDOWNER NEEDS TO KNOW* (2017), https://www.westernlandowners.org/wp-content/uploads/2017/11/2017_Water-Rights_KB.pdf [<https://perma.cc/PLG8-V3YS>].

99. *Haystack Ranch, LLC v. Fazio*, 997 P.2d 548, 552 (Colo. 2000); *Upper Harmony Ditch Co. v. Carwin*, 539 P.2d 1282, 1285 (Colo. 1975).

100. *Upper Harmony Ditch*, 539 P.2d at 1285.

101. COLO. REV. STAT. ANN. § 37-92-402(11) (West 2025) (“[F]ailure for a period of ten years or more to apply to a beneficial use the water available under a water right when needed by the person entitled to use same shall create a rebuttable presumption of abandonment of a water right with respect to the amount of such available water which has not been so used; except that such presumption may be waived by the division engineer or the state engineer if special circumstances negate an intent to abandon.”); *WATER RIGHTS HANDBOOK*, *supra* note 2, at 23.

102. *Gjovig v. Spino*, 701 P.2d 1267, 1269 (Colo. App. 1985).

103. *Westland Nursing Home, Inc. v. Benson*, 517 P.2d 862, 866 (Colo. App. 1974).

104. *See Haystack Ranch*, 997 P.2d at 552 (“The critical element of abandonment is intent.”); *WATER RIGHTS HANDBOOK*, *supra* note 2, at 99.

105. *WATER RIGHTS HANDBOOK*, *supra* note 2, at 99; *see City & Cnty. of Denver By & Through Bd. of Water Comm’rs. v. Middle Park Water Conservancy Dist.*, 925 P.2d 283, 286 (Colo. 1996). While nonuse is generally insufficient to prove abandonment without a showing of intent, intent may be shown by implication. *City & Cnty. of Denver*, 925 P.2d at 286. Nonuse for a long period of time, for example 20 years, is sufficient to establish a prima facie case of abandonment. *Id.* In such cases, the burden shifts to the owner of the subject water right to rebut the presumption established by nonuse and demonstrate other actions to evince a lack of intent to abandon. *See, e.g., Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300, 302 (Colo. 1982).

manifesting an intent to abandon, accompanied by nonuse, “could constitute abandonment and such obligations and restrictions would not be enforceable.”¹⁰⁶ “Therefore, the grantee should avoid any affirmative manifestations of intent to abandon,” such as telling the grantor they do not intend to enforce the provisions on the water rights.¹⁰⁷

“Forfeiture, unlike abandonment, does not require that the appropriator intend to abandon” their water rights; rather, the involuntary loss of all or a portion of the water right is triggered by nonuse for a statutory period, typically five years.¹⁰⁸ Statutes declaring water rights “abandoned” without any intent requirement are effectively forfeiture statutes.¹⁰⁹ “The burden of proving nonuse is on the State, or other party, asserting forfeiture.”¹¹⁰ Oregon, Idaho, New Mexico, Wyoming, Utah, South Dakota, and other states have forfeiture statutes.¹¹¹

Unlike surface water, groundwater rights typically are not lost by non-use.¹¹² Here is a risk, however, that nearby groundwater users could drain the water beneath a conservation easement. This could happen even if the underlying groundwater is protected by law or a legally recognized groundwater right depending on the state.¹¹³ Consequently, a geographically comprehensive program to encumber contiguous groundwater may be necessary to effectively conserve the groundwater through non-use or reduced use.¹¹⁴ The Ogallala Land & Water

106. *Beaver Park Water, Inc.*, 649 P.2d at 302; WATER RIGHTS HANDBOOK, *supra* note 2, at 99.

107. WATER RIGHTS HANDBOOK, *supra* note 2, at 99; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 7.

108. *See, e.g.*, OR. REV. STAT. ANN. § 540.610(1) (West 2025); IDAHO CODE ANN. § 42-222(2) (West 2025); N.M. STAT. ANN. § 72-12-8 (West 2025); S.D. CODIFIED LAWS § 46-5-37 (2025); WYO. STAT. ANN. § 41-3-401 (West 2025); UTAH CODE ANN. § 37-92-305 (West 2025); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 7.

109. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 7.

110. *Id.*

111. *See, e.g.*, OR. REV. STAT. ANN. § 540.610(1); IDAHO CODE ANN. § 42-222(2); N.M. STAT. ANN. § 72-12-8; WYO. STAT. ANN. § 41-3-401; UTAH CODE ANN. § 37-92-305; S.D. CODIFIED LAWS § 46-5-37.

112. COLO. REV. STAT. ANN. § 37-90-107, -108 (West 2025). While groundwater rights are not normally subject to the State Engineer’s decennial abandonment list, if an applicant fails to timely perfect conditional groundwater rights, the rights could be lost. *See Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.*, 247 P.3d 567, 571, 577 (Colo. 2011).

