

9-1-2006

## Peter D. Nichols et al., Water Rights Handbook: for Colorado Conservation Professionals

Roman Ginzburg

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Roman Ginzburg, Book Note, Peter D. Nichols et al., Water Rights Handbook: for Colorado Conservation Professionals, 10 U. Denv. Water L. Rev. 167 (2006).

This Book Notes is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

**Peter D. Nichols et al., Water Rights Handbook: for Colorado Conservation Professionals**

**Peter D. Nichols et al., *Water Rights Handbook: for Colorado Conservation Professionals*, Bradford Publishing Company, Denver, CO (2006); 134 PP; \$45.00; ISBN: 1932779329.**

In 2006, the Colorado Water Trust (“CWT”) published the *WATER RIGHTS HANDBOOK: FOR COLORADO CONSERVATION PROFESSIONALS*. CWT is a nonprofit organization focused on securing water rights for conservation purposes. Authored by Peter D. Nichols along with several members of the CWT board and other experts on water rights, the book is a how-to guide on conservation easement water rights.

Conservation organizations must secure water critical to the protection of target conservation values, such as wildlife habitat, farming, or ranching. Unfortunately, this is often a murky process due to the complexity of Colorado’s water laws and conservation easement tax regulations. In this book, CWT provides a model procedure for a conservation organization to follow.

After explaining the need for water conservation and the fundamental principles of Colorado water law, the authors break down by chapter the water conservation process into six stages: due diligence, baseline inventory, appraisal, easement drafting, closing, and stewardship. Each chapter describes concrete steps a land trust should follow for each stage, identifies potential problem areas, and concludes with a summary checklist of prescribed actions. An extra chapter highlights how the prescribed water conservation process addresses conservation easement donation tax issues.

In the first two chapters, the authors introduce the legal framework which shapes the water rights conservation process. Under Colorado water law, water rights are separate interests; however, the Colorado conservation easement statute does not permit an easement solely of water rights. Only water rights essential to the preservation of land conservation values can be conserved. Any additional water rights are subject to claims of abandonment under Colorado’s “beneficial use” doctrine. Therefore, land trusts can only include water rights which are essential to preserving target conservation values into a conservation easement.

In chapter three, the authors recommend four due diligence investigations and outline the necessary steps for each. Before entering into a conservation easement, the conservation organization should (1) identify the water rights used on the land, (2) confirm the ownership of such rights, (3) determine the historical uses of the rights, and (4) determine the physical and legal reliability of the rights. By gathering this information, the conservation organization ensures that it encumbers the water rights needed to support the conservation values and that it will be able to enforce these interests in the future.

Chapter four highlights the essential parts of a baseline water inventory. Such an inventory should contain a list of conservation values

served by the water rights, maps of all diversion structure locations, records of historical beneficial use, and copies of water rights documents. By documenting this information, the conservation organization creates a record for future monitoring and enforcement purposes.

Chapter five focuses on appraising water rights for tax credit purposes. While the level of responsibility that a conservation organization assumes for the accuracy of the valuation of an easement donation is unclear, this area has received much scrutiny, raising expectations of more stringent, future government regulations. Therefore, the authors discuss relevant water valuation issues, highlights what a "qualified appraisal" should contain, when and how an appraiser should be hired and reviewed, and conclude with a practical tip section listing appraising practices to avoid.

Chapter six discusses drafting water right provisions for a conservation easement. In order to prevent costly future disputes, the authors recommend including a separate water section containing specific provisions which address the water rights granted and reserved. The chapter includes model language encumbering water rights historically used for irrigation. If the conservation values require alternative water uses, the conservation organization should consult a water attorney to guide the drafting process.

Chapter seven briefly discusses additional closing and post-closing notice requirements for encumbering water rights. For example, if someone were to donate a water right, the conservation organization must notify the office of the state engineer.

Chapter eight focuses on stewardship issues. Forfeiture of encumbered water rights can happen through failure to enforce the use restrictions of the easement (estoppel), failure to enforce similar restrictions in other easements (waiver), or nonuse (abandonment). The conservation organization should include in the easement an enforceability clause stating that waiver and estoppel are not defenses against enforcement of an easement. Such saving language effectively preserves the conservancy's enforcement rights. To guard against claims of abandonment, the conservation organizations should conduct annual field and office audits and require landowners to compile records of annual water usage. To ensure the conservation organization is able to perform monitoring tasks in perpetuity, it must charge a stewardship fee.

Chapter nine provides an overview of how federal and state tax incentives relate to water right donations. As long as appropriate regulations are followed, a donation of an easement encumbering water rights for conservation purposes should qualify for both federal and state tax incentives. An exception is the exclusion of donated water rights for instream flow purposes from Colorado income tax credits program. The authors strongly advise conservation organizations to monitor donors' compliance with tax regulations, as the Internal

Revenue Service recently indicated it may revoke the tax exempt status of conservation organizations for accepting overvalued donations.

CWT created a comprehensive introduction and a practical manual to the difficult field of water rights conservation. This book is an essential read for any conservation professional hoping to avoid costly problems in the future.

*Roman Ginzburg*

