

The State Bar of Montana's
CLE INSTITUTE

Presents:

ANNUAL REAL ESTATE
CLE



February 18, 2005
Fairmont Hot Springs

ANNUAL REAL ESTATE CLE

A G E N D A

- 8:30 am *Registration*
 (Coffee and Pastries served)
- 8:55 am *Welcome and Overview*
 Colleen Dowdall
- 9:00 am **Meandering Waters: A DNRC Perspective**
 Tommy Butler
- 10:15 am **Playing Easement Detective: Finding and Proving Access**
 Randy Snyder
- 11:45 am *Lunch (Included in Registration Fee)*
- 12:45 pm **Conservation Easements**
 Robert Knight
- 2:30 pm **Ethical Considerations**
 (1.25 Ethics CLE)
- 3:45 pm **Questions and Answers; Wrap Up**
- 4:00 pm *Adjourn*

***APPROVED FOR 5.50 MONTANA CLE CREDITS,
INCLUDING 1.25 ETHICS CREDITS***

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STATE BAR OF MONTANA

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TABLE OF CONTENTS

MEANDERING WATERS; A DNRC PERSPECTIVE

Tommy Butler, Esq.

SECTION A

PLAYING EASEMENT DETECTIVE: FINDING AND PROVING ACCESS

Randy Snyder, Esq.

SECTION B

CONSERVATION EASEMENTS

Robert Knight, Esq.

SECTION C

MISCELLANEOUS INFORMATION:

PRO BONO STATEMENT
THANK YOU TO MODERATORS/PRESENTERS
UPCOMING SEMINARS
CALL FOR SPEAKERS

A

**MEANDERING WATERS:
A DNRC PERSPECTIVE**



**Tommy Butler, Chief Legal Counsel,
Forestry and Trust Lands Division
MT Dept. of Natural Resources and
Conservation
Helena**

MEANDERING WATERWAYS: A DNRC PERSPECTIVE

Tommy H. Butler
Chief Legal Counsel, Forestry & Trust Lands
Montana Department of Natural
Resources & Conservation

Navigable Waterways & Origins of Ownership

I. INTRODUCTION

The State of Montana owns, on behalf of the general public, real property and minerals located below the low water marks of navigable waters, pursuant to its sovereign powers under the Equal Footing Doctrine. The Department of Natural Resources and Conservation, Trust Land Management Division (DNRC), administers these lands on behalf of the state. Consequently, the DNRC has responsibility for the determination of navigability, the delineation of river boundaries, quieting title to island formations, abandoned riverbeds, and mineral ownership involving the State's navigable waters.

II. AUTHORITY

The State's ownership of navigable water bodies arises from extensive case law and statutory authority. In Martin v. Waddel, 41 U.S. 234 (1842) the U.S. Supreme Court considered whether title to submerged lands in navigable tidal waters was vested at statehood in a State or the riparian owner. The U.S. Supreme Court held that:

When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use . . .

Id. at 262-263.

In Pollard's Lessee v. Hagen, 44 U.S. 212 (1845), the United States Supreme Court held that the same principle was applicable to all states subsequently admitted to the United States so as to be on an "equal footing" with the original thirteen states. Subsequently, in Barney v. Keokuk, 94 U.S. 324 (1877) the principle of state ownership of the submerged beds of navigable waters was extended to non-tidal waters as well. Consequently, as of the date of Montana's Statehood (November 8, 1889) the State of Montana owned in fee simple title the submerged lands of all navigable waters in the state up to the high water mark, subject to the

power of the United States to regulate commerce under Article I, Section 8, Clause 3 of the United States Constitution.

A second corroborating source of authority is the federal Submerged Lands Act of 1953. By that act, Congress vested in the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. Section 1311(a) (1982). Similarly, Section 70-1-201, MCA, directs that: "[t]he original and ultimate right of all property, real and personal, within the jurisdiction of this state and not belonging to the United States is in the people of the state[.]"

The Montana Legislature clearly accepted the "equal-footing" doctrine in 1894 when it enacted Section 70-1-202, MCA, which states that:

The state is the owner of:

- (1) all land below the water of a navigable lake or stream;
- (2) all property lawfully appropriated by it to its own use;
- (3) all property dedicated or granted to the state; and
- (4) all property of which there is no other owner.

→ California law vis-a-vis navigable water/ownership is nearly identical to MT law.
Rivers that were used or susceptible of being used in their natural condition, or with reasonable improvements, are considered navigable under Federal law and title to their beds passed to the State upon its admission to the Union. U.S. v. Appalachian Power Co., 311 U.S. 377, 406-409; The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (The Federal test for navigability is whether the waterway is susceptible of use in commerce.). Montana was admitted to the Union on November 8, 1889. Therefore, rivers that were susceptible of use in commerce at that time are held by the State of Montana under its sovereign powers under the Equal Footing Doctrine.

Although the Federal test for navigability may determine whether a State took title to submerged lands at statehood, state property law controls the resolution of all property disputes thereafter. See, United States v. Oregon, 295 U.S. 1, 14 (1934); State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (After statehood, state law applies to determines boundaries between state and private ownership.)

The navigability of a river is unaffected by subsequent changes in the river, obstructions, or seasonal changes. Alaska v. U.S., 891 F.2d 1401 (9th Cir., 1989); U.S. v. Utah, 283 U.S. 64, 83 (1931). As the U.S. Supreme Court stated in Economy Light & Power Co. v. U.S., 256 U.S. 113 at 122: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional ... obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."

Recreational river floating may prove navigability

MT: actual historic use standard

Fed standard: susceptible to use

In Montana Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38 at 47-48, 682 P.2d 163 (1984), the Montana Supreme Court cited excerpts from Illinois Central Railroad v. Illinois, 146 U.S. 387 at 452-453 (1892) to emphasize that the State must continue to own all navigable waters and cannot convey fee title to those lands to private parties:

... [T]he State can no more abdicate its trust over property in which the whole people are interested like navigable waterways and the soils under them, so as to leave them entirely under the control of private parties, except in the instance of parcels mentioned for the improvement of navigation and the use of waters, or when parcels can be disposed of without impairment to the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

III. River Movement and its effects upon riparian titles.

Rivers are dynamic. As waters flow through unconsolidated sand, clay, and gravel, erosive and depositional forces are at work. The process and sequence by which this occurs dramatically and conclusively may affect the ownership of the resulting land forms.

Avulsion:

Section 70-18-205, MCA provides that:

If a stream navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to the owner.

Rapid lateral erosion should not be mistaken for avulsion. The American Geological Institute's "AGI Glossary of Geology", AGI Institute, Washington, D.C. (1977) defines an "Avulsion" as:

A sudden cutting off or separation of land by a flood or by an abrupt change in the course of a stream, as by a stream breaking through a meander or by a sudden change in current whereby the stream deserts its old channel for a new one.

Determining whether an avulsion has taken place may be quite easy where there is eye-witness testimony. However, avulsion may have to be inferred from the physical characteristics resulting from the river movement. Section 70-18-202, MCA, allows a land owner in Montana a one year period of time to fill in channels created by avulsion, when it provides that:

*often caused by
spring ice
breakups*

If a river or stream, navigable or not navigable, carries away by sudden violence a considerable and distinguishable part of a bank and bears it to the opposite bank or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

*never known to have
been used*

Accretion:

Section 70-18-201, MCA, provides that:

Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right-of-way over the bank.

The AGI definition of "Accretion" is:

The gradual or imperceptible increase or extension of land by natural forces acting over a long period of time, as on a beach by the washing-up of sand from the sea or on a flood plain by the accumulation of sediment deposited by a stream.