113. For example, in a state that follows the doctrine of reasonable use or the rule of capture, other overlying landowners may lawfully deplete the groundwater resource. *See Smolen, Mittelstet & Harjo*, *supra* note 35.

114. *See id.*

Conservancy has embarked on such a program in particularly groundwater-rich areas of the Ogallala Aquifer in Curry County, New Mexico, around Clovis.¹¹⁵

2. *Avoiding Abandonment or Forfeiture*

The ideal course of action is to avoid a presumption of abandonment or forfeiture by “diverting and using the water pursuant to its decree or permit.”¹¹⁶ However, note that “diverting and using the water in a manner not authorized . . . may not be sufficient . . .”¹¹⁷ As a first line of defense, conservation easements should include an affirmative obligation on the grantor to avoid abandonment or forfeiture.¹¹⁸ A second line of defense is to include a provision allowing the grantee to enter the property to use the water right for the specified conservation purpose pursuant to decree or permit.¹¹⁹ The conservation of groundwater may not constitute a beneficial use protected in some states, however, and thus potentially subject to abandonment or forfeiture.¹²⁰ Where available, enrolling in a water conservation program administered by the state, a local water conservancy, water conservation, soil and water conservation, or similar quasi-governmental district will often constitute a beneficial use and protect the subject rights.¹²¹

3. *Estoppel*

The grantee could be estopped from asserting their right to enforce the use of the water material to conservation purposes if they failed to do so in a timely manner.¹²² The elements of estoppel are: “full knowledge of the facts; unreasonable delay in the assertion of available remedy; and intervening reliance by and prejudice to another”.¹²³ For example, estoppel could arise in a situation

115. *Our Work*, OGALLALA LAND & WATER CONSERVANCY (Oct. 23, 2025, at 13:18 CT), <https://www.ogallala.org/services-1> [<https://perma.cc/9WGH-ZPEJ>].

116. WATER RIGHTS HANDBOOK, *supra* note 2, at 99; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 9.

117. WATER RIGHTS HANDBOOK, *supra* note 2, at 99; *see* Santa Fe Trail Ranches Prop. Owners Ass’n v. Simpson, 990 P.2d 46, 59 (Colo. 1999) (holding that the undecreed use of water cannot be a basis for changing those water rights).

118. WATER RIGHTS HANDBOOK, *supra* note 2, at 99.

119. *Id.*

120. WRIGHT, BRAMMER & REGAN, *supra* note 8, at 11–13.

121. *Id.* at 13. Colorado law, for example, protects ground water rights that are enrolled in conservation programs from abandonment. COLO. REV. STAT. ANN. § 37-92-103(2) (West 2025).

122. 28 AM. JUR. 2D *Estoppel and Waiver* § 2, Westlaw (database updated Jan. 2026); *see* Bijou Irrigation Dist. v. Empire Club, 804 P.2d 175, 185–86 (Colo. 1991).

123. *Barker v. Jeremiasen*, 676 P.2d 1259, 1262 (Colo. App. 1984).

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 change the use of the water rights to another place of use.”¹²⁴ In that scenario, the grantee could be “estopped from enforcing the obligations and restrictions on the use of water rights in the conservation easement.”¹²⁵ To avoid such a 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.”¹²⁶ This risk underscores the importance of not writing provisions into the conservation easement on water rights unless the rights are material to the conservation purpose, and the grantee “has the intent and the resources to enforce the . . . obligations and restrictions” on those water rights.¹²⁷

4. Waiver

The right to enforce a restrictive covenant “may also be lost by waiver.”¹²⁸ “What constitutes waiver depends on the particular facts of each case.”¹²⁹ “Typical examples involve multiple lot owners violating subdivision covenants without objection before enforcement is attempted.”¹³⁰ In the water rights scenario, “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.”¹³¹ Similarly, waiver may be asserted against the grantee if that grantee “owned multiple conservation easements with water rights for conservation purposes” and failed to object or enforce water use obligations

124. See 42 AM. JUR. 3D *Proof of Facts* § 463, Westlaw (database updated July 2025); WATER RIGHTS HANDBOOK, *supra* note 2, at 102.

125. 42 AM. JUR. 3D *Proof of Facts* § 463, Westlaw (database updated July 2025).

126. See *generally id.* (explaining that the enforcement of the conservation easement should not be unreasonably delayed); WATER RIGHTS HANDBOOK, *supra* note 2, at 102.

127. WATER RIGHTS HANDBOOK, *supra* note 2, at 102.

128. *Id.*; 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 43, Westlaw (databased updated May 2025).

129. WATER RIGHTS HANDBOOK, *supra* note 2, at 103; 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 43, Westlaw (databased updated May 2025).

