

NEW MEXICO LAND CONSERVATION INCENTIVES ACT GUIDELINES

WATER RIGHTS IN CONSERVATION EASEMENTS

Energy, Minerals and Natural Resources Department

A water right is a property interest that may be essential to the perpetuation of one or more conservation purposes for a conservation easement (CE) donation. Land trusts and government agencies will usually require CE Grantors to defend their water rights and tie them to the CE property. This is especially necessary for CEs on irrigated agricultural lands with conservation purposes of open space or wildlife habitat. If the ability to irrigate crops is lost in arid New Mexico, the resulting dry, wind-eroded fields of weeds cannot support either conservation purpose. Land Conservation Incentives Act (LCIA) tax credit assessment applications must identify the conservation purposes of a proposed donation and “if a conservation or preservation purpose is for the protection of agricultural land, a detailed description of ... how the conservation easement or deed will provide for agricultural use and the continued use of any water rights” [3.13.20.9D(1)(m) NMAC].

These guidelines are intended to help LCIA applicants prepare their tax credit applications to the Energy, Minerals and Natural Resources Department (EMNRD). The model language below for deeds of CE has been reviewed by the New Mexico community of Land Trusts, EMNRD, and the Natural Lands Protection Committee (NLPC). Verbatim use of this model for water rights in agricultural land CEs will reduce administrative review and may save time in processing the tax credit applications.

WATER RIGHTS LANGUAGE FOR DEEDS OF CONSERVATION EASEMENT

[The following section should be completed and included in the ‘Recitals’ section of the deed]

Water Rights. *The Property has water rights for the irrigation of and appurtenant to ____ acres of land, from _____ (i.e. well, acequia, conservancy district), with a priority date of _____, which are more particularly described in Exhibit __ (the "Water Rights"). In addition, the term Water Rights as used herein includes all of the Landowner's right, title, and interest in any and all water or water rights of any kind or nature located on or associated with the Property (including stock wells, domestic wells, and supplemental wells) whether or not adjudicated, permitted, or decreed. Any and all water associated with the Water Rights is sometimes referred to herein as the "Water."*

[The following section should be included in the ‘Agreement’ section of the deed]

Water.

(a) *Beneficial Use. The Landowner shall continue to use the Water Rights in a manner and for a use consistent with the Conservation Values and shall take all prudent measures to avoid loss of the Water Rights, including: (i) beneficially using the Water; (ii) timely paying applicable assessments; (iii) complying with permit requirements, if any, and (iv) applying for extension of time in which to complete any of the foregoing.*

(b) *Alternative Uses. The Landowner may sell Water or temporarily lease the Water Rights to a third party or participate in a conservation program approved by the Office of the State Engineer, acreage reserve program or conservation reserve program established by federal law and recognized under state law, water bank authorized by state law, strategic water reserve administered by the Interstate Stream Commission, or any similar program under which the Water Rights will not be lost, forfeited, or abandoned. Any such alternative use of Water or the Water Rights, however, may only be done with the prior written consent of the Grantee, in a manner and for a use consistent with the Conservation Values, and in no event for a domestic, municipal, or industrial use.*

(c) *No Abandonment. Abandoning the Water Rights or taking any action from which abandonment might reasonably be implied is prohibited.*

(d) *No Forfeiture. If the Landowner is ever notified or aware of any possible forfeiture of any of the Water Rights, the Landowner shall immediately notify the Grantee in writing and: (i) arrange for the beneficial use of the Water; (ii) arrange for an extension of time to put the Water to beneficial use; and/or (iii) establish, to the Grantee's reasonable satisfaction, entitlement to a lawful exemption from the requirements of beneficial use as provided by state law. Similarly, if the Grantee ever independently becomes aware of any possible forfeiture of any of the Water Rights, the Grantee may require that the Landowner take advantage of one or more of the options described above.*

(e) *No Severance. Changing any element of the Water Rights (including priority, amount, purpose, and place of use) is prohibited. In no event shall any use or disposition of the Water or the Water Rights permitted by this Section (Water) be allowed to result in the severance of the Water Rights from the Property.*

Grantors (Donors) of CEs on agricultural land should note that the above model for deeds of CE does not prohibit them from selling water with the agreement of the Grantee. The water right cannot be sold, but if water is conserved (from a different crop or irrigation method), the landowner and Grantee may approve the sale of a portion not used to support the conservation purpose(s).



Alternative water rights language for a deed of CE on agricultural land may be proposed to EMNRD and the NLPC. However, the tax credit applicant must incorporate the following requirements in the deed of CE:

- Enough water rights must be perpetually tied to the property to successfully grow agricultural crops and support the conservation purposes of the CE.
- The CE Grantor (landowner) and Grantee must both be able to maintain and defend the water rights.
- If the Grantor cannot or will not use the water, the water rights may be transferred to a third party or conservation program for a purpose consistent with the conservation values of the CE, but only temporarily. The transfer cannot be made permanent and the water must eventually come back to the CE property.