



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

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TO: Colorado Water Conservation Board Members
FROM: Alex Funk, Agricultural Water Resources Specialist
DATE: November 18-19, 2020

AGENDA ITEM: 11 - Draft CWCB Conservation Easement Grant Policy

Staff Recommendation: Staff recommends the Board approve Policy 24 - Conservation Easement Grant Policy.

Background: A conservation easement is a voluntary legal agreement between a landowner and a conservation entity such as a land trust or government agency, which identifies important conservation values of a property and permanently protects those values by restricting development, subdivision, and other non-compatible uses.

Conservation easements can play a critical role in preserving Colorado's working lands and avoiding the conversion of these lands to development. In western states, conservation easements also help strengthen the connection between water and working landscapes. For example, in Colorado, conservation easements may encumber water rights on land where the water is put to beneficial use to help retain agricultural production and open space values. Conservation easements can help protect and restore aquatic wildlife habitats, including floodplains, wetlands, riparian areas, and other water-related conservation values. More recently, land trusts have been working to engage in and facilitate alternative transfer methods that couple conservation easements to protect working lands while meeting other water supply needs and utilizing innovative easements to address groundwater sustainability goals. Altogether, conservation easements provide an essential strategy and tool for meeting multiple objectives in the Colorado Water Plan and Basin Implementation Plans.

CWCB will reevaluate the policy in two years to assess progress on addressing current CWCB challenges in processing conservation easement purchase contracts. CWCB will present any proposed changes to the policy to the Board.

Colorado Water Conservation Board and Conservation Easements

CWCB funding may be used to fund conservation easement acquisition where such conservation easements advance objectives of the Colorado Water Plan and Basin Implementation Plans. Since 2007, the CWCB has financially supported approximately 18 grant projects involving the purchase of conservation easements to further various water-resource objectives outlined in the Colorado Water Plan and Basin Implementation Plans. The CWCB Board has approved the purchase of conservation easements through two current grant programs: the Water Supply Reserve Fund (WSRF) and Alternative Transfer Method (ATM)



programs. Based on current grant criteria, other CWCB grant programs such as the Colorado Water Plan Grant program could also fund the purchase of conservation easements.

Overall, previously funded CWCB-funded conservation easements focus on the permanent protection of important aquatic wildlife habitat, including wetlands and riparian-river corridors, and maintaining agricultural viability through the preservation of irrigated agriculture. Conservation easements funded through the ATM grant program explore the concept of coupling conservation easements with ATMs, which helps address buyer concerns of permanency and long-term water availability while protecting a working farm or ranch. The inclusion of water leasing in conservation easements represents an evolution in land protection strategies that recognizes the importance of maintaining flexibility in water management.¹

Currently, projects, including the purchase of conservation easements, present challenges due to the complexity of conservation easement transactions, the necessary coordination of document review, and current CWCB staff capacity. Given these challenges, this new Policy (Policy #24 - draft attached) attempts to outline and standardize the documentation required by applicants. In order to improve internal processes, the policy also outlines all required documentation and requests applicants to provide a timeline for all projects. In developing the draft policy, CWCB modeled easement requirements on the Colorado Parks and Wildlife (CPW) Colorado Wildlife Habitat Protection Program, which funds the purchase of conservation easements to protect wildlife habitat and provide recreational opportunities, and the Great Outdoors Colorado (GOCO) conservation easement programs to develop consistency between program requirements. CPW and Colorado Conservation Easement Oversight Commission staff also provided feedback on the draft policy. CPW staff have voiced support for assisting CWCB staff in reviewing conservation easement documentation as part of a document review process. CPW staff have also provided training for CWCB staff on the conservation easement process.

CWCB Funded Conservation Easements

The majority of CWCB funded conservation easement purchases have been in the Rio Grande Basin. The Rio Grande Basin Implementation Plan identifies conservation easements as a strategy in the protection of critical water sources such as wetlands and irrigated land in the Basin. In the South Platte Basin, conservation easements are helping to promote the development of innovative alternative water transfers while preserving irrigated agriculture. Below are a sampling of approved CWCB conservation easement projects from 2007 to 2020.