130. WATER RIGHTS HANDBOOK, *supra* note 2, at 103; see *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 77 (Colo. App. 1993); *Moran v. Mem’l Point Prop. Owners Ass’n, Inc.*, 410 S.W.3d 397, 404 (Tex. App. 2013) (explaining the factors for determining abandonment of a restrictive covenant, which include: “the number, nature, and severity of the existing violations, any prior enforcements of the restriction, and whether it is still possible to realize to a substantial degree of the benefits of the restriction despite the violations”).

131. WATER RIGHTS HANDBOOK, *supra* note 2, at 103.

against a majority of the grantors.¹³² In such a scenario, another grantor might argue that, by failing to enforce against others, the grantee “waived its right to enforce the obligations and restrictions on the water rights” at issue.¹³³

IV. ENFORCEABILITY OF WATER RIGHTS PROVISIONS

“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.”¹³⁴ Historically, this posed an enforcement problem because courts “disfavored both easements in gross, and negative easements.”¹³⁵ This uncertainty led most states, including Colorado, “to adopt specific authorizing legislation for conservation easements.”¹³⁶ The Colorado statute, however, did not clearly encompass water rights.¹³⁷ Colorado amended its statutes in 2003 to explicitly allow the creation of conservation easements that include the “water rights beneficially used upon [the] land or water area” that is the subject of the easement.¹³⁸ This was an important provision because it removed “the uncertainty regarding the enforceability of existing conservation easements with water rights.”¹³⁹

In *San Antonio Water System v. Matiraan, Ltd.*, the Texas Court of Appeals upheld the City’s conservation easement, the purpose of which is to prevent any use of the burden property that would “adversely impair or interfere with the recharge of the Edwards Aquifer.”¹⁴⁰ The Aquifer serves as the primary source of

132. *Id.*; see generally 42 AM. JUR. 3D *Proof of Facts* § 463, Westlaw (database updated July 2025) (explaining the right to waive enforcement of covenant restrictions).

133. WATER RIGHTS HANDBOOK, *supra* note 2, at 103.; see 42 AM. JUR. 3D *Proof of Facts* § 463, Westlaw (database updated July 2025).

134. See Nichols, *supra* note 84, at 508–09, 515; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 10.

135. 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 n.25 (1996); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 10.

136. Nichols, *supra* note 84, at 515–16; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 10.

137. See COLO. REV. STAT. ANN. §§ 38-30-101 to -111 (West 2025).

138. *Id.* § 38-30.5-102.

139. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 11.

140. *San Antonio Water Sys. v. Matiraan, Ltd.*, 692 S.W.3d 545, 553 (Tex. Ct. App. 2023).

water for south central Texas and is, therefore, vital to: the residents, industry, and ecology of the regions; the State's economy; and the public welfare.¹⁴¹

In *Mesa County Land Conservancy, Inc. v. Allen*, the Colorado Court of Appeals held that the amended law validated conservation easements that include water rights created prior to its enactment.¹⁴² The easement, which the USDA granted to a local Colorado land trust in 1990, included a short sentence that the court held was sufficient to encumber the water rights: “[a]ll water rights held at the date of this conveyance shall remain with this land.”¹⁴³ This was the first appellate decision on water rights encumbered by a conservation easement in the United States, which would be persuasive authority in any prior appropriation state.¹⁴⁴ Many conservation attorneys believe this case settled the issue of whether a conservation easement could encumber water rights, so long as it was consistent with a state enabling statute.¹⁴⁵ This belief is due to the short language in the easement, the thorough analysis of the appellate court, and the denial of certiorari by the Colorado Supreme Court, which at the time was wanting to take cases whenever they thought the law was at all unclear.¹⁴⁶

While some other state statutes may allow conservation easements to encumber groundwater independent of land, like New Mexico,¹⁴⁷ it may be necessary to amend a state's conservation easement enabling statute or obtain an administrative or judicial interpretation where the statute is ambiguous, and the easement purpose is exclusively groundwater conservation.

V. DRAFTING A CONSERVATION EASEMENT ON GROUNDWATER

As discussed above, it is critical to understand the subject water rights and how they relate to the conservation purpose of the easement. From that perspective, “it is possible to craft an appropriate conservation easement” to avoid potential enforcement pitfalls and ensure the easement satisfies the statutory requirements needed for the grantor to obtain state and federal tax deductions, if desired.¹⁴⁸

141. *About the Edwards Aquifer*, EDWARDS AQUIFER AUTH. (Oct. 23, 2025, at 12:18 ET), <https://www.edwardsaquifer.org/aquifer-science/about-the-edwards-aquifer> [<https://perma.cc/4C79-D2UA>].

142. *Mesa Cnty. Land Conservancy, Inc. v. Allen*, 318 P.3d 46, 57 (Colo. App. 2012).

