
The Rocky Mountain Land Use Institute
Thirteenth Annual Conference

Session Handouts
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for

***Conservation Easements: Balancing Public
Incentives and Private Decisions***

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Moderator: Lawrence R. Kueter, Esq.
Shareholder
Isaacson, Rosenbaum, Woods & Levy, P.C.
Denver, Colorado

Panelists: Adam Eichberg
Associate Director of Public Finance
The Trust for Public Land - Denver Office
Denver, Colorado

Brooke S. Fox
Consultant
Windsor Parks and Recreation Board Member
Windsor, Colorado

The Rocky Mountain Land Use Institute
University of Denver College of Law
2255 E. Evans Ave., Suite 404
Denver, CO 80208
Phone: (303) 871-6319 ? Fax: (303) 871-6051 ? Email: rmlui@law.du.edu
Website: www.law.du.edu/rmlui

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PRESENTER BIOGRAPHIES

Lawrence R. Kueter, Esq., is a shareholder in the Denver law firm of Isaacson, Rosenbaum, Woods & Levy, P.C. and practices in the areas of land use and land conservation law. His twenty-five years of public and private land use experience includes zoning matters, subdivisions, annexations, public financing, and public improvement projects. In his land conservation law practice, he represents numerous land trusts, local and national conservation organizations, and governmental organizations in land conservation matters, including the Colorado Coalition of Land Trusts and Colorado Cattlemen's Agricultural Land Trust. Mr. Kueter has also represented numerous landowners regarding conservation easements, purchases, annexations, bargain sales, and limited developments.

Adam Eichberg serves as the Associate National Director of the Trust for Public Land's Conservation Finance Program, a position he has held since November, 1999. TPL's conservation finance program offers technical assistance to elected officials, public agencies, and legislatures in creating new revenue sources for the protection and acquisition of critical open lands and parks. He also serves as National Campaigns Director, overseeing TPL's involvement in ballot measure campaigns across the country, and as a Vice-President of The Conservation Campaign, TPL's 501(c)4 campaign affiliate which he helped to found. Prior to his appointment with TPL, Mr. Eichberg served as a strategic communications consultant with a private Denver-based firm. He also served as the Rocky Mountain Regional Director of a national environmental group. A campaign veteran, he has been involved in a variety of local and state campaigns across the country. A fourth generation Coloradoan, he received a Bachelor of Arts degree in Environmental Conservation from the University of Colorado, where he was a President's Leadership Scholar.

Brooke S. Fox is a Town of Windsor Parks and Recreation Board member and in that capacity is assisting the town in crafting policies and acquiring conservation easements to protect open lands. As the former Director of Douglas County's Division of Open Space and Natural Resources, she oversaw the acquisition of over 37,000 acres of open space (over half in conservation easements) and directed the development of management plans on properties owned by the county. Ms. Fox currently works as a consultant and negotiator on issues related to open space, endangered species, land management, and other issues for local governments and land management entities. She received a Bachelor of Arts degree in Political Economics from The Colorado College, and a Master of Arts degree in Environment and Resource Policy from George Washington University. Prior to working for Douglas County, Ms. Fox was a Colorado field representative for U.S. Senator Hank Brown. She spent seven years working in Washington, D.C., on legislative and regulatory issues related to natural resources and the environment. In addition to her consulting work, she enjoys spending time with her two children, Earl Henry, age 8 and Laura Tate, age 5.

**CONSERVATION EASEMENTS:
BALANCING PUBLIC INCENTIVES AND PRIVATE DECISIONS**

By: Lawrence R. Kueter

*Isaacson, Rosenbaum, Woods & Levy, P.C.
633 17th Street, Suite 2200
Denver, Colorado 80202
Telephone: (303) 292.5656
lkueter@irwl.com*

Thirteenth Annual Rocky Mountain Land Use Institute Conference

March 12, 2004

- I. Why local officials need to know about conservation easements.
 - A. Serious pressures affect the local quality of life in many areas of Colorado:
 - 1. population increases
 - 2. increasing development pressures
 - 3. shrinking open space
 - 4. shrinking local resources
 - B. Conservation easements that satisfy Internal Revenue Code requirements are a tool to use Federal income and estate tax benefits and the Colorado and New Mexico income tax credits for the donation of a conservation easement for encouraging the preservation of open space and wildlife habitat.
 - C. Conservation easements that do not satisfy the Internal Revenue Code requirements are being used as a valuable land use tool by the local governments.
- II. What is a conservation easement?
 - A. A conservation easement is a legal document which contains permanent restrictions on the use or development of land. A conservation easement usually limits further development of the land. The conservation easement is typically granted to a land trust or governmental entity.
 - B. State Laws typically authorize the creation of a real property interest by means of a conservation easement specifically by statute. All of the statutory authorities require that the grantee be a governmental entity or a §501(c)(3) charitable organization of the Internal Revenue Code and specify the conservation purposes for which the conservation easement can be created.