South Platte River Alternative Transfer Method & Conservation Easement

- **Grantee: Colorado Open Lands**
- **Board Approval: November 2017**
- **Basin: South Platte**
- **Grant Program: ATM Grant Program**

¹ Under Colorado's conservation easement enabling statute (C.R.S. 38-30.5-101, et seq.), the coupling of conservation easements may occur so long as removing the water from the land will not impair the conservation easement's underlying conservation easement purpose (e.g., preservation of open space, natural habitat for fish and wildlife).



CWCB Priorities: Addresses barriers to ATM development and implementation, promotes flexible water-sharing arrangement, protection of working farm from development, promoting innovative solutions, fostering partnerships

Description: Colorado Open Lands (COL) used CWCB funds to pilot the concept of coupling conservation easements with an alternative transfer method (ATM). The protected property consists of a 389-acre farm and associated augmentation ponds located in Weld County, just west of Orchard on the north side of the South Platte River. The farm has a well that provides water for two center pivots and irrigates approximately 313.5 acres. The farm produces hay and corn. In addition to the purchase of the conservation easement, the project scope of work included an assessment of potential ATM strategies, identification of municipal and/or industrial partners, and the development of specific terms of the agreement. The project is significant, as it represents the first time the United States Department of Agriculture-Natural Resources Conservation Service has funded a conservation easement through the Agricultural Land Easement program that included flexible water language. The conservation easement prohibits the permanent separation of associated water rights from the farm, thereby giving municipalities a secure source of future water.

Cactus Hill Alternative Transfer Method & Conservation Easement

- **Grantee:** Rio Grande Headwaters Land Trust (RiGHT)
- **Board Approval:** May 2018
- **Basin:** Rio Grande

CWCB Priorities: Addresses barriers to ATM development and implementation, promotes flexible water-sharing arrangement, protection of working farm from development and permanent dry-up, promoting innovative solutions, fostering partnerships, enhancement of environmental and recreational river flows, protection of riparian habitat

Description: RiGHT used the requested ATM Grant funds to develop and purchase a conservation easement on the 250-acre Cactus Hill property in Conejos County along the Alamosa River. This conservation easement will include an ATM component that will give the City of Alamosa (the City) enough certainty of future availability of water that they will be willing to lease that water rather than buy-and-dry while not affecting the underlying conservation easement values. The conservation easement will achieve this goal by requiring the landowner to participate in a lease agreement for approximately 40-acre feet of water annually with the City into perpetuity.

List of Board Approved Conservation Easement Grants as of November 2020

- *Rio Grande Initiative - Water Supply Reserve Fund (WSRF), 2007, Rio Grande*
- *Rio Grande Initiative - WSRF, 2008, Rio Grande*
- *Dugan I - WSRF, 2010, Rio Grande Initiative*
- *Rio Grande Initiative - WSRF, 2011, Rio Grande*
- *Dugan II Ranch - WSRF, 2015, Rio Grande*
- *Haywood Ranch - WSRF, 2012, Rio Grande*
- *Nash Ranch - WSRF, 2016, Rio Grande*
- *Paulson Ranch - WSRF, Rio Grande*
- *Anderson Lazy Conservation Easement - WSRF, 2018, Rio Grande*
- *North Rio Grande River Ranch Conservation Easement - WSRF, Rio Grande*



- *Jackson Ranch Conservation Easement - WSRF, 2020, Rio Grande*
- *Schaefer Farms Conservation Easement - WSRF, 2020, Rio Grande*
- *Ag-Municipal Conservation Easement Demo Project - WSRF, 2012, Arkansas Basin*
- *Cristobal Inlet - WSRF, 2013, Gunnison Basin*
- *SP Water Protection & Wetland Restoration - WSRF, 2008, South Platte Basin*
- *Cactus Hill - Alternative Transfer Method Grant Program (ATM), 2018, Rio Grande*
- *Riverview Farms - ATM, 2018, South Platte Basin*



