

Easement Monitoring and Landowner Relations

The following guidance describes both *minimum* and *recommended* contents for title work due diligence. Minimum contents are indicated by “must”; recommended contents are indicated by “should” or “may” statements.

Items recommended by the Center of Excellence to be checked off and completed have a box - .

Minimum contents for title work due diligence are described in the following Land Trust Alliance (LTA) Standards and Practices, Colorado Open Space Alliance (COSA) Best Practices, and the Colorado Division of Real Estate’s Rule A-1. The conservation organization must meet these minimum standards for each transaction.

There are a variety of acceptable procedures and practices for easement monitoring. Organizations that utilize volunteers to monitor all or some of their easements may have slightly different procedures. Where applicable, this checklist attempts to provide guidance to all conservation organizations with monitoring obligations. An example of a detailed monitoring form is attached as an exhibit to this document for informational purposes.

Treas. Reg. 170(A)-14(g)(5)(ii). Under the Treasury Regulations, any qualified donation must include an agreement by the donor to notify the donee in writing of the exercise of any reserved right which may have an adverse impact on the conservation interests associated with the qualified real property interest. The easement must also provide the right of the donee to enter the property at reasonable times for the purpose of inspecting the property to determine if there is compliance with the terms of the donation.

LTA S&P 11C. Easement Monitoring. The land trust monitors its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property, and keeps documentation (such as reports, updated photographs and maps) of each monitoring activity.

LTA S&P 11D. Landowner Relationships. The land trust maintains regular contact with owners of easement properties. When possible, it provides Landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement’s existence and restrictions and the land trust’s stewardship policies and procedures. The land trust establishes and implements systems to track changes in land ownership.

COSA 5.2. Monitoring. The conservation industry standard is for the easement holder to monitor all conservation easements at least annually. Colorado HB 1353 requires annual monitoring for all easements with a donation component and best practices support and encourage local governments to monitor all regulatory or purchased easements not having a donation component annually or at least on a consistent and regular basis. The local government should have a monitoring plan that is appropriate to the size, accessibility, and individual characteristics of each property and appropriate to the program or process that resulted in the conservation easement and that will adequately protect the conservation values of each property. The local government should also retain all documentation such as reports, updated photographs, and maps of each monitoring activity. It is important for staff to maintain regular contact with Landowners of easement properties. Establishing a positive working relationship with Landowners will help the local government ensure that the Landowners understand the terms and restrictions in the easement and should result in fewer violations. It is especially important to establish a positive working relationship with new owners and inform them about the easement’s existence and restrictions, as well as the local government’s stewardship policies and procedures. When appropriate, staff can provide Landowners with information on property management and/or referrals to resource managers. Establishing an institutional system to track changes in land ownership and receive notification related to requests for building permits or land use changes is a best practice to ensure compliance with the easement.

Colorado Division of Real Estate Rule A-1: Qualifications for Certification to Hold Conservation Easements.

The Division may deny, refuse to renew, or revoke the certification of a conservation easement holder who fails to meet any of the following minimum qualifications:

(c) Stewardship: Practices and Capacity

(i) The conservation easement holder has and follows reasonable policies and procedures to ensure the short- and long-term management of its conservation easements. These include, but are not limited to:

1) Having adequate resources and policies in place to provide annual monitoring of each conservation easement held in Colorado, except for any conservation easement granted to a local government that did not involve a charitable donation.

2) Monitoring all conservation easements on an annual basis, including visually inspecting the property and performing other types of monitoring actions as appropriate;

Recommended contents set forth in this guidance were developed based on input from conservation organizations (also referred to as “donees,” “grantees,” “land trusts,” or “local governments” throughout this website) and conservation professionals with experience on these topics. Because each project is unique, a conservation organization may tailor recommended contents, as appropriate, to suit an individual property or project.

A. Pre-monitoring

1. Determine how often monitoring for each easement should occur.

Each easement is monitored annually.

- Timing of annual monitoring should be reasonable. One guideline to use is one year plus/minus 3 months. Unreasonable timing of annual monitoring is reviewed by the Colorado Conservation Easement Oversight Commission.
- More frequent monitoring may be required to properly evaluate seasonal conservation values (e.g., seasonal elk habitat) and/or the activities planned (e.g., building occurring pursuant to reserved rights).
- Note: Colorado State law does not require local governments to monitor all regulatory or purchased easements not having a donation component annually. These easements should be monitored at least on a consistent and regular basis.

Conflict of Interest - no one who is an owner of the property or has a direct interest in the property (financial, etc.) should be allowed to monitor their own property.

Monitoring procedures are appropriate for the size and restrictions of each property.

- Some organizations have their monitoring procedures approved by the organization's Board of Directors, Advisory Group, or other appropriate oversight individual or entity.
- Determining photo points and other procedural details should be the result of a well-thought out process aimed at documenting and protecting the conservation values.