1. Colorado. Colorado's law is found at C.R.S. §390-1-101. Unusual features of this law are that any non-governmental entity must be in existence for two years before accepting a conservation easement, that the conservation easement is perpetual unless otherwise provided for, and that water rights can be restricted in conjunction with the land to which they are appurtenant.
2. New Mexico. The New Mexico Land Use Easement Act is found at N.M. State. Ann. §47-12-1 to 6 (1991). New Mexico law requires that a conservation easement specify a term and that the state cannot acquire a conservation easement through eminent domain.
3. Utah. The Utah Land Conservation Easement Act is found at Ut. Code Ann. §§57-18-6(1),(2). Utah also prohibits the acquisition of a conservation easement by eminent domain.

III. How does a conservation easement satisfy Section 170(h) of the Internal Revenue Code?

- A. A conservation easement must be granted to a qualified organization. That can be either:
 1. a governmental entity; or
 2. a 501(c)(3) charitable organization that meets certain public support tests.
- B. The conservation easement must be granted exclusively for conservation purposes. Conservation purposes include the following:
 1. The preservation of open space for scenic enjoyment, pursuant to a clearly delineated governmental conservation policy;
 2. The preservation of land for outdoor recreation;
 3. The protection of the natural habitat of wildlife or plants; and
 4. The preservation of historically important land or a certified historic structure.
- C. If a conservation easement satisfies these Internal Revenue Code requirements, then the grantor may receive a charitable deduction (not a tax credit) for the difference in value of the property before the easement was granted compared to the value of the property after the granting of the conservation easement. This is often called the "before and after" test.
 1. For income tax purposes, this difference in value is a charitable deduction which can be used for a period of up to 6 years for reducing the income

tax of the grantor of the easement. The maximum deduction in any year is 30% of the grantor's adjusted gross income.

2. For estate tax purposes, the grant of the easement results in a lower value for the property and therefore a lower, value of the estate for the federal estate tax to be applied to.

IV. State Tax Credits.

A. Colorado Income Tax Credit. Colorado law permits a credit against Colorado income taxes for the donation of a conservation easement.

1. Credit is a maximum of \$260,000 for a \$500,000 donation. The credit is \$100,000 for the first \$100,000 of donation and 40% for each dollar of donation above \$100,000.
2. A Colorado taxpayer has 20 years to use up the credit.
3. The credit can be transferred to another party for use.
4. In years of state budget surplus, the landowner can use the credit to receive up to a \$50,000 refund from the state.

B. New Mexico Income Tax Credit. The New Mexico tax credit is contained in the New Mexico Land Conservation Incentives Act .

1. For conservation easements donated after January 1, 2004.
2. For up to 50% of fair market value, but not more than \$100,000 credit per donation.
3. The credit may be carried forward for 20 years.
4. The conservation easement must be certified by the Secretary of Energy, Minerals and Natural Resources Department as fulfilling the purposes of the Act.

V. How is a conservation easement created?

A. The first necessary element is a landowner who is motivated to donate or sell development restrictions on their property. They may be motivated by a desire to preserve the land, by generating income tax and/or estate tax benefits, or by receiving compensation for the easement.