DRAFT Colorado Water Conservation Board Conservation Easement Grant Policy

POLICY NUMBER: 24

SUBJECT: CONSERVATION EASEMENT GRANT POLICY

EFFECTIVE DATE: TBD

REVISED DATE: N/A

POLICY: Conservation easements can play a critical role in meeting several Colorado Water Plan and Basin Implementation Plan objectives. Colorado Water Conservation Board (CWCB) funding may be used to fund conservation easement purchase expenses where such conservation easements further state and regional goals. The CWCB shall require all applicants applying for grants for conservation easement purchases to submit specific documentation as outlined prior to receiving funding.

PURPOSE: The Conservation Easement Grant Policy is intended to establish a uniform process for grantees applying for CWCB financial assistance for conservation easement purchases.

APPLICABILITY: The Conservation Easement Grant Policy applies to ALL conservation easements funded by CWCB Programs.

PROCEDURE:

Application - In addition to the required application, scope of work, and budget documents, applications for financial assistance to purchase a conservation easement **MUST** provide the following information for evaluation:

- **Property and Vicinity Maps** - Maps are required and must match the legal description provided by the applicant. The vicinity map should display identifiable landmarks and show boundaries of the property and its relationship to the surrounding landscape. It should also depict the surrounding land ownership and the current development and infrastructure. The property map should clearly identify the property's boundaries. The property map must identify the location of existing physical and legal access to the property and any building envelopes proposed. Building envelopes are areas within a conservation easement boundary which is reserved for existing and future building sites and is subject to the rights and restrictions defined by the conservation easement. Applicants are encouraged to provide additional maps such as wildlife habitat maps that may be helpful in reviewing the application.

- **Legal Description** - An accurate and complete legal description of the property is required. Legal descriptions for most properties can be found in the property's vesting deed(s). If more than one parcel is involved, applicants must include the legal descriptions for each parcel offered in the application. If they exist, applicants shall include legal descriptions for any building envelopes, rights of way, etc.
- **Letter of Intent and Title Report** - Each application should include a letter of intent describing the proposed transaction by the landowner and a recent (within five years) title report or documentation including information containing the legal description of the property, chain of title, mineral estate ownership, mortgages, liens, and other encumbrances. Applicants should also disclose any future uses of the property that may be inconsistent with the identified conservation values.
- **Draft Title Commitment:** Applicants should provide a draft title commitment defining any encumbrances that may affect closing.
- **Water right/well permit information** - If the conservation easement will encumber water rights, the applicant must provide CWCB with a letter that summarizes the water rights or well permits involved in the conservation easement purchase transaction. The following information regarding water rights/shares/well permits should be provided:
 - A description of how the water rights/well permits are related to the property's conservation values. Are the water rights associated with the property sufficient to support the conservation values protected in the easement? If applicant is considering including alternative transfer method language, will temporary leasing impact conservation values?
 - Describe the extent of actual historical use of and the physical and legal reliability of the water right(s) or any ditch or reservoir company shares. Provide copies of the water decree or well permit. Provide any outstanding chain of title or encumbrance issues. Provide a plan for maintaining beneficial use of and monitoring the encumbered water rights.
 - If the land and water resources to be protected through the purchase of a conservation easement are within the service boundaries of a public or private water management entity, applicants must provide a copy of the relevant entity articles of incorporation, bylaws, regulations, or other formal guidelines to demonstrate that the water management entity does not preclude the encumbrance in a conservation easement. Water management entities may include mutual ditch and reservoir companies, acequias, irrigation districts, and Federal water projects.
- **Notice to Ditch or Reservoir Company/Water Right Holder:** If the conservation easement purchase includes shares in a mutual ditch or reservoir company a conservation easement that encumbers those shares may be created only after sixty days' notice and in accordance with the applicable requirements of the mutual ditch or reservoir company including, but not limited to, its articles of incorporation and

bylaws in accordance with state law (§ 38-30.5-104(5) C.R.S.). Applicants must provide documentation of notice to CWCB.