143. *Id.* at 49 (alteration in original) (citation omitted).

144. *See generally id.*

145. Austin Hamre, *Title Fight—Avoiding a Water Right Conveyance TKO*, COLO. LAW., Mar. 2015, at 41, 42.

146. *Id.*

147. N.M. STAT. ANN. § 47-12-5 (West 2025).

148. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 13.

As far as the authors know, there is only one conservation easement which restricts the use of groundwater in the country. That easement reduced groundwater pumping by 50 percent for the purpose of achieving and maintaining a “sustainable water supply” from the Confined Aquifer of the San Luis Valley of Southern Colorado.¹⁴⁹ Colorado’s enabling statute requires the encumbrance with water with land and does not authorize the encumbrance of water alone.¹⁵⁰

Below are the legal and substantive issues that drafters of a conservation easement for the purpose of conserving groundwater should consider:

A. Conservation Purpose

An easement should define the conservation purposes served by encumbering the groundwater.¹⁵¹ The conservation of groundwater may mesh with state and local policies more broadly than are generally familiar to the conservation and land trust community. For example, the state’s natural or water resources agency may have policies related to sustainability of natural resources generally, water resources specifically, or the state’s forestry agency may have policies that recognize that the conservation of groundwater fosters forest health and mitigates wildfire risk.¹⁵²

B. Statutory Authority

The easement should cite to the relevant state’s statutory authority for encumbering groundwater in a conservation easement. The drafter should consider asserting why the encumbrance of the groundwater is consistent with the statute

149. Ronald R. Bowman Revocable Trust and Gail J. Bowman Revocable Trust, Deed of Conservation Easement to Colorado Open Lands ¶ B3 (Nov. 9, 2022) (on file with the Colorado Saguache County Clerk under reception number 397989 and the Drake Journal of Agricultural Law).

150. COLO REV. STAT. ANN. § 38-30.5-102 (West 2025).

151. Nancy A. McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 GEORGETOWN ENV’T L. REV. 167, 180 (2022); see WATER RIGHTS HANDBOOK, *supra* note 2, at 76, 82–83; CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 13.

152. See, e.g., *Northern California Regional Profile: Water Security*, CAL. WILDFIRE & FOREST RESILIENCE TASK FORCE (Oct. 23, 2025, at 12:17 CT), <https://wildfiretaskforce.org/the-northern-california-region/water-security/> [<https://perma.cc/YL62-GA3H>] (explaining that, in Northern California, the California Wildfire and Forest Resilience Task Force recognizes that groundwater is an important resource both to make water resources available for active firefighting purposes and because higher levels of soil moisture mitigate the risk of soil damage and erosion caused by high-severity fires).

and quoting relevant statutory language.¹⁵³ The drafter should also consider citing any relevant administrative findings or state court decisions in support.

In some states, like New Mexico, a conservation easement on groundwater alone is facially legally enforceable.¹⁵⁴ In others, like Colorado, water—including groundwater—may only be encumbered in combination with land on which it is used.¹⁵⁵ Although many states have adopted a version of the Uniform Conservation Easement Act of 1981, the Act does not explicitly provide for the protection of groundwater.¹⁵⁶

The drafter should consider asserting why the encumbrance of the groundwater meets the requirements of the I.R.C. if the grantor wishes to claim a federal charitable deduction.¹⁵⁷ This reasoning may also be relevant to qualifying for a state tax credit or state charitable deduction in states that follow the I.R.C. requirements for eligibility.¹⁵⁸

If the grantor intends to claim a federal charitable deduction, the encumbrance of the groundwater must be exclusively for “conservation purposes,” which includes “the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,” and “the preservation of open space (including farmland and forest land) where such preservation is . . . for the scenic enjoyment of the general public, or . . . pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit”¹⁵⁹

153. WATER RIGHTS HANDBOOK, *supra* note 2, at 76.

154. WRIGHT, BRAMMER & REGAN, *supra* note 8, at 18–19.

155. See COLO. REV. STAT. ANN. § 38-30.5-104.

156. See *Conservation Easement Act*, UNIF. L. COMM’N (Oct. 23, 2025, at 12:32 CT), <https://www.uniformlaws.org/committees/community-home?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd> [<https://perma.cc/C8AE-5PZF>] (highlighting that to date, 23 states and the District of Columbia have enacted the Act in state law); UNIF. CONSERVATION EASEMENT ACT § 1 (UNIF. L. COMM’N 1981). The Uniform Conservation Easement Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1981. *Id.* As drafted, the Act defines a conservation easement as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting . . . natural resources, maintaining or enhancing air or water quality,” but does not specifically refer to the conservation of groundwater resources as a conservation easement purpose. *Id.*