B. The landowner needs to find a governmental entity or a land trust to be the recipient of the conservation easement.

- C. A baseline inventory is done to satisfy the Internal Revenue Code requirements of "documentation sufficient to establish the condition of the property at the time of the gift."
 - D. An appraisal of the property is completed. The appraisal will appraise the value of the property before a conservation easement is placed on the property and after the property is encumbered by the conservation easement.
 - E. During the preparation of the baseline survey and the appraisal, the exact terms of the conservation easement are negotiated between the landowner and the land trust or governmental entity.
- VI. Additional important features of the IRS regulations that anyone dealing with conservation easements should know about.
- A. Perpetual. A grant of a conservation easement has to be perpetual. It cannot be for a specified term of years.
 - B. Public Access. Public access to the property encumbered by the conservation easement is typically not required.
 - C. Limited Development. Notwithstanding the grant of the conservation easement, it is possible to permit some very limited development of the property in a manner consistent with the easement.
 - D. "Donative Intent". A conservation easement that is granted in return for something, i.e., where there is a "quid pro quo," does not satisfy the "donative intent" requirement and is not allowable for a charitable deduction. An example is a conservation easement granted by a landowner to a city in exchange for annexation or zoning of the property.
 - E. Dealer Issues. Different tax roles apply to the grantor of a conservation easement if they are a "dealer" under the Internal Revenue Code rules. A developer usually is a dealer. A dealer is limited to a tax deduction equal to their "basis" (or cost) for the donated property. This is particularly a problem where the property is owned by a dealer and the land has appreciated substantially in value.
 - F. Mineral Interests. The general rule is that no charitable deduction is allowed if the landowner does not own the minerals, if at any time there may be a removal of minerals by any surface mining method. An exception is if the minerals were severed before June 13, 1976. If they were, a landowner may obtain a charitable deduction if the probability of removal of the minerals by any surface mining method is so remote as to be negligible.
 - G. Lender Subordination. Any holder of a mortgage or deed of trust must subordinate to the grant of the conservation easement.

VII. Types of Situations That Are Likely to Generate Conservation Easements.

- A. A ranching family, whose primary asset is the land, desires to pass the land on to the next generation for ranching. A conservation easement, along with other estate planning techniques, can enable the passing of the land to the next generation. Without such planning, and with a substantial federal estate tax rate, it might otherwise be necessary to sell the land in whole or in part to pay the estate taxes for the estate. This is an example of the land rich, cash poor estate.
- B. A landowner who owns a very scenic parcel of property and has resided on the property for a substantial period of time would like to be sure that the property does not end up in condominiums or five-acre ranchettes. The landowner places a conservation easement on the property to assure that the property is retained for scenic open space purposes for future generations.
- C. A landowner desires to generate some income from their property but also desires to protect the property from full development. They may consider annexing and developing a small portion of the property, and putting the remainder under a conservation easement. (A caution: If the same or related parties own land adjacent to property on which a conservation easement was placed, and the creation of the easement enhances the value of the adjacent property, that enhancement in value is used to reduce the amount of the charitable deduction generated by the grant of the easement.)

VIII. Variations on the Theme

- A. Not all property owners may be interested in donating a conservation easement. Like any other real property interest, a local government can purchase a conservation easement from a landowner.
- B. It is also possible to have a bargain sale of a conservation easement, where a landowner is paid only a portion of the value of the conservation easement. The difference between the actual value of the easement and the amount paid may generate a charitable deduction for income tax purposes and a reduced value for the property for estate tax purposes.
- C. Some property owners may wish to grant a conservation easement, but cannot afford the professional services and transactional costs required. A local government may want to pay those professional and transactional costs in order to ensure the grant of the conservation easement.

IX. Developer Easements

- A. To create a valid property interest in a conservation easement in Colorado does require the donation to be either to a governmental entity or a 501(c)(3) charitable organization. It does not require that the conservation easement be capable of generating a charitable deduction under the Internal Revenue Code.

- B. A "developer easement" is an easement that is granted by a landowner as a condition of development. Because it is granted as consideration for the approval of development (the quid pro quo rule) there is no charitable deduction.
- C. However, the conservation easement is still a valid property interest if granted to a governmental entity or a 501(c)(3) charitable organization. In some circumstances, a grant of a conservation easement may be an alternative to requiring the fee dedication of real property. Some of those circumstances might be as follows:
 - 1. A land use designation of a portion of a development as open space may not give much comfort to concerned neighbors (never trust an unrestricted piece of property). A grant of a conservation easement to a land trust would give them some certainty that the open space restrictions will be perpetual and enforced.
 - 2. A developer may be willing to keep some property as open space; but is resistant to the notion of dedicating the fee title to the property to the local government, and desires to restrict access to the preserved open space.
 - 3. A municipality or county may require a conservation easement over a portion of property as a condition of approval of a rezoning, a subdivision or an annexation.

X. Miscellaneous Thoughts and Conclusions.

- A. Why would a grantor of a conservation easement prefer to make the grant to a land trust and not to a local governmental entity?
- B. Conservation easements are not a solution to every land use open space problem or to every landowner's estate tax problem. Conservation easements take the right kind of circumstances to be helpful.
- C. The creation of a conservation easement, particularly one that is intended to generate a charitable deduction or a reduction in the value of an estate, must be done very carefully, and should not be undertaken without the professional advice of accountants, lawyers, and appraisers.
- D. The conservation easement, used and encouraged selectively, can be a valuable tool for local planners in preserving open space.