2. Determine type of monitoring for each easement.

- The type of monitoring to be used is appropriate for the size and location of the property, ease of physical access and type of legal access.
 - Some on-site, on-the-ground monitoring should occur if the property is accessible by vehicle or on foot.
 - Aerial and float monitoring as a means of monitoring may be appropriate.
 - If the organization has determined it is acceptable to use an alternative to on-site monitoring (e.g., aerial monitoring), a policy should be established regarding the types of monitoring that are appropriate that includes information such as how often alternative forms of monitoring may be conducted on a property and what properties may be appropriate for alternative monitoring.
 - Thought should be given to how photo points are determined, maintained and labeled. Some organizations return to the same points every year, other organizations may adopt a rotating schedule, others return to the photo points taken in the original baseline documentation report.

3. Determine appropriate outreach to each landowner.

- Document how, when, and who should give the appropriate person appropriate notice, fulfilling the conservation organization's legal notice obligations pursuant to the conservation easement.
 - Notice can include, if available, the name of the person who will conduct the monitoring, the monitoring date and time, contact information for the organization generally, and contact information for the person who will conduct the monitoring. The notice also encourages the landowner to participate in the monitoring activities.
 - Written notice may simply confirm an oral agreement between the landowner and organization.
 - The expected duration may be included, if the organization finds that feasible to predict.

4. Prepare for monitoring.

- Inspector should review the conservation easement and all associated files (e.g., inspection records, the baseline report, landowner correspondence, maps, photos) prior to monitoring the property.
 - Specific preparations will depend upon the size, character, and complexity of the easement and the familiarity of the Inspector with the property.
- Notes should be prepared from the file review indicating any past easement problems, unique attributes of or restrictions in the easement, and other useful information such as what areas of the property may be most likely to see easement violations.
- An inspection form should be created for each easement. It may be appropriate to have a standard form for inspections, but some easements may require special treatment.
- The conservation organization should complete an assessment of water encumbrances on the suite of conservation easements held by the organization.
 - If water rights are explicitly encumbered by the conservation easement and if the organization has a step in right-to-use the water to ensure it is not abandoned, then the organization

should review the division of water resources website water records and confirm the accuracy with the landowner on an annual basis.

- If the easement falls into a less restrictive category the land trust should make the determination on how to handle water monitoring records. One suggested classification of encumbered water rights:
 - Tier 1 – water explicitly encumbered (exhibit of water rights attached to CE deed)
 - Tier 2 – restrictive water language exists, but no specific water rights tied to CE
 - Tier 3 – vague water language in CE, no specific rights tied to CE
 - Tier 4 – no water language

- If there is a management plan required for the property, the inspector should revisit the plan with the landowner according to the organizations requirements.

B. During monitoring

- **Ensure the inspector uses an adequate process to determine easement violations and assesses general property conditions.** On-site, the inspector views the features and uses of the subject property, compares uses to the easement's terms, and documents the visit with a report, photographs (as appropriate), and supporting documents.

- Some organizations document the property completely each time, while some organizations instead photograph changes each time and then periodically take more photographs that fully document the property.

- The inspection process should note the property's current conditions and activities, even if not at odds with the easement's terms. Such records may be critical to establish a prior condition in case of a future violation. The following items may be important to check on or track:

- Man-made changes in infrastructure – indicate changes in number, size or location of the following:
 - Note new residences or changes relevant to easement terms
 - Agricultural buildings and structures (barns, corrals, etc)
 - Water storage or irrigation features (ponds, dams, ditches, tanks)
 - Fences
 - Roads
 - Trails
 - Utility lines, poles, pipelines
- Activities (which also might involve structures):
 - Energy development (drilling, excavating, mining, power lines, pipelines, wind towers, solar fields)
 - Dredging/filling
 - Forestry/removal of vegetation
 - Recreational or commercial uses, if they might impact the conservation values
 - Livestock and crops: current types and changes to production that might impact conservation values
 - “Has owner exercised water rights and continued historic irrigation patterns?”
- Other man-made changes:
 - Trash, debris or pollution
 - Evidence of trespassing or vandalism
 - Encroachments from adjacent properties/landowners
 - Land use changes on adjacent property that could impact the property that has a CE