157. WATER RIGHTS HANDBOOK, *supra* note 2, at 6, 76.

158. See CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 127–28.

159. I.R.C. § 170(f)(3)(B)(iii), (h)(1)(C), (h)(4)(A)(ii)–(iii) (West).

C. Groundwater Rights

A conservation easement on groundwater should specifically identify the groundwater to be encumbered by the conservation easement.¹⁶⁰ The easement should include an attached exhibit that details the administrative permits and judicial decrees that describe in detail the groundwater rights, if available.¹⁶¹ If the groundwater, however, is simply a right associated with land ownership, it may be necessary to attach an exhibit or survey of the owner's land interests and cite the state statute or regulations that recognize the landowner's right to use and convey the extra-territorial use of the groundwater to another party.¹⁶²

D. Governmental Water Conservation Program

If the conserved groundwater will be enrolled in or recognized by a state or local government conservation program, state this in the easement, cite to the program and, if possible, cite any specific governmental action such as a resolution or contract that memorializes the recognition.¹⁶³ The easement should also address any specific program restrictions that apply to the groundwater that is conserved.¹⁶⁴

E. Permitted Uses of Groundwater

The easement language should clarify if all or some groundwater pumping will be restricted immediately. The drafter should consider whether the restrictions will be phased in and how—for example to facilitate the conversion of irrigated land to dryland farming or grazing, discussed below¹⁶⁵—and whether some pumping will be allowed for on-farm domestic use or stock watering. Many states will permit new wells limited to domestic use or stock watering, which could be allowed under the terms of the easement while restricting the pumping of irrigation wells.¹⁶⁶

160. WATER RIGHTS HANDBOOK, *supra* note 2, at 75.

161. *See id.* at 75, 85.

162. *See id.*

163. *See, e.g.*, COLO. REV. STAT. ANN. § 37-92-103(2)(b)(I)–(II) (West 2025) (protecting water rights from termination via abandonment if participating in a state or local water conservation program).

164. *Id.*; *see* WRIGHT, BRAMMER & REGAN, *supra* note 8, at 18–19.

165. *Our Mission*, OGALLALA LAND & WATER CONSERVANCY (Oct. 23, 2025, at 13:17 CT), <https://www.ogalwc.org/> [<https://perma.cc/8YLH-FVVX>].

166. COLO. REV. STAT. ANN. §§ 35-49-101 to 116, 37-92-602; *see* WRIGHT, BRAMMER & REGAN, *supra* note 8, at 16.

F. Land Transition Plan

If the land irrigated by groundwater that is in an arid environment and immediate cessation of groundwater pumping would have detrimental effects on the vegetation and soil resources of the overlying land, pumping could be gradually reduced over a specified period of time. During that period, the land and groundwater could be managed according to a land transition plan that specifies irrigation amounts, places, and timing, while guiding land remediation activities in order to encourage soil stability and health, minimize invasive species, and maximize approved vegetative cover.¹⁶⁷ The parties should acknowledge and agree that adaptability is essential, given the innovative nature of this work, and, upon mutual agreement, update the land transition plan as needed based on field evaluations during its lifespan.

G. Restrictions on Transfer

The easement should prohibit the transfer, encumbrance, sale, or otherwise permanent separation of the groundwater from the historically irrigated land.¹⁶⁸

H. Forfeiture and Abandonment

The easement should state that the grantor shall not abandon or allow abandonment or forfeiture of the water rights by action or inaction. The conservation easement must be “perpetual” to qualify for a federal charitable income tax deduction, and some state income tax deductions and tax credits.¹⁶⁹

Some states allow a “tolling” of the presumptive periods before forfeiture or abandonment when the resource (irrigated land or irrigation water) is enrolled in a governmental conservation program such as the Conservation Reserve Enhancement Program.¹⁷⁰

167. See ABBEY WARNER, COLO. OPEN LANDS, RIO GRANDE HEADWATERS LAND TR., GROUNDWATER CONSERVATION EASEMENTS FOR AQUIFER RECOVERY IN THE SAN LUIS VALLEY 13, <https://coloradoopenlands.org/wp-content/uploads/Groundwater-Conservation-Easements-for-Aquifer-Recovery-in-the-San-Luis-Valley-web.pdf> [<https://perma.cc/N6A7-L7N3>].