Conserving Land for People

Conservation Easements: Publicly Funded Private Conservation

Rocky Mountain Land Use Institute

March 11, 2004



Conserving Land for People

The Trust for Public Land

- Mission: Conserving land for people
- Since 1972, TPL has helped protect more than 1.9 million acres in 45 states
- 3 Tiered Approach to Mission:
 - Vision
 - Conservation Finance
 - Transaction



Conserving Land for People

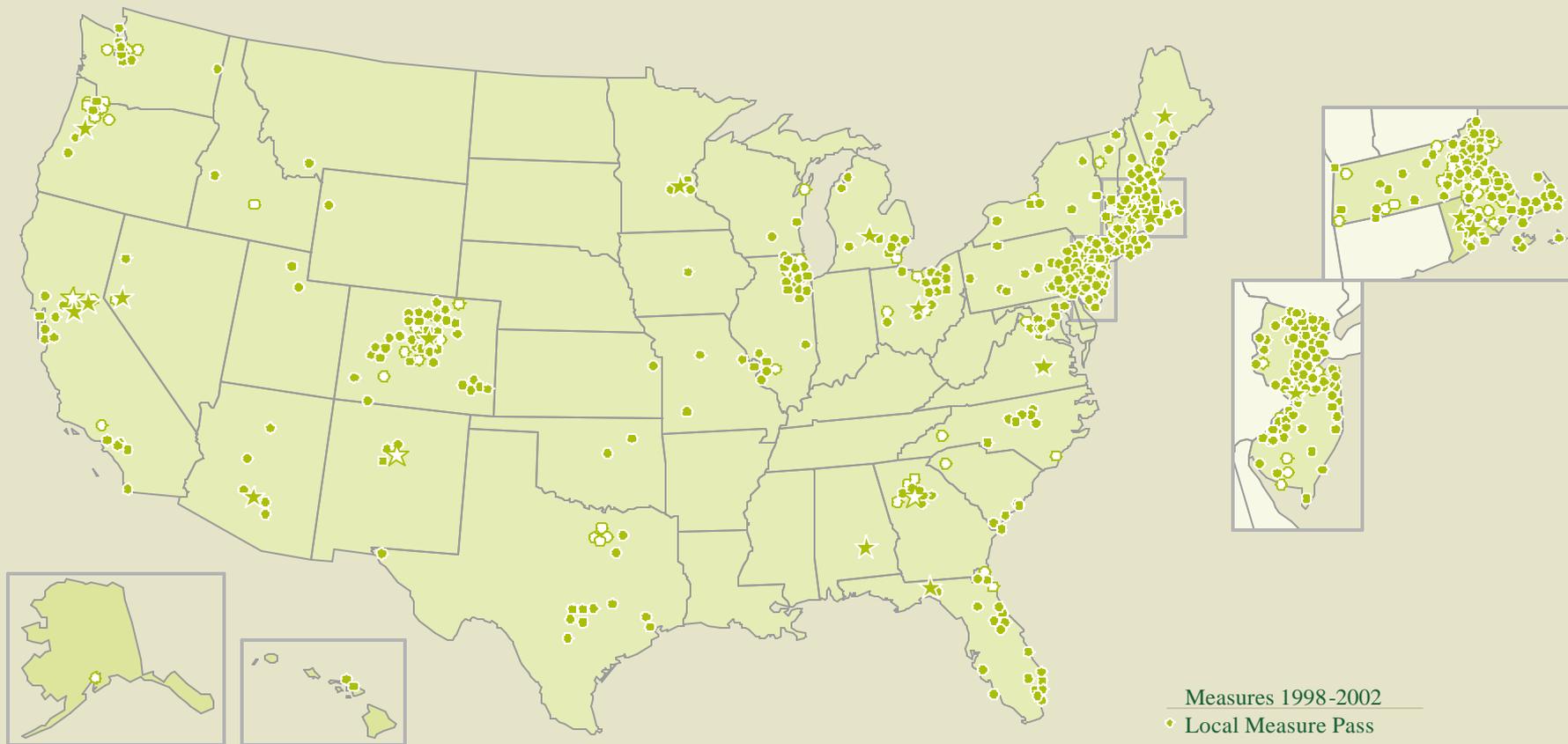
Trends: Nationwide



1998	1999	2000	2001	2002	2003
• 150 measures	• 102 measures	• 210 measures	• 196 measures	• 107 measures	• 129 measures
• 126 passed (84%)	• 92 passed (90%)	• 174 passed (83%)	• 137 passed (70%)	• 92 passed (83%)	• 99 passed (77%)
• \$8.3 billion created	• \$1.8 billion created	• \$7.5 billion created	• \$1.7 billion created	• \$6.9 billion created	• \$1.8 billion created