- **Project timeline:** All applications should include a proposed timeline of major project milestones including an anticipated closing date. Describe the expected timeline for completion and explain any concerns or constraints on the timing of closing, including any factors that may delay closing, or relevant deadlines involving any landowner financial obligations CWCB should be aware of.

Other documents that applicants are encouraged to provide at the time of application or prior to Board approval include:

- **Concurrence Letters:** From local government entity (e.g. municipality or county) or Basin Roundtable representing the region/basin in which the protected property is located. Letters should either approve or not oppose the conservation easement project.
- **Letters of Support:** From Federal, state or local government natural resource entities, including Basin Roundtables, which speak to the conservation values being protected under the conservation easement project. In particular, evidence that the conservation easement will protect important agricultural and water-related conservation values.
- **Management plan and reports:** All applications should describe a clear vision of the future of the protected property and describe proposed monitoring and stewardship activities and overall management to protect/enhance the property's conservation values. In particular, applicants should describe how on-going management and stewardship of the property will help achieve and maintain Colorado Water Plan and Basin Implementation Plan objectives and water-related conservation values. Grantees shall create a management plan in conjunction with the seller/grantor and deliver to CWCB within six months of closing. Grantees shall provide six-month progress reports detailing its monitoring of the easement.

Certification: All applicants seeking CWCB funds for the purchase of a conservation easement must be certified and regulated by the Colorado Department of Regulatory Affairs (DORA). This requirement applies to nonprofit entities and state and local governmental entities that hold easements.

Document Review: Once a grant containing the purchase of a conservation easement is approved by CWCB, applicants must provide additional documentation for the document review. The Attorney General's Office (AGO)/Assistant Attorney General (AAG) should review the documents pertaining to the transaction to ensure the proper documents are in place to convey the conservation easement. The AAG will provide CWCB/DNR staff with timely, written updates regarding the document review process as issues are identified, and provide written confirmation when the document review process is complete.

If a conservation easement is receiving funding from another entity, such as Great Outdoors Colorado or Colorado Parks and Wildlife, CWCB/DNR staff may also choose to rely on the due diligence review of those entities. The applicable CWCB project manager will work with the

applicant to collect the relevant due diligence documentation and negotiate any necessary changes to adhere to this CWCB Conservation Easement Grant Policy.

The following documents are required for the document review and should be submitted at between 60-90 days prior to closing for timely document review¹ and grant contract execution:

- **Purchase and sale agreement or other documentation** which sets forth the terms and conditions associated with the conservation easement purchase. The terms of the agreement should be consistent with the goals of the project in the application to CWCB.
- **Baseline documentation report** which provides an assessment of the natural resource values and existing conditions on the property encumbered by the conservation easement. Land trusts should provide a baseline check list along with the report.

Phase I Environmental Site Assessment which may disclose any contamination, unsafe conditions, potential clean-up costs, potential liability to the purchaser such as recognized environmental conditions or potential environmental concerns on the property and concludes whether the presence of any hazards would preclude any uses described in the grant application. Additional assessments may be required.