168. WATER RIGHTS HANDBOOK, *supra* note 2, at 77–78.

169. *Publication 526 (2024), Charitable Contributions*, INTERNAL REVENUE SERV. (Oct. 23, 2025, at 12:38 CT), https://www.irs.gov/publications/p526#en_US_2024_publink1000229643 [<https://perma.cc/9YR3-G9KR>]; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

170. See, e.g., OR. REV. STAT. ANN. § 540.610 (West 2025). The Conservation Reserve Enhancement Program (CREP) is a federal program administered by the Farm Service Agency to work with farmers and landowners to remove environmentally sensitive land from agricultural production and implement conservation practices. *Conservation Reserve*

As with any legal drafting, there is no one “right” way to do this, and “different attorneys will have different preferences and styles.”¹⁷¹ If you are reviewing an easement that someone else has drafted, however, “look critically at the language and how it does or does not address the issues discussed above.”¹⁷²

VI. FINANCING CONSERVATION EASEMENTS: FEDERAL AND STATE TAX DEDUCTIONS

A. IRS Requirements

Federal and state income tax benefits from the donation or below-market sale of a conservation easement “are key to financing many transactions.”¹⁷³ To qualify for a federal tax deduction, the conservation easement must enumerate a conservation purpose sufficient to satisfy IRS requirements for a charitable donation.¹⁷⁴ Specifying the conservation purpose requires careful consideration. There are only limited circumstances in which the I.R.C. permits a charitable deduction for a partial interest in property.¹⁷⁵ If water is material to the conservation purpose, it may be necessary to include it in the easement in order to sustain the tax deduction.¹⁷⁶

The I.R.C. permits a deduction of a partial interest in property, such as a conservation easement that is “a qualified conservation contribution.”¹⁷⁷ To qualify, the contribution must meet three requirements.¹⁷⁸ Relevant here, it must be used “exclusively for conservation purposes[.]”¹⁷⁹ which includes “the protection of a relatively natural habitat of fish, wildlife, or plants, or similar

Enhancement Program (CREP), FARM SERV. AGENCY, U.S. DEP’T OF AGRIC. (October 23, 2025, at 12:37 CT), <https://www.fsa.usda.gov/resources/programs/conservation-reserve-enhancement-program-crep> [<https://perma.cc/JG22-6AHY>].

171. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 13.

172. *Id.*

173. *Id.* at 3; *How Much Does a Conservation Easement Reduce Property Values?*, REALIZED (Dec. 19, 2022), <https://www.realized1031.com/blog/how-much-does-a-conservation-easement-reduce-property-values> [<https://perma.cc/GZ36-ZGEX>].

174. COLIN GAISER, COLO. LEGIS. COUNCIL STAFF, ISSUE BRIEF OCTOBER 2024: CONSERVATION EASEMENTS 2 (2024), https://content.leg.colorado.gov/sites/default/files/r24-655_update_conservation_easements_memo.pdf [<https://perma.cc/YF5U-7V9A>].

175. I.R.C. § 170(f)(3)(A) (West).

176. *See* GAISER, *supra* note 174, at 2; *see* S.B. 24-126, 74th Gen. Assemb., Reg. Sess. (Colo. 2024).

177. I.R.C. § 170(f)(3).

178. *Id.* § 170(h)(1).

179. *Id.* § 170(h)(1)(C).

ecosystem,”¹⁸⁰ and “the preservation of open space (including farmland and forest land) where such preservation is . . . for the scenic enjoyment of the general public, or . . . pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit”¹⁸¹

Further, the donation must be “protected in perpetuity.”¹⁸² IRS regulations amplify the statutory requirements, and both should be consulted.¹⁸³ Unfortunately, the available case law is very fact specific, like most tax cases, and does not contain useful guidance about satisfying a conservation purpose.¹⁸⁴

1. Groundwater-Specific Issues

The conservation of groundwater without a specific conservation purpose enunciated may not meet I.R.C. standards for use “exclusively for conservation purposes” or “protected in perpetuity” if available for future use.¹⁸⁵ Notably, the IRS has begun to disallow conservation easement deductions where any use is deemed inconsistent use under 26 C.F.R. § 1.170A-14(e) no matter the scale.¹⁸⁶

There are several options to avoid potential federal income tax consequences of conserving groundwater with a conservation easement. The easiest and most certain remedy is simply to forgo claiming a federal charitable deduction for the donation.¹⁸⁷ Conversely, a conservation easement that conserved groundwater that would otherwise be pumped for agricultural irrigation could provide a “soft landing” for irrigators to transition to dry-land farming or grazing before running out of groundwater,¹⁸⁸ and arguably preserve open space, including farmland.¹⁸⁹ A

180. *Id.* § 170(h)(4)(A)(ii).

181. *Id.* § 170(h)(4)(A)(iii).

182. *Id.* § 170(h)(5)(A).

183. *See* 26 C.F.R. § 1.170A-14(d)–(e) (2025).

184. *See, e.g.,* *Stotler v. Comm’r*, 53 T.C.M. (CCH) 973 (1987) (noting where donation would be defeated by subsequent act or event, and the possibility of occurrence of which appears on the date of the gift to be so remote as to be negligible, the deduction is allowable); *see also* *Hughes v. Comm’r*, 97 T.C.M. (CCH) 1488 (2009) (determining the value of the conservation easement for purposes of charitable deduction).

185. *See* I.R.C. § 170(h)(1)(C), (h)(5)(A).