Conserving Land for People



- Measures 1998-2002
- Local Measure Pass
 - Local Measure Fail
 - ★ Statewide Measure Pass
 - ★ Statewide Measure Fail



Conserving Land for People

Multiple Funding Sources

All Measures since 1998:

49% Property Tax

33% G.O. Bonds

7% Sales Tax

11% Other



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Active Colorado County Easements Programs

Adams County (sales tax)
Arapahoe County (sales tax)
Boulder County (sales tax)
Douglas County (sales tax)
Eagle County (property tax)
Gunnison County (property tax)
Jefferson County (sales tax)
Larimer County (sales tax)

Pitkin County (sales and property tax)
Routt County (property tax)
San Miguel County (property tax)
Summit County (property tax)



Conserving Land for People

Ballot Language: First Step

...TO BE USED FOR THE PURPOSE OF ACQUIRING, MAINTAINING, OR PERMANENTLY PRESERVING OPEN SPACE IN EAGLE COUNTY SUCH AS...(Eagle County, CO 2002)

...FOR THE PURPOSE OF ENHANCING THE GREAT OUTDOORS COLORADO TRUST FUND'S ABILITY TO ADDRESS URGENT AND PERMANENT LAND ACQUISITION PRIORITIES, INCLUDING THE ACQUISITION OF PERPETUAL CONSERVATION EASEMENTS, IN ORDER TO...(Colorado Statewide Ref. A, 2001)

...TO ACQUIRE NECESSARY REAL ESTATE AND EASEMENTS FOR OPEN SPACE, OPEN SPACE PARKS, AND RELATED AREAS AND FACILITIES WITHIN THE COUNTY TO...(Santa Fe County, NM 2000)

...FOR THE PURPOSE OF PRESERVING OPEN SPACE IN GALLATIN COUNTY BY PURCHASING LAND AND CONSERVATION EASEMENTS FROM WILLING LANDOWNERS...(Gallatin County, MT 2000)

...WITH THE PROCEEDS TO BE USED SOLELY TO PRESERVE OPEN SPACE IN ORDER TO LIMIT SPRAWL, TO PRESERVE FARMLAND, TO PROTECT WILDLIFE AREAS, WETLANDS, RIVERS AND STREAMS, AND FOR CREATING, IMPROVING AND MAINTAINING PARKS AND RECREATION FACILITIES, IN ACCORDANCE WITH RESOLUTION 99-1...(Adams County, CO 1999)



Conserving Land for People

Implementing Ordinance/ Resolution: Second Step

- E. Additional Guidelines for Use of Funds:
 - 1. Revenues collected from the Open Space Sales and Use Tax may be used in the following manner:
 - a. To acquire fee title interest in real property for the purposes provided herein;
 - b. To acquire less than fee interests in real property for the purposes provided herein; such as easements (including conservation and agricultural), future interests, covenants, development rights, subsurface rights and contractual rights, either on an exclusive or nonexclusive basis; (Arapahoe County, CO 2003)

- C. Authorized Projects and Uses of Funds.
 - i. Revenues collected from the Open Space Sales Tax may be used in the following manner:
 - A. To acquire fee title interest in real property for open space, natural areas, wildlife habitat, agricultural and ranch lands, historical amenities, parks and trails;
 - B. To acquire less than fee interests in real property such as easements (including conservation and agricultural), leases, options, future interests, covenants, development rights, subsurface rights and contractual rights, either on an exclusive or nonexclusive basis, for open space, natural areas, wildlife habitat, agricultural and ranch lands, historical amenities, parks and trails purposes; (Adams County, CO 1999)



Conserving Land for People

Citizen's Advisory / Oversight Boards: Third Step

Almost all publicly funded programs include a citizen's advisory / oversight board whose purpose is to:

- Develop project selection criteria
- Analyze and rank potential projects
- Make project recommendations to the County Commission / City Council



Conserving Land for People

Public Incentives: Final Step

Landowner

- Cash
- Tax relief
- Retain ability to work the land

Public

- Leverage
- Viewsheds, wildlife habitat, water quality, etc.
- Diminished need to provide services



Conserving Land for People

Public Incentives: Public Issues

- Access
- Valuation Challenges
- Monitoring
- Enforcement



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Adam Eichberg 303-837-1414

adam.eichberg@tpl.org

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