- **Mineral remoteness report** prepared by a geologist if the title commitment identifies mineral rights that have been severed from surface ownership or if the mineral rights are intact but the landowner wants to retain them. CWCB will support projects with mineral rights, but will consider if mineral development will affect the conservation values underlying the easement. A Surface Use Agreement which sets out strategies to mitigate the risks of mineral right development to conservation values may need to be required.
- **Draft deed of conservation easement** to ensure that it protects the conservation values of the property, furthers Colorado Water Plan and Basin Implementation Plan objectives, and is consistent with the grant application.
- **Title Insurance Policy** insuring the property interest in an amount at least equal to the purchase price, but recommended up to the appraised fair market value.
- **Current, qualified appraisal** from an independent, certified, qualified appraiser licensed in the state of Colorado who follows state and Federal requirements in preparing appraisals of conservation easements. Appraisals must be received prior to closing. If closing has not occurred within one year of the appraisal, CWCB will require a new appraisal. Note, CWCB's contribution may pay up to the final appraised value of the conservation easement. If the appraised value is lower than the value included in the grant request, CWCB will offer the amount equal to the percentage requested of CWCB.²

² For example, if the easement purchase value in the application is \$200,000, and applicant requests CWCB provide \$100,000 (applicant providing 50% match), the applicant is requesting 50% from CWCB. Therefore, if the appraisal is \$150,000, CWCB may only offer 50% of the appraised value (\$75,000).

- **Draft settlement statement**

CWCB understands that many conservation easement transactions involve closing dates that are important for a variety of funding or other reasons. CWCB will make every effort to meet these deadlines but will not compromise the quality of the document review to meet a scheduled closing or other deadline. To ensure timeliness, applicants are encouraged to communicate with CWCB staff about important deadlines and to submit each document as it is developed to CWCB project managers to avoid unnecessary delays prior to closing.

Grant Execution and Disbursement: Project managers, upon completion of the document review, will work with DNR purchasing to execute a final grant contract in advance of closing. Contracts for the purchase of conservation easements are expected to be executed within one year of award. Depending on CWCB staff capacity and the document review process, contracting for conservation easements purchases may require additional processing time. CWCB will make a disbursement only upon receiving a title insurance policy, draft settlement statement, and any other documentation reflecting the final appraised value of the easement and stating both the seller/grantor and easement holder have committed to the conveyance of the conservation easement.

Proposed Evaluation Criteria for CWCB Conservation Easement Projects

Grant applications for the purchase of conservation easements must address the respective grant criteria and guidelines for the program (e.g. WSRF, WPG) under which the applicant has applied for. All CWCB-funded conservation easements must further Colorado Water Plan or Basin Implementation Plan objectives.

In reviewing conservation easement applications, CWCB should also consider the following project characteristics:

- If the conservation easement will help protect significant water-related conservation values such as maintaining intact riparian and floodplain corridors and wetland ecosystems of regional significance and other critical watershed functions such as source water protection. Ideally, applications will also include information detailing specific stewardship and restoration activities for the protected property that will enhance ecosystem services such as water quality, watershed and forest health, and climate resiliency. CWCB also supports conservation easements that preserve culturally significant landscapes and water use practices and community-assets such as urban open space and green infrastructure enhancement.
- If the conservation easement will help sustain working agricultural landscapes and rural communities by keeping water in agriculture. Applicants are encouraged to work with landowners to include flexible language in conservation easements that allow for voluntary, temporary, and compensated water transactions, including leases benefiting instream flows, so long as the proposed transaction will not affect the underlying conservation values of the conservation easement. Furthermore, all ATM Grant applications including a conservation easement should be part of a broader scope of work that includes the development of an ATM transaction.
- If the conservation easement will help promote restoration, recovery, and resiliency of endangered, threatened, and imperiled aquatic and riparian dependent species and

plant communities. Ideally, the protected property will protect and enhance river-based environments and recreational opportunities, such as self-sustaining fisheries, that support local and statewide economies.

- If the conservation easement is part of a broader, watershed or regional-scale landscape protection strategy that has collaborative support. All conservation easements should be highly leveraged with Federal, state, local and private funding.
- If the conservation easement does not allow for any activities that undermine the underlying conservation values of the easement. Examples may include, but are not limited to, surface mining, oil, and gas development activities that affect the surface of the land covered by the conservation easement. Also, if the applicant speaks to strategies to mitigate those risks, such as Surface Use Agreements.

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