186. 26 C.F.R. § 1.170A-14(e) (requiring that to qualify for the tax deduction, “a donation must be exclusively for conservation purposes” and prohibits inconsistent use of the donation that would injure other conservation interests); *see* Roddewig, *supra* note 89, at 697.

187. *See Conservation Easements*, INTERNAL REVENUE SERV. (Oct. 9, 2025), <https://www.irs.gov/charities-non-profits/conservation-easements> [<https://perma.cc/92DX-AF5U>].

188. *See, e.g.,* *Our Work*, *supra* note 115.

189. 26 C.F.R. § 1.170A-14(d)(iii).

conservation easement that conserves groundwater that supports riparian areas or wetlands also may protect, “relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,” in satisfaction of IRS regulations.¹⁹⁰

Finally, a conservation easement could encumber just a portion of the groundwater, leaving another portion for future use.¹⁹¹ This is the approach the Ogallala Land & Water Conservancy is pursuing in Southeastern New Mexico to extend the life of the Ogallala Aquifer, currently the only source of water in that area of the state.¹⁹² These easements, however, will be purchased in total and will not involve donations that could qualify for federal tax deductions or state tax credits.¹⁹³ Taxpayers should consult with a tax attorney or accountant experienced in conservation easements and I.R.C. Section 170(h) to ensure compliance with current tax regulations and tax court decisions, and to maximize potential benefits.¹⁹⁴

B. State Income Tax Credits

Some states and territories provide income tax credits for donations of conservation easements to qualified governmental entities or non-profit conservation organizations including Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Iowa, Maryland, Massachusetts, Mississippi, New Mexico, Puerto Rico, South Carolina, and Virginia.¹⁹⁵ The state tax credits may or may not require compliance with federal tax law applicable to such donations.¹⁹⁶ If not, some of the issues inherent in federal income tax deductions may not affect eligibility for state tax credits.¹⁹⁷ Transferable state tax credits may be available for qualified donations in some states, including Colorado, Georgia,

190. *Id.* §1.170A-14(d)(ii).

191. *See Our Work*, *supra* note 115.

192. *Our Mission*, *supra* note 165.

193. Ogallala Land & Water Conservancy is using federal grants, among other sources of funding, to enter leases with landowners and compensate them for costs incurred while transitioning to irrigation practices for long-term conservation. *See* Morgan Wagoner, *Beneath Our Feet: Are Groundwater Easements a Solution for the West?*, ON LAND (February 25, 2025), <https://onland.westernlandowners.org/2025/on-water/beneath-our-feet-are-groundwater-easements-a-solution-for-the-west/> [<https://perma.cc/USW4-M4T2>].

194. I.R.C. § 170(h) (West).

195. *Conservation Tax Incentives*, CONG. SPORTSMEN’S FOUND. (Oct. 23, 2025, at 12:20 CT), <https://congressionalsportsmen.org/policy/conservation-tax-incentives/> [<https://perma.cc/P7CL-323Y>].

196. *See Income Tax Incentives for Land Conservation*, *supra* note 15.

197. *See Conservation Tax Incentives*, *supra* note 195.

New Mexico, South Carolina, and Virginia.¹⁹⁸ Tax credit brokers active in those states can provide valuable assistance to taxpayers and should be consulted early on when considering a donation that might qualify for a transferable state tax credit. Taxpayers should, of course, consult with a tax attorney or accountant experienced in conservation easements in their state before making a donation.

When included in an easement, water rights provide “a big percentage of the value of a conservation easement” in western states, and often the majority.¹⁹⁹ If the surface water rights or groundwater are part of the value for a taxpayer’s anticipated federal income tax deduction or state income tax credit, those rights should be encumbered in the conservation easement so long as the water is material to the conservation purpose.²⁰⁰

C. Potential Federal and State Tax Issues

1. Grantor

“The failure to enforce obligations and restrictions on water rights for conservation purpose[s] could have a direct financial impact on the grantor.”²⁰¹ “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.”²⁰² Similarly, a state “might withhold or withdraw its tax credit[s]” which are often tied to compliance with the I.R.C.²⁰³ “Because tax deductions and tax credits are often key to funding conservation easements,” this result should be avoided.²⁰⁴

The most significant financial concern for the grantor “is that the tax deduction may be at risk during the period of its statute of limitations.”²⁰⁵ Although

198. *Income Tax Incentives for Land Conservation*, *supra* note 15.

199. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 3.

200. *Id.*; BATES ET AL., *supra* note 74, at 4, 17.

201. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

202. *Id.*; *Publication 526 (2024)*, *supra* note 169.