Erosion:

The AGI definition of "Erosion" is:

The general process or group of processes whereby the earthy and rocky materials of the earth's crust are loosened, dissolved, or worn away, and simultaneously removed from one place to another, by natural agencies that include weathering, solution, corrasion, and transportation, . . . specif. the mechanical destruction of the land and the removal of material (such as soil) by running water (including rainfall), waves and currents, moving ice, or wind.

The Montana Supreme Court held in Jackson v. Burlington Northern, 205 Mont. 200, 667 P.2d 406 (1983), that the State of Montana owns the bed of navigable rivers, and the minerals beneath those rivers, even though the location of the riverbed should move over time to occupy lands that once constituted severed mineral estates.

Island Formation:

*Yellowstone River (Williston Basin)
split minerals move w/ land surface, and a
State's ownership moves!*

River islands often form through the vertical accretion of sediment during times of high water. Islands formed and existing prior to statehood (November 8, 1889) are part of

the federal domain and belong to the federal government or its patentee. Texas v. Louisiana, 410 U.S. 702 at 713, *rehearing denied*, 411 U.S. 988 (1973) Federal islands which totally erode away and re-form after statehood belong to the state. See, Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir., 1951), *rehearing denied* 191 F.2d 705 (5th Cir., 1951), *cert. denied*, 342 U.S. 920 (1952). Federally owned islands continue to be federally owned, even though the island ceases to be surrounded by water, and becomes part of the "river bank". See, U.S. v. Severnson, 447 F.2d 631 (7th Cir., 1971)

By contrast, Islands created by avulsion continue to belong to the original riparian owner. See, Bode v. Rollwitz, 60 Mont. 481, 199 P. 688 (1921)

Section 70-18-205, MCA, provides that:

Sandbars may not necessarily be islands!

If a stream navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner.

Islands created by vertical accretion after November 8, 1889 are owned by the State of Montana, in trust for public schools. Also, the State continues to own certain abandoned riverbeds. Section 77-1-102, MCA, directs that: *← an unusual MT statute*

All lands lying and being in and forming a part of the abandoned bed of any navigable stream or lake in this state and lying between the meandered lines of such stream or lake as the same are shown by the United States survey thereof and all islands existing in the navigable streams or lakes in this state which have not been surveyed by the government of the United States and all lands which at any time in the past comprised such an island or any part thereof, except such lands as are occupied by and belong to the adjacent landowners as accretions, belong to the state of Montana to be held in trust for the benefit of the public schools of the state.

This statute was effective February 19, 1937. DNRC's policy is not to claim abandoned riverbeds that were abandoned prior to this date. DNRC claims all active riverbeds between the low-water marks and all islands arising from between the low-water marks of a navigable waterway after November 8, 1889.

The Montana Supreme Court in DSL v. Jerry D. Armstrong, et al., 251, Mont. 235, 824 P.2d 255 (1992) held that the State of Montana owed two islands formed in the Missouri River after statehood through the process of vertical accretion between the low-water marks

STATE OF MT OWNS
active riverbeds
post '37

low to low watermark (inc. new islands)
abandoned river beds between meander lines

In Montana, the high-water mark is the absence of vegetation. See, State v. Mogen, 298 Mont. 87, at 89, 993 P.2d 699, at 701 (2000); Montana Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 55-57, 682 P.2d 163, 172 (1984). Section 87-2-305, MCA, (commonly referred to as "the Angler's easement") instructs that:

Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose.

What is the "low-water" mark?

In Montana, all owners of land adjacent to navigable waters own down to the low-water mark. The Montana Supreme Court decided this in 1895 in the case of Gibson v. Kelly, 15 Mont. 417 (1894), and again in 1925 in Herrin v. Sutherland, 74 Mont. 587, 241 P. 328 (1925). The State Legislature has recognized this public/private-property boundary in Section 70-16-201 of the Montana Code Annotated (MCA), which provides that:

Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

The Department argued in Montana Department of State Lands v. Armstrong, et al., 251 Mont. 235, 824 P.2d 255 (1992), that the "low-water mark" is that point on the bank of the river which is covered by water when the river is at its lowest 10th percentile of flow. The Montana Court tacitly agreed, and accepted the state's title to these islands by basing its decision upon that standard.

How do I obtain a Disclaimer of Interest from the State for riparian Lands?How do I obtain a Disclaimer of Interest from the State for riparian Lands?How do I obtain a Disclaimer of Interest from the State for riparian Lands?How do I obtain a Disclaimer of Interest from the State for riparian Lands?

Contact Tommy Butler, Chief Legal Counsel, DNRC, P.O. Box 201601, Helena, MT 59620-1601, ph. (406) 444-3776, and submit the exact legal description (preferably by governmental subdivision or metes and bounds survey tied to a section corner monument). The Department will review the area, and conduct a study. If the State concurs that it has no

Adverse possession does not work against the State

claim, it will recommend to the State Board of Land Commissioners that the Board issue a disclaimer of interest for the described property.

IV. RIVERS ASSERTED TO BE NAVIGABLE BY THE STATE OF MONTANA.

BIG HOLE RIVER

Based on historical documentation, the Big Hole River is commercially navigable from Steel Creek to Divide, Montana . Therefore, the state claims ownership of the Big Hole River between these two points.

BIG HORN RIVER

Based on historical documentation, the Big Horn River is commercially navigable from the Wyoming state line to its confluence with the Yellowstone River . Therefore, the state claims ownership of the Big Horn River between these two points.

BITTERROOT RIVER

Based on historical documentation, the Bitterroot River is commercially navigable from the mouth of Jennings Camp Creek on the east fork to its confluence with the Clark Fork River . Therefore, the state claims ownership of the Bitterroot River between these two points.

BLACKFOOT RIVER

Based on historical documentation, the Blackfoot River is commercially navigable from Lincoln, Montana to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Blackfoot River between these two points.

BOULDER RIVER (Tributary to the Yellowstone River)

Based on historical documentation, the Boulder River is commercially navigable from the northern township line of Township 6 South, Range 12 East, to its confluence with the Yellowstone River. The west Boulder River is commercially navigable from the southern line of Township 3 South, Range 11 East, to its confluence with the main stem of the Boulder River. Therefore, the state claims ownership of the Boulder River between these points.

BULL RIVER

Based on historical documentation, the Bull River is commercially navigable from a point

south of Bull Lake (approximately in Section 16, T28N, r33W) to its confluence with the Clark Fork River . Therefore, the state claims ownership of the Bull River between these two points.

CLARK FORK RIVER

Based on historical documentation, the Clark Fork River is commercially navigable from Deer Lodge, Montana to the Idaho state line. Therefore, the state claims ownership of the Clark Fork River between these two points.

CLEARWATER RIVER

Based on historical documentation, the Clearwater River is commercially navigable from, and including, Seeley Lake, to its confluence with the Blackfoot River. Therefore, the state claims ownership to Seeley Lake and the Clearwater River between these two points.

DEARBORN RIVER

Based on historical documentation and court adjudication, the Dearborn River is commercially navigable from Highway 434 to its confluence with the Missouri River. Therefore, the state claims ownership of the Dearborn River between these two points.

DUPUYER CREEK

See "South Fork Dupuyer Creek".

FLATHEAD RIVER - MAIN STEM

Based on historical documentation, the main stem of the Flathead River is commercially navigable from the confluence of its north and middle forks to its confluence with the Clark Fork River. However, given the Neman court case, the state does not claim any river ownership within the boundaries of the Flathead Indian Reservation at this time. Therefore, the state claims ownership of the main stem of the Flathead River excepting any portion within the Flathead Indian Reservation. The state also claims ownership of the portion of Flathead Lake located outside of the Flathead Indian Reservation.

FLATHEAD RIVER - MIDDLE FORK

Based on historical documentation, the middle fork of the Flathead River is commercially navigable from three (3) miles above Nyack, Montana to its confluence with the North fork of the Flathead River. Therefore, the state claims ownership of the middle fork of the Flathead River between these two points.

FLATHEAD RIVER - NORTH FORK

Based on historical documentation, the north fork of the Flathead River is commercially navigable from Logging Creek to its confluence with the main stem of the Flathead River. Therefore, the state claims ownership of the north fork of the Flathead River between these two points.

FLATHEAD RIVER - SOUTH FORK

Based on historical documentation, the south fork of the Flathead River is commercially navigable from the face of Hungry Horse Dam to the main stem of the Flathead River. Therefore, the state claims ownership of the south fork of the Flathead River between these two points.

FORTINE CREEK (Tributary to Tobacco River)

Based on historical documentation, Fortine Creek is commercially navigable from Swamp Creek to its confluence with the Tobacco River. Therefore, the state claims ownership of Fortine Creek between these two points.

GALLATIN RIVER

Based on historical documentation, the Gallatin River is commercially navigable from Taylor's Fork to Central Park, Montana. Therefore, the state claims ownership of the Gallatin River between these two points.

GRAVES CREEK (Tributary to Tobacco River)

Based on historical information and Departmental interpretation, Graves Creek is commercially navigable from where Graves Creek intersects the eastern township line of Township 35 North, Range 26 West, to its confluence with the Tobacco River. Therefore, the state claims ownership of Graves Creek between these two points.

JEFFERSON RIVER

Based on historical documentation, the Jefferson River is commercially navigable from its confluence of the Beaverhead and Ruby Rivers to the Jefferson's confluence with the Missouri River. Therefore, the state claims ownership of the Jefferson River between these two points.

KOOTENAI RIVER

Based on historical documentation, the Kootenai River is commercially navigable from the Canadian line to the Idaho state line. Therefore, the state claims ownership of the Kootenai River between these two points.

LOLO CREEK

Based on historical documentation, Lolo Creek is commercially navigable from the mouth of Tevis Creek to Lolo Creek's confluence with the Bitterroot River. Therefore, the state claims ownership of Lolo Creek between these two points.

MADISON RIVER

Based on historical documentation, the Madison River is commercially navigable from the confluence of its west fork to Varney, Montana. Therefore, the state claims ownership of the Madison River between these two points.

MARIAS RIVER

Based on historical documentation, the Marias River is commercially navigable from its confluence with the Missouri River to a point five miles upstream. Therefore, the state claims ownership of the Marias River between these two points.

MILK RIVER

Based on historical documentation, the Milk River is commercially navigable from Glasgow to its confluence with the Missouri River. Therefore, the state claims ownership of the Milk River between these two points.

MISSOURI RIVER

Based on historical documentation, the Missouri River is commercially navigable from its headwaters at Three Forks, Montana to the North Dakota state line. Therefore, the state claims ownership of the Missouri River between these two points.

NINE MILE CREEK (Tributary to the Clark Fork River)

Based on historical documentation, Nine Mile Creek is commercially navigable from the southeast corner of Township 17 North, Range 24 West, to its confluence with the Clark Fork River. Therefore, the state claims ownership of Nine Mile Creek between these two points.

ROCK CREEK (Tributary of the Clark's Fork of the Yellowstone River)

Based on historical documentation, Rock Creek is commercially navigable from the main fork of Rock Creek to Red Lodge, Montana. Therefore, the state claims ownership of Rock Creek between these two points.

SHEEP CREEK (Tributary to Smith River)

Based on historical documentation, Sheep Creek is commercially navigable from the mouth of Deadman Creek to its confluence with the Smith River. Therefore, the state claims ownership of Sheep Creek between these two points.

SMITH RIVER

Based on historical documentation, the Smith River is commercially navigable from the mouth of Sheep Creek to its confluence with the Missouri River. Therefore, the state claims ownership of the Smith River between these two points.

SOUTH FORK DUPUYER CREEK (Tributary to Dupuyer Creek and Marias River)

Based on historical documentation, the south fork of Dupuyer Creek is commercially navigable from the basins above the canyon to the mouth of the canyon, a distance of approximately five miles. Therefore, the state claims ownership of the south fork of Dupuyer Creek between these two points.

STILLWATER RIVER

Based on historical documentation, the Stillwater River is commercially navigable from upper Stillwater Lake to its confluence with the Flathead River. Therefore, the state claims ownership of the Stillwater River between these two points.

SUN RIVER

Based on historical documentation, the Sun River is commercially navigable from the confluence of the north and south forks of the Sun River to its confluence with the Missouri River. Therefore, the state claims ownership of the Sun River between these two points.

SWAN RIVER

Based on historical documentation, the Swan River is commercially navigable from and including Swan Lake to its confluence with Flathead Lake. Therefore, the state claims ownership of the Swan River between these two points.

TETON RIVER

Based on historical documentation, the Teton River is commercially navigable from the confluence of its north fork to its confluence with the Marias River. Therefore, the state claims ownership of the Teton River between these two points.

TOBACCO RIVER

Based on historical documentation, the Tobacco River is commercially navigable from the mouth of Graves Creek to its confluence with the Kootenai River. Therefore, the state claims ownership of the Tobacco River between these two points.

TONGUE RIVER

Based on historical documentation, the Tongue River is commercially navigable from the south line of Township 2 South, Range 44 East to its confluence with the Yellowstone River. Therefore, the state claims ownership of the Tongue River between these two points.

WHITEFISH RIVER

Based on historical documentation, the Whitefish River is commercially navigable from, and including, Whitefish Lake to its confluence with the Stillwater River. Therefore, the state claims ownership of the Whitefish River between these two points.

YAAK RIVER

Based on historical documentation, the Yaak River is commercially navigable from the mouth of Fourth of July Creek to its confluence with the Kootenai River. Therefore, the state claims ownership of the Yaak River.

YELLOWSTONE RIVER

Based on historical documentation, the Yellowstone River is commercially navigable from the mouth of Emigrant Creek to the North Dakota state line. Therefore, the state claims ownership of the Yellowstone River between these two points.

Tommy Butler serves as Legal Counsel for Montana's State Forests and Trust Lands, which cover 5.2 million acres of land in Montana. Mr. Butler received his Juris Doctorate degree from the University of Tulsa, in Tulsa Oklahoma in 1983. Since the State of Montana owns the beds of all navigable waters in Montana, and islands forming therein after statehood, Mr. Butler has developed expertise in quieting title to lands adjacent to navigable waters. Riparian lands – those adjacent to navigable waters – may prove to be a trap for the unwary. Land title records may not necessarily reflect the actual ownership of riparian lands and minerals. Instead, the physical processes by which the riparian land formed will determine the ownership of the land and the placement of the boundary lines between state and private ownership. Mr. Butler's presentation will discuss the origins, concepts, and recent developments in riparian property law in Montana. His presentation should be of interest to anyone contemplating ownership of land or minerals near a river or attempting to locate riparian ownership boundaries.

Riparian land titles are highly uncertain
Want pick this up from abstract of title

Generally start w/ original GLO meander lines

Artificial accretions - avulsions - artificial fill belongs to
the owner of the subsurface land

CA - accretions artificial are owned by State
diff't from cities of Missoula & Baker

Ownership of land flooded by dams

MT (+ND) River angler's easement (fishing between high water marks)
court: easement adjusted to new water line

MT prob (based on CA) owns the beds of reservoirs

Butler - quiet title "Helpful Reminders"

- Subdivision consideration must go thru county CTR 76-3-201(2)

B

**PLAYING EASEMENT DETECTIVE:
FINDING AND PROVING ACCESS**



**Randy Snyder, Esq.
Bigfork**

PLAYING EASEMENT DETECTIVE: SEARCHING FOR AND PROVING RIGHTS OF ACCESS

*Randall A. Snyder
Bigfork, Montana
February 18, 2005*

	<u>Page</u>
1. Introduction	1
2. Screening and Selecting Cases	1
2.1 Decline Cases Which Will Not Improve	1
2.2 Case and Client Profile	2
3. File Setup	2
4. Establish a Relationship with a Title Examiner	3
5. Simple Easement Analysis	3
6. Tracing an Easement	4
6.1 Identify Dominant and Servient Tenements	4
6.2 What your Maps will Show:	8
7. Montana Cadastral Database	8
7.1 Menu Items	8
7.2 Parcel Search	9
7.3 Subdivision Search	9
7.4 Map Functions	10
7.5 Download Data	11
8. Montana Maps Online	11
9. Aerial Photography	12
10. Hand-held GPS Units	13
11. Forest Service Road Maps	13
12. Other Sources	13
13. Style, Mediation and Settlement	13

PLAYING EASEMENT DETECTIVE: SEARCHING FOR AND PROVING RIGHTS OF ACCESS

*Randall A. Snyder
Bigfork, Montana
February 18, 2005*

1. Introduction

I will always believe that access cases are won or lost from a title report, the clerk and recorder's office and an accurate map and history. This outline seeks to lay out the steps for searching for and evaluating an access case. Whether your goal is to prove, disprove, create or resolve an access issue, we should each utilize a uniform method of research and proof. And whether the goal is to create a new or litigate old access, your methods, file set up and presentation of evidence should be uniform and orderly. As with most litigated cases, our files become voluminous, making organization essential. While it is tempting to rely on the old accordion file and folders and stuff them to their seams, we're far better off to spend the time necessary up front to organize a loose leaf notebook. Then *take the time* to document the chain of title, diagram the title history and reserve your conclusion of easement or no easement until your file is complete. Like any complicated personal injury claim, the current access case can no longer be evaluated during the initial conference. Do your homework. Evaluate the case, tell the potential client your findings and recommendations and then discuss representation and goals.

2. Screening and Selecting Cases

Granted, most cases will not require litigation or extensive research. Where the easement is recorded and access is reasonably clear (or clearly lacking), your initial interview may well be sufficient. But too often we accept the clean, simple case only to have it explode in our face. As with any litigation, you'll be married to a case and a client for three or more years. Do your homework before you propose marriage.

2.1 Decline Cases which will not improve.

Most attorneys want to help everyone. We frequently (and arrogantly) believe we can litigate or resolve any case coming in the door. Time to stow the superman cape and objectively decide whether your work and will likely help. Unless you are desperate for one more case you'll come to hate, take the time up front to objectively evaluate whether you can truly improve the situation. Seek

another opinion. If you can not improve the situation, be honest with yourself and the client and decline. I generally try to provide some additional attorneys' names for referral.

2.2 Case and Client Profile

Most access cases seem to arrive in one of three sizes:

Simple: a new easement to draft and record, reforming an old easement, writing a road maintenance agreement, reviewing a title report, survey or covenants for easements or simply telling a client they do or do not have an easement.

Moderate: These require followup work, obtaining documents from the courthouse, plat room or title company; reading a title report (or insurance); perhaps digesting multiple documents in a title chain and reviewing maps or surveys. Here, you're actually synthesizing multiple documents to issue an opinion of access and recommendations.

Complex: You know it when you see it, or it quickly mushrooms from simple or moderate. Any quiet title action, cases with multiple owners or claimants, and nearly every prescriptive or implied easement claim is complex. Any case requiring multiple title chain searches are complex.

The point here, is be honest with yourself and a potential client. Few contested access cases are simple. There is a delicate balance between honestly advising a potential client (and being honest with yourself) and unduly causing them to panic.

You probably have an intake form for new cases and clients. That's fine, but go the next step and *evaluate the case and client – both* before accepting either. I've attached a sample evaluation in **Appendix 1**. Road and boundary disputes can be worse than divorces. They are frequently not about the road or boundary. Take the time to objectively decide whether you are suited to the case AND client. Try to maintain the overall goal: can you truly help the client and/or the situation?

3. File Setup

Pay now or pay later. You'll do far better work if you take the time up front to properly organize a file, rather than wait for trial. Retire the accordion file and invest in a two-ring, looseleaf notebook. Any simple case can quickly become

complex. Don't wait for the quick settlement you expect. Get the case into a notebook early.

Paralegals are invaluable and you will know how much to delegate. But each case is unique; you should decide which documents go into which divider. No one else thinks like you do and someone else will organize it differently.

Take a look at Bindertek products, www.bindertek.com. They are far simpler to setup *and to keep current* than a conventional, three – ring binder. Next, decide how you'll break down a file. I suggest a format in **Appendix 2**. Once you are set up, don't let it get cluttered because of research, discovery or motions. Bindertek is flexible since it is simple to revise and reprint. This allows separation or merger of folders, additional notebooks and unlimited divider numbers.

4. Establish a relationship with a title examiner

There is no substitute for having recorded documents a phone call away. Even if documents are available on line (e.g. Yellowstone County), you can not efficiently search chains of title or find easements or surveys. Most title companies will find and FAX you documents within an hour of asking. Some will FAX them during your initial conference.

You will also need the title company for more in depth research or for litigation guarantees. What I can not do by phone, I usually go to their office in person. They store maps, plats, surveys and recorded documents electronically and can locate and print deeds, surveys and documents in minutes. You'll inevitably ask for more, and it's a phone call away. Title chain searches are typically \$75.00 per hour, but you'll receive a complete set of documents that would take you hours to find.

5. Simple Easement Analysis

Any road or easement access issue, case, search or dispute will always break down into simple, commonly identifiable issues. Here is my method:

1. Does legal access exist? It can only be one of three:

- A. Granted, reserved, surveyed, covenanted and of record;
- B. Prescriptive easement, from five years adverse use; or

C. Implied easement, from a road which pre-existed a property split

2. If an easement (or claim for one) exists, then the primary issues are:

A. What are the dominant and servient tenements,

B. Where is it located and what width; and

C. What is the scope of use? (*Note, this may involve reexamining the dominant and servient tenements*)

one of the most hotly debated issues now →

Easement research and litigation is sufficiently difficult without confusing issues. ***Always, always identify dominant and servient tenements first.*** This requires *tracing an easement*, discussed in section 6. Without at least one dominant and servient tenement each, there generally is no easement, unless it is *in gross*, such as a public utility easement. And once the tenements are identified, you'll answer yes or no to the first issue: does legal access exist. Nearly every case with a recorded easement is clearly yes or no. While many historical easements failed to identify tenements, ownership history will usually prove the tenements. However, see footnote 1, page six. Identifying tenements will also frequently answer scope of use issues.

Prescriptive easements are use, not ownership dependent. However, implied easements again require "tracing" and chain of title research, in addition to use history.

6. Tracing an easement

Easements are appurtenant to property, not people. Unfortunately, most historical easements name individuals, not tenements. You need to deduce the tenements from the properties owned at the time of recording.

6.1 Identify Dominant and Servient Tenements

You will need to be at the title company or courthouse plat room to retrieve records.

1. If granted, reserved, surveyed or covenanted start with the recorded instrument of creation.

A. Note the recording date (not date of signature).

B. Note whether dominant and servient tenements are positively identified. Typically they are not, so next identify what property the grantor and grantee owned *when the easement or deed was recorded*.

C. If your claim is an implied easement, you will need to identify the "parent" tract prior to subdivision.

2. Create a map of property and ownership as of the date of the easement's recording.

(1). Sketch (draw in) the tenements within a larger section map or quarter-section. Show the location of the public roadway to be accessed.

(2). Post (write in) the owner's names, date they acquired title and recording information. This also begins your chain of title research.

(3). Name the map as to its section (or quarter) and the date it was historically accurate. *Note, this map will also become your first "Deed Diagram" (see Appendix 3), described below.*

3. If it existed, trace the road over the map as of date of:

recording, for granted or reserved easements;

first adverse use, for prescriptive easements;

first severance of title, for implied easement claims. This may occur in stages, for parcels are subdivided and roads may have been extended. At this point, your map is a hand-sketch and approximate.

Identify the road on the map, the recording data of the easement and the grantor/grantee. Typically, your title report should disclose the first recorded instrument referencing the easement, but do not assume that to be correct. **You will still need to read every deed in the title chain to be certain.** This should yield the dominant and servient tenements over the larger, historical, undivided parcels. If the easement does not describe the tenements, then we assume that the grantor of an easement owned the servient tenement and the named grantee of the

easement (and all of the grantee's then owned, *contiguous* property¹) is the dominant tenement.

Occasionally, the grantor of a recorded/reserved easement does not own the servient tenement across which access is purportedly granted. And if true, then the easement may not exist. This should reveal historical dominant and servient tenements. You next need to document how the tenements have passed on through title exchanges, whether or not the easements were consistently listed in deeds. The only way to be certain is to create maps showing the relevant roads and parcels as they originally existed when the easement or road was first created or recorded, and following chains of title, creating successive maps or "Deed Diagrams."

4. Document chains of title, down to your client and create "Deed Diagrams" (see Appendix 3)

(1) Again, you'll need the title examiner or send your paralegal to the courthouse. Professional agencies may also compile this cost effectively. See Appendix 4. You will need title chains from the earliest evidence of the easement (initial recording, first adverse use, date of first severance of title) for the dominant and servient tenements. Obtain copies of each deed or transfer to the present day client. These will take branches, similar to a family tree.

(2) Once back in your office, on a large table, separate the deeds into various chains and keep them in separate files. I put the oldest deed on top, with successive deeds next, in order, with current ownership on the bottom.

(3) Starting with the oldest deeds (on top), sketch your map. *If you followed the prior step of documenting the creation of the easement, your first map should already be made.* Depending upon the age of your easement and deeds, you'll likely be working with maps that are at least one section or larger. Show (post, or write in) the locations of deeded property, the date of recording and recording information (book and page or other reference). You should cross-reference the parcel and recording information to a particular deed: "D-1", "D-2" etc. for future reference.

¹Our supreme court has not decided this issue. While an undescribed "easement for egress" likely gives access to the grantee's then owned property then serviced by a connecting road, what about grantee's other property, not adjacent to that dominant tenement? It may depend on what roads existed and which parcels they served at the time of recording.

(4) Give your "hand-drawn" sketch to your assistant, to be redone in Excel or PowerPoint. Once done, you can copy your first map to a new page and update the map with subsequent deeds and new parcels for the years which may be of issue.

5. Consult other maps and aerial photos

You may want to perform this step earlier. Some roads are clear as to location and commencement. Many are not. Logging roads, forest service roads and even obscure roads which may arguably be public roads come and go, and their precise location (whether physically crossing or reaching a parcel) is critical, but difficult to prove. Topographic map websites are listed in paragraph 6.6.

6. Next, photocopy your first map and post the title chains, showing subdivided parcels

The first map only identifies the historical owners, road and data. Leave that undisturbed, as it will become a trial exhibit. With the new copy, begin drawing in the various subdivisions, also inscribing the recording data of deeds. Also *note whether the private easements at issue were included (together with or subject to)* in the conveyance documents. This is where easements become misplaced or misidentified in the title chain. While you want to prove or disprove access to a particular parcel, post recording data for adjoining parcels in the title chain of the parent tract. And again, note whether the easement was referenced in the conveyance.

Depending upon the number of deeds in your chains, the length of time you must research and the number of subdivided parcels, you may need several, intervening maps at successive, historical dates. These are illustrative and can furnish circumstantial evidence of tenements and scope of use. Always label each map with its appropriate date.

7. Transfer maps and data to computer diagrams and tables

Your research is based upon public record, so there's hardly in work product privilege or secret to it. Any software can create a table for title chains. Excel and Powerpoint work well for maps and diagrams and will then be ready for briefing, oral argument, trial and electronic transfer.

6.2 This process should yield information as to whether:

- a. The easement existed, but was “lost” in title;
- b. The easement actually referred to a different road;
- c. The easement referred to a road not yet constructed. (This is very problematic: when a road is finally built, where should it go and under what easement does the builder claim authority?)
- d. It was given by a grantor who did not own the servient tenement (an “assigned easement) or who had not reserved the right to do so.
- e. Together with information not of record, you may determine when a road was built, improved, relocated or extended and which recorded easement applies.
- f. There are often multiple easements of record. Sometimes they refer to different roads, sometimes the same road. Only a comprehensive study can be certain.

7. MONTANA CADASTRAL DATABASE:

[HTTP://gis.doa.state.mt.us/index-html](http://gis.doa.state.mt.us/index-html)

Most of us probably rely on this website daily. It was substantially reconstructed in 2004 and nearly out-competes county websites for property, maps and information. The website offers far more information than most of us utilize. This outline will help, but your best bet is to utilize the “help” menu, download the PowerPoint presentation (a compressed, zip file), unzip it and open the file in PowerPoint. It can also be viewed a page at a time under broadband help. Windows XP contains automatic extraction (winzip.exe). If you are using an older version of Windows 2000 or earlier systems) you may need to download the file from microsoft.

7.1 Menu Items

Property Map

If you have a general area, such as county or township you can search the map for property information or eventually “zoom” to a specific lot. Look to the lower right corner: you can also enter and zoom in to almost any Montana city.

Download

Use this to download county shape files for use in GIS applications. This is

useful if you need an entire township or portion of a city AND if you have and are familiar with mapping software. Otherwise, leave this function for the pros.

7.2 Parcel Search

This may be one of the sight's greatest strengths. Make certain your pop-up blocker is turned off for this website (under Tools, pop-up blocker in Internet Explorer) or the map function will not work.

1. Click on "parcel search". Most of us will only have an owners or partial owner's name, but you can also search by subdivision.
2. Click on owner.
3. Choose a county: click on down arrow, scroll through and select your county.
4. Type in owner's last name, a space (no comma or punctuation) and the first letter of the owner's first name. This will avoid pulling up everyone in the county of the same last name.
5. Select and click on your owner: They are listed by section and township which should narrow your search. Note, if you have a lengthy list and need to find a specific parcel, use the right hand button of the mouse on "view parcel details." Then click "open in new window". This leaves the master list of owners up and running, so you don't have to repeat the search.
6. View, copy or print parcel data.
7. "Map view": In a separate window, your selected parcel will be highlighted, probably in pink or red. You can enlarge (zoom in) reduce, save and print this map file. Note the various features on the right hand side: parcels, roads streams, city, county and aerial photo. Checking or unchecking these will revise your map diagram.

7.3 Subdivision Search

1. Click parcel search.
2. Click subdivision.
3. Select county.
4. Type in or scroll through subdivisions and select the desired subdivision; or
5. Select owner.
6. Click "view parcel details".
7. Again, when viewing your map, right click your mouse, click "open a new window" and your original search and list remains in the background.

7.4 Map Functions

“Click” on layers, to the right of the map. Many items by default are already checked and show on the map in your view. There are two features, one of which is available and the other in construction:

1. Topographic Map. This is not yet available. When added, you’ll click this feature on and continue to zoom in. These are streamed into the website from other web files at the Montana State Library. *Do not use this function with a dial up connection.* You’ll find it is slow, even with DSL.

2. Aerial Photography. Check this item and the view switches to an aerial photograph. Again, these are linked from the Montana State Library. The pictures may not be recent, nor are they available for every area, but they do show section, township and property lines. Do not assume they are sufficiently precise to be positive proof of road and boundary locations, but they are a good, preliminary indication.²

Map Controls:

- ◆ Zoom: Click on “zoom in” or “zoom out” and left click in the map. Each click will continue your zoom function. Under “zoom in” function you may also drag your mouse to form a box, then release (the rubber band method). You will zoom in to that squared parcel.
- ◆ Pan: Click on this, then drag and move the map up, down, left or right to recenter your focus area.
- ◆ Find: Click on find, move your mouse to and click on a particular parcel. Scroll down through the pop-up window and click on “view parcel details.” You’ll get a new window with all of that new parcel data, again to save or print.
- ◆ Measures: Drag your mouse from starting to end point. It shows a measure of distance on the map in miles.
- ◆ Clear: Clears a mapping feature, *e.g.* removes a distance measurement.
- ◆ Identify: Click on this, then on some other parcel on the map. You’ll get a new pop-up window that is mostly blank. Again, click on “view

²The state’s powerpoint tutorial explains the road location issue in cities in slide number 14. Parcel data is today more accurate than road data. Over time, this should improve.

parcel details” and you’ll obtain the same information as your primary parcel.

- ◆ Extract: Under construction. When it becomes available, you will clip, zip and ship a zip file of the parcel data you selected.
- ◆ Find by parcel, by stream, by road: These items assist you in locating parcels adjacent to a named road or stream, but you must have “roads” or “streams” feature turned on under the “layers” menu on the right of the map.
- ◆ “G” in green: Short for Geocommunicator. This link takes you to the BLM geocommunicator site, in turn linking you to a geography network which provides land record information.
- ◆ “Mortar board hat”: Link to Montana State Library Spatial Data clearinghouse, or more interactive maps for download.
- ◆ White, lowercase “g” on green background: Environmental Research Institute’s Geography Network, where you can tap into a variety of geography related websites and data.

7.5 Download Data.

This is for intense users (your paralegal) with more than a few minutes to search and store property data. You will be connected to county FTP (file transfer protocol) sites with 56 county folders. Once learned, the link is useful and the

downloaded map information will be on your server for future, quicker access. You’ll need your own GIS software to read the maps.³

8. Montana Maps Online.

1. www.nris.state.mt.us/gis/mtmaps.html

This site lists each and every state-wide map available, showing a wide variety of data, including county maps, county seats, lakes and streams, highways, railroads, population density, land use, river basins, water sheds, national forests, park service, Indian reservations, wildlife refuges, legislative districts, geology, *topographic maps and a topographic map finder*.

2. Topographic maps.

³Again, this summary pales to the powerpoint tutorial. A similar text explanation is available under help under the dial up category; or gis.doa.state.mt.us/Help/TextWebTutorial.htm.

The Montana GIS website can show you a topographic map and allow you to save and print it, but it is small, slow and limited. Complete quad maps are available on-line, but even with experience and knowing where you are searching, they can be time consuming to find, download and ultimately print the correct map vicinity. Here's the procedure:

1. <http://nris.state.mt.us/nsdi/drgpages/tifstate.html>
2. "Click" mouse on geographic quad you desire. This yields "sub quads", also showing major highways and water features. You'll need to be fairly certain of your geographic vicinity before your next "point and click."
3. Click on geographic quad you desire. These are compressed (zipped) folders of approximately 3 megabytes. DO NOT attempt to open them over the net. Rather, download them to a server subdirectory.
4. If you haven't already, create a subdirectory on your server ("maps-client name") and save the zipped folder to that directory. That will take a few minutes.
5. If using Windows XP, you can simply open the zipped folder (double click). That will provide you maps in three formats: *.gd, *.tfw and *.tif (showing a picture in the icon). Double click on the TIF file, and the map will open in your windows picture and fax viewer. You can now zoom, scroll, print, save, e-mail or incorporate all or any portion of the map into another presentation or document. The uncompressed map is 8-9 megabyte, so you may have difficulty e-mailing the entire, uncompressed map, depending upon your ISP.

9. Aerial photography

For most purposes, the state's website (discussed above) will give you adequate photos, along with boundary lines and roads. However, the imagery is sometimes poor or outdated. My favorite is:

<http://terraserver.microsoft.com>

This gives you map searches, city and street searches, and latitude and longitude searches. Instructions are simple, straight forward and images can be saved to your computer.

Here are a few other aerial photo websites (there are thousands). Most of them charge a subscription fee, but you typically get faster, better work product and a more user friendly environment:

www.digital-topo-maps.com/montana.shtml (Offers to sell you a subscription; can also buy national geographic cd to upload to gps and includes gps coordinates)

www.aerial-photos.us-montana.shtml

10. Hand-held GPS units

Without one, I'd be lost hunting deer or for roads or parcels. They contain a compass, directions back to your truck, latitude and longitude and they interface with the maps you can buy from the websites above. The second or third time you're in the forest, the map is imprecise and you need to know precisely where you are (within 6-10 feet) you'll find it's worth the \$125.00 not to have to go back. Check out www.garmin.com for the latest models or your local sporting goods store.

11. Forest Service Road Maps

Ranger stations carry numerous maps. You want the map that shows open and closed roads, in detail. Even when not dealing with public land, these maps show proximity to geographic features which may be helpful for research. Most ranger stations will also retain prior, outdated maps which may also show a road's historical existence or use.

12. Other sources

Do not ignore old county commissioner journals, if your road has any history of public use. These records frequently make or break a case. In significant cases, you cases where old or historical road use is critical, logging records, family photos, newspaper articles or a road archeologist may be useful.

13. Style, Mediation and Settlement

I used to be quick to evaluate a road or boundary case, vigorously advising a client of "their rights" and outlining the process to secure them. A few losses and a lot of stress later, I've learned a calmer style. More recently, as property and access

become more scarce, values skyrocket and litigation intensifies, I've tried yet another style.

Instead of "here's your case as I see it," I ask questions like, "what are your goals, what is important to you, and what are your best and worst case scenarios?" These and others are some of the favorites of good mediators. And their techniques may well be the key to resolving many of these cases before they take on a life of their own.

So instead of, "is this a trespass, what's the dominant tenement or is this within the scope of use," (which are relevant), I now spend more time asking, "what do you want, and why is this a problem?" If other parties will do the same, we'll all come closer to finding and resolving the real issues of a case – which are frequently an issue other than the road or boundary. This will more properly prepare a client for settlement or mediation – even before litigation is filed. Property cases should all be mediated before suit is filed. It won't happen unless we propose it. And it may not succeed if do not support and prepare for it.

The old style doesn't work as well as it used to. I find it also helps the entire process when clients understand the limitations of litigation. Courts are limited to legal outcomes with limited predictability. Again, negotiated or mediated solutions will more likely reach the real issue. If attorneys on all sides slightly shifted their focus and that of their clients toward a goal or solution, rather than only discovery and trial preparation, it is possible that more cases would settle earlier. (Better yet, we should each be required to take classes in mediation – I was surprised by what I learned.)

I am quick to admit this style is not "zealous" nor does it appear to convey strength or confidence in one's position – necessary perhaps for litigation. If the other party or counsel has a "take no prisoners" style, goals discussions is pretty useless. You may well spend the same time, stress and client money and still end up in trial, despite loftier styles.

But we need to change how cases are handled from the start. Too many cases are never filed due to cost or dissatisfaction with our adversarial system. Instead, someone sells and walks away, while the problem remains. Unlike business, contract or damage claims, property cases are unique – when the litigation concludes, the parties are still neighbors. I urge us to rethink our style. There is little to lose. The courthouse will always be there.

CLIENT INTAKE CHECKLIST AND EVALUATION

NAME: _____

ADDRESS: _____

TELEPHONE: _____

SHORT DESCRIPTION:

+ POSITIVE 0 – NEUTRAL – CAUTION -- RED FLAG

_____ Probable Outcome if Litigated (results and/or benefits to client)

_____ Other parties: State, Forest Service, Large Lumbar Company, County

_____ Collateral Issues (trespass, damages, gates, injunctions)

_____ Facts and Law

_____ Will you personally be able to help?

PRIOR COUNSEL?

_____ Lawyer Client Relationship: Reason for termination or substitution

_____ Inflamed Client

_____ Radically Different Case Evaluation

PARTIES

- _____ Multiple Plaintiffs
- _____ Multiple Defendants
- _____ Client Personality Type
- _____ Other Parties' Personality Type
- _____ Witness Personality Type

TALLY

- _____ Positives
- _____ Neutrals
- _____ Cautions
- _____ Red Flags

File Name:

Fairmont 05
Seminar

Notes:

Client Name:
Address:

Telephone:
Fax:
e-mail:

Opposing Counsel

Item #IND-15
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Attorney and File Notes	1
Pre-attorney Correspondence	2
Prior Counsel Correspondence (or by date)	3
New Correspondence	4
Pleadings	5
Scheduling Orders	6
Mediation / Settlement	7
Summary Judgment	8
Witness / Exhibit Lists	9
Easement Documents	10
Subdivision Documents	11
Maps / Photos / Survey	12
Chains of Title -- Able	13
Chains of Title -- Baker	14
Plaintiff Discovery	15

File Name:

Fairmont 05
Seminar

Notes:

Item #IND-1630
BINDERTEK
Document Organization System
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Defendant Discovery

16

Title Report / Insurance

17

Witness Statements

18

Collateral Issues

19

20

21

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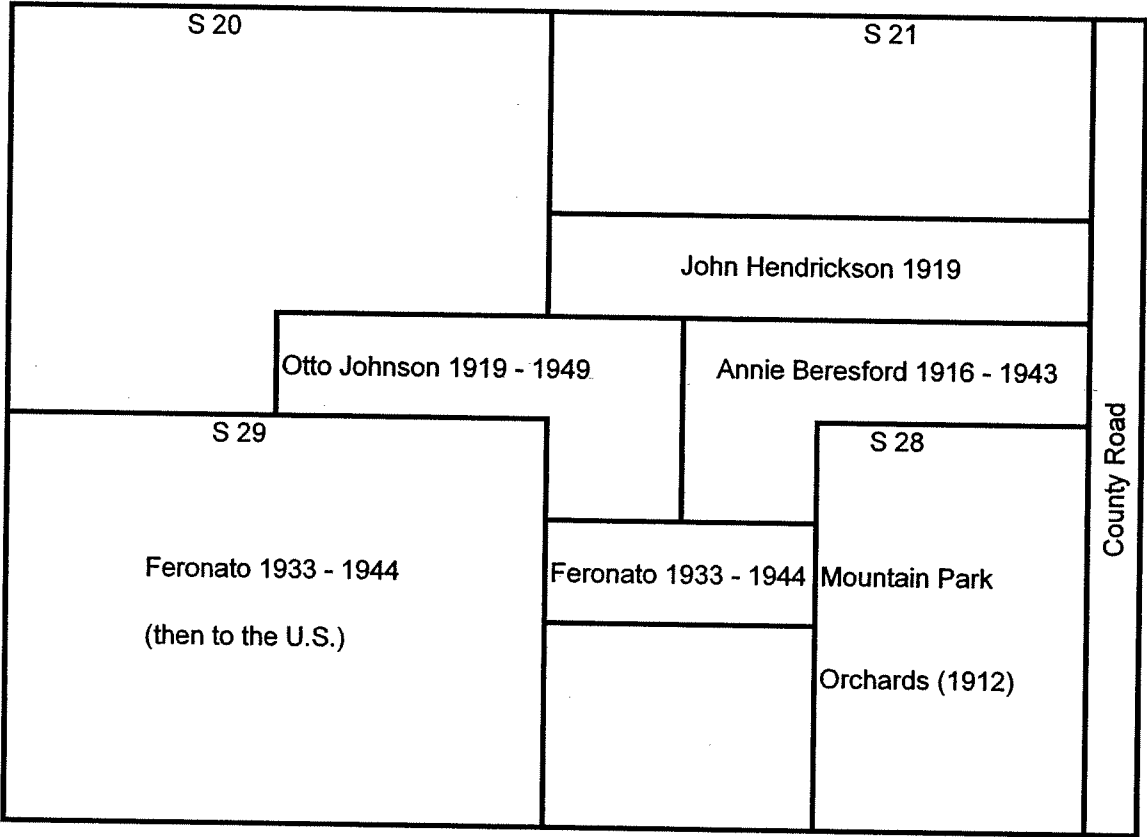
28

29

30

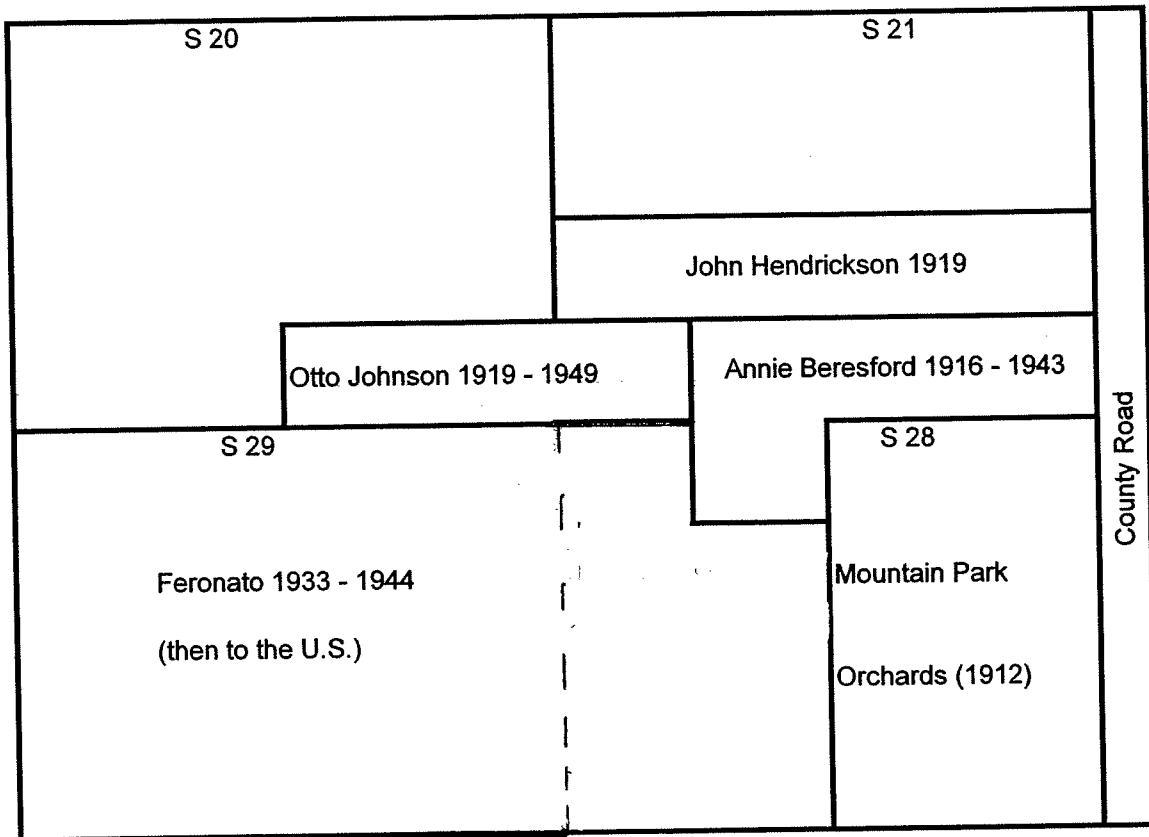
Deed Diagram One: 1919 Map

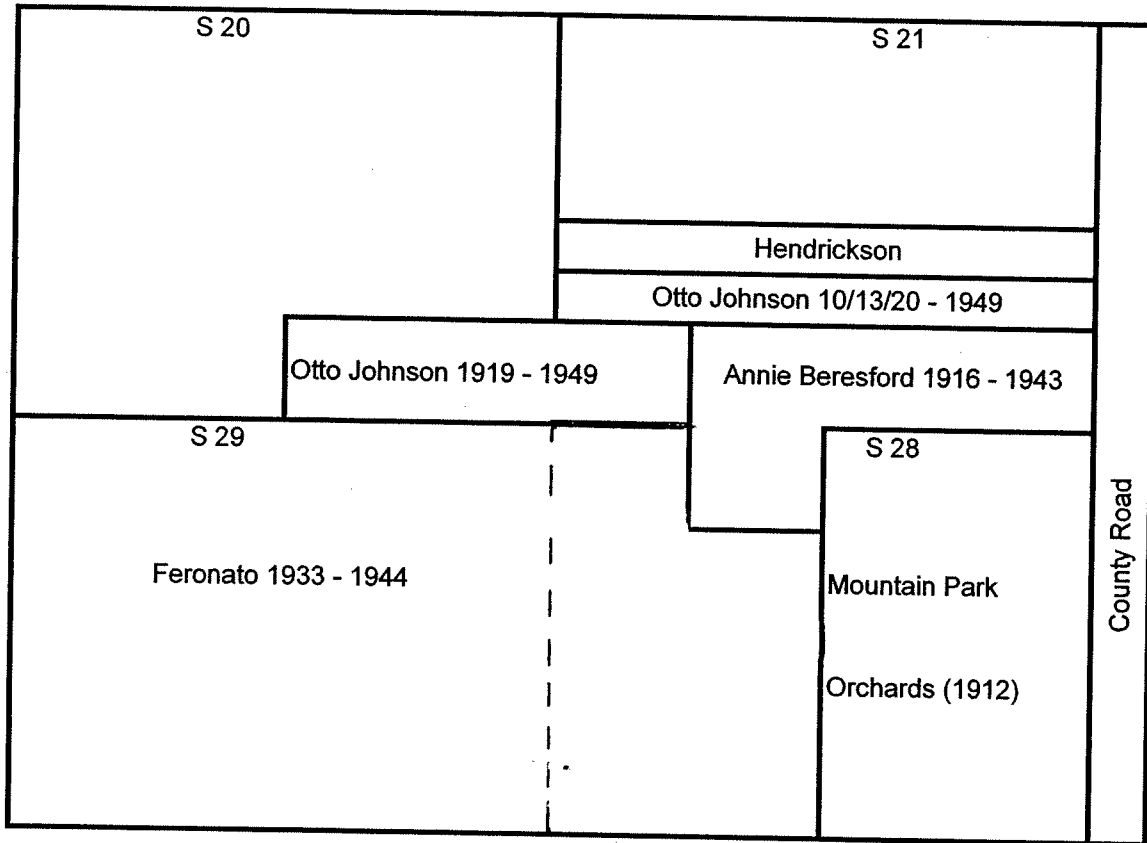
Township 10 north, Range 20 west, Ravalli County Montana

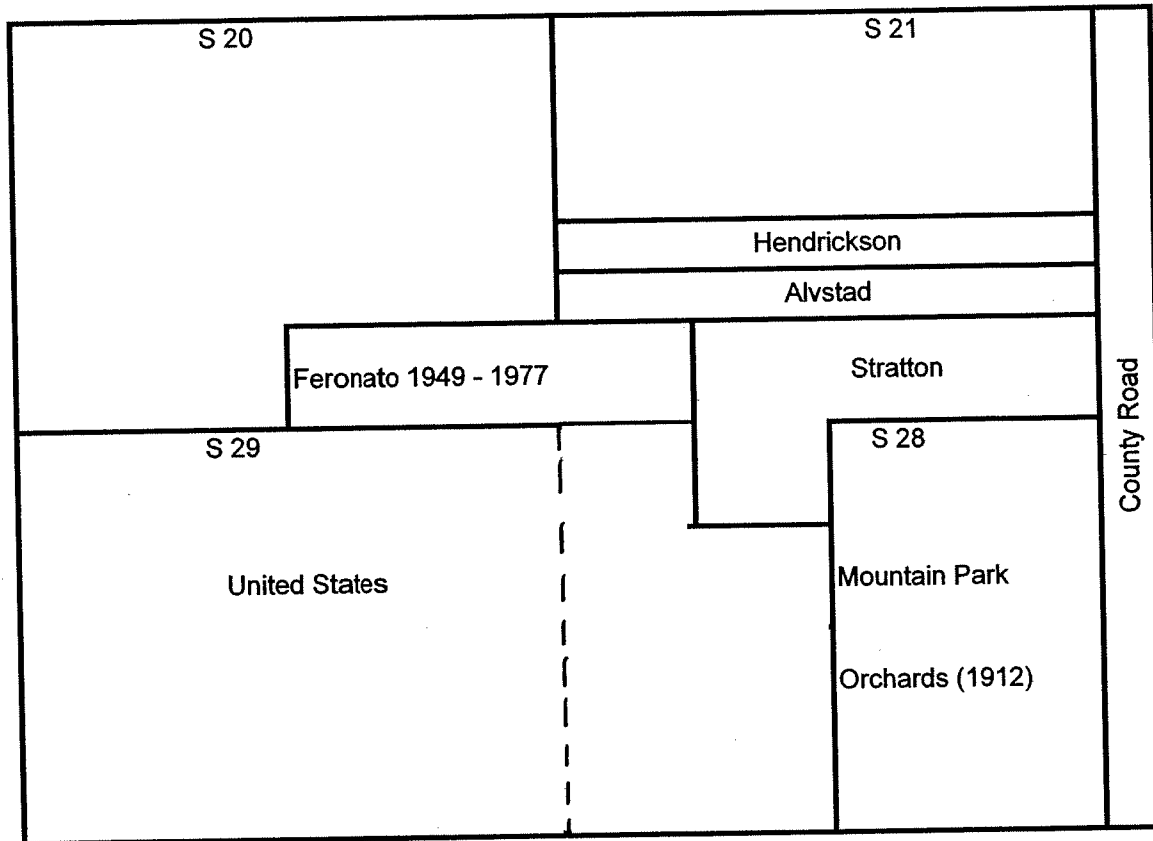


Deed Diagram One: 1919 Map

Township 10 north, Range 20 west, Ravalli County Montana



Deed Diagram Two: 1920

Deed Diagram Three: 1949

Bitterroot Research