- Natural changes/events:
 - Wildlife use of the property
 - Significant natural disturbances (fires, floods, erosion, insect infestation, noxious weeds)
- Inspector carefully documents any concerns for subsequent consultation with other staff or advisors.
- During the site visit, the inspector documents water use and water structures as they relate to the conservation easement terms, baseline, and permitted uses.
 - If the landowner intends to change any of the water use, further discussions will need to occur to ensure that the future use will not violate the terms of the easement or the uses specified under the terms of the decrees.
- If the landowner is available, have a discussion. The site visit presents an opportunity to check-in with the property owner or site manager. This relationship is a key factor in the long-term success of many conservation interests. Ideally, the inspector will leave the property with an understanding of the landowner's current activities, and the owner or manager will be left with a renewed understanding of not only the terms of the easement or deed restriction, but also of the conservation values which are organization's reasons for holding it. Discussion can include:
 - The management plan for the property, if applicable.
 - If there are water rights encumbered by the conservation easement, discuss the records obtained from the Division of Water Resources site for accuracy, compliance with terms of the decree, and non-use of rights.
 - Contact information - check with landowner to make sure current.
- The monitoring report includes at a minimum:
 - The inspector's direct observations.
 - The landowner's statements about any activities that have impacted the property since the last inspection and plans for future projects for the upcoming year.
 - Documentation of current uses, changes to infrastructure (including photographs), management problems, other activities relevant to the conservation easement, and a summary with recommendations.
- Protocol when a potential violation is discovered during the monitoring visit:
 - If a potential violation is discovered on site, gather as much information as possible while in the field. It is preferable to refrain from making a decision onsite as to whether a violation has occurred.
 - After the site visit, the appropriate individual(s) within the conservation organization should assess the situation and make a determination once all of the information is gathered and reviewed according to the organizations violations policy.
 - See Section 2 – 2. Enforcement of Easements for more information.

Post-Monitoring, General

1. **Follow up with the landowner.**

- Inspector should follow up with the landowner, answering any questions the landowner had during the site visit or addressing how the organization will produce an answer and when that is anticipated.
 - Some organizations discuss the results of their visit with the landowner, while others do so only if the landowner has requested a follow-up conversation.
 - Consider sharing a copy of the monitoring report with the landowner, if requested or if the report would facilitate good communications and the ongoing relationship between the landowner and your organization.

2. Ensure adequate retention and safety of files.

- Have authorized individual review, sign and date monitoring report.
- Monitoring visits are documented through written reports, with maps and updated photographs as appropriate.
- Completed monitoring reports and other easement-related documents shall be kept on file for future reference.
- Files should be backed-up so that a catastrophic event will not decimate the history of monitoring visits to the property according to the conservation organization's file retention policy.

D. Landowner relations

1. Communication.

- Communicate with landowners to remind them of the upcoming monitoring season and site visit.
 - May send out reminders to each landowner of what rights required prior approval from the organization as part of the spring letter, prompting conversation and interaction with landowners who were planning projects for the spring, summer and fall.
 - May use a stewardship newsletter for this notification and reminder.

2. Ideas and Suggestions for landowner relations.

- If there are community events held by the organization, invite landowners! If there are not currently events, consider creating some type of gathering – annual BBQ in summer or chili gathering in winter.
- Send landowners copies of newsletters organization letters regularly.
- Offer ranching exchanges or other networking opportunities (such as membership in the CSU Cooperative Extension's local small or large acreage management group) for landowners to share information and best practices. This is also helpful when working with new owners who are considering placing conservation easements on their properties.
- Provide landowners with resources and information such as best management practices on invasive species or information on state regulations regarding oil and gas development and surface owner rights.
- Send landowners holiday cards, organizational calendars, etc.
- Have an annual award for landowners who are doing something above and beyond on their property to acknowledge and to thank landowners e.g., a restoration project or a new grazing regime that benefits biodiversity.

3. **Recommendations for volunteer monitoring.** Volunteers can be an invaluable resource for completing monitoring tasks each year. A core team of volunteers with a long-term commitment to the program not only provides efficient and effective method to complete monitoring tasks, but it also provides a great sense of community among those volunteers, and a resulting strong support for the conservation organization.

- Give the volunteer monitors refresher training each year. When only a few days each year are devoted to a responsibility, it is easy to forget the details of the responsibility.
- On most properties, assign both a Lead Monitor and a Monitor Partner.
- The Lead Monitor for each property is responsible for most of the monitoring tasks, including setting appointments and completing monitor reports.
- The Monitor Partner role has several purposes:

- Serves as a back-up person who is knowledgeable about the property, its landowner and its boundaries. In future years when a Lead Monitor “retires” or moves away, a knowledgeable Monitor Partner can step in to the Lead role;
 - Provides a safety net in case there are mishaps on the field visit;
 - Provides a second set of eyes for validating monitor observations;
 - Provides a good training opportunity for new monitors.
- For new properties, a conservation organization Board or Commission Member is assigned to the Partner role for the first year to introduce the Lead Monitor to the property.
 - Under usual circumstances, assign volunteers to the same properties each year in order to facilitate their familiarity with the property and the landowner.
 - Provide name badges or other forms of identification e.g., business card containing office contact information, to the volunteer monitor for their use in the field work.
 - Instruct volunteer monitors that they are responsible for identifying problems and potential violations on an easement property, but they should not confront the landowner about those problems or seek resolutions. Problems or any other post-monitoring discussions should be referred to the staff and/or Board of the conservation organization for follow-up assessments and actions. The role of the volunteer is to maintain a positive relationship with the landowner.
 - When using volunteer monitors, place extra emphases on the importance of timely and complete inspections. This is not an optional activity for the Land Trust, and the volunteers have to make that same commitment.
 - Make sure the volunteers understand that they are needed and appreciated!