203. COLO. REV. STAT. ANN. § 38-30.5-107 (West 2025); COLO. DEP’T OF REV., INCOME TAX TOPICS: CONSERVATION EASEMENT CREDIT 1 (2025), https://tax.colorado.gov/sites/tax/files/documents/ITT_Conservation_Easement_Credit_Mar_2025.pdf [<https://perma.cc/63PJ-8ABZ>]; Nancy A. McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 GEO. ENV’T L. REV. 167, 203 (2022); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

204. *Income Tax Incentives for Land Conservation*, *supra* note 15; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

205. I.R.C. § 6511(b)(1) (West); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8. While securing the tax deduction is often key to financing a conservation

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the Tax Court “has yet to reject a conservation easement,” the IRS has objected to “the value placed on a conservation easement.”²⁰⁶ In one author’s experience, “an IRS contest of a charitable deduction for a donated conservation easement can take more than a decade to resolve.”²⁰⁷ “Any adjustment to the claimed charitable value of the conservation easement, including the water rights, raises issues of tax liability, interest[,] and penalties.”²⁰⁸ With carry-back and carry-forward provisions, there is increased potential for “lengthy, complicated tax problems.”²⁰⁹ Therefore, the grantor “has a direct financial interest” in the enforcement of the water rights provisions of a conservation easement “to ensure her tax benefits are realized.”²¹⁰

2. Grantee

The grantee likewise has a direct interest in ensuring the federal tax deduction is allowed.²¹¹ “If the conservation easement does not meet the standards for a charitable contribution, the grantee may have created a private rather than public benefit.”²¹² This could put the grantee’s status as a charitable organization at risk, “with all the attendant consequences, including tax liability for

easement, grantors should be mindful of the legal risks associated with misrepresenting the easement value. Following an IRS investigation, several attorneys and accountants were sentenced to prison time for their participation in a fraudulent syndicated conservation tax scheme, including two individuals both sentenced to over 20 years. *See New Jersey CPA Sentenced in Syndicated Conservation Easement Tax Scheme*, INTERNAL REVENUE SERV. (Feb. 10, 2025), <https://www.irs.gov/compliance/criminal-investigation/new-jersey-cpa-sentenced-in-syndicated-conservation-easement-tax-scheme> [<https://perma.cc/GAT9-4MRC>]; *Atlanta Attorney Sentenced in Syndicated Conservation Easement Tax Scheme*, INTERNAL REVENUE SERV. (May 14, 2025), <https://www.irs.gov/compliance/criminal-investigation/atlanta-attorney-sentenced-in-syndicated-conservation-easement-tax-scheme> [<https://perma.cc/25WF-M3B6>].

206. *See, e.g., Schwab v. Comm’r*, 67 T.C.M. (CCH) 3004 (1994); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

207. *See id.*; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

208. I.R.C. § 6695A; IRM 20.1.12.5 (Mar. 21, 2025), https://www.irs.gov/irm/part20/irm_20-001-012#idm140432138197136 [<https://perma.cc/NR3N-RGCY>]; CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

209. *See* I.R.C. § 170(d), (b)(E)(iv)(I); CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8. Unlike other businesses, farming businesses can carry back net operating losses two years. *See Publication 536 (2023), Net Operating Losses (NOLs) for Individuals, Estates, and Trusts*, INTERNAL REVENUE SERV. (Sep. 9, 2024), https://www.irs.gov/publications/p536#en_US_2023_publink100095401 [<https://perma.cc/QP7Z-BNQF>].

210. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

211. *Id.*

212. *Id.*; I.R.C. §170(c); *see* CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 35.

contributions received.”²¹³ The grantee should not warrant the conservation easement, and, further, the grantee should require the easement include indemnity provisions, protecting them from any legal actions that arise from the easement.²¹⁴ The grantee should 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.”²¹⁵

Similar to a failure to enforce, the abandonment or forfeiture of water rights that are 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.”²¹⁶ This is another reason the grantee might want to have the right to control the use of the water rights or groundwater for conservation purposes, 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.”²¹⁷

VII. CONCLUSION

Surface water rights and groundwater “add another layer of complexity to conservation easements that should not be underestimated.”²¹⁸ Although most real estate attorneys are generally familiar with surface water rights—but less familiar with groundwater—“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.”²¹⁹

213. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8; LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 11–12 (Bates & Burke eds., 2017). Tax-exempt organizations are prohibited from conveying a net financial gain to private individuals or entities, unless that gain is incidental to achieving a greater public benefit. *See* Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV’T L. REV. 119, 141 (2012).

214. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 8.

215. *Id.* at 8–9.

216. *Id.* at 10; Bray, *supra* note 213, at 141; CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 35.

217. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 10; *see* BATES ET AL., *supra* note 74, at 7; I.R.C. §170(c); CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE, *supra* note 54, at 35.

218. CONSERVATION EASEMENTS AND WATER RIGHTS, *supra* note 1, at 14.

219. *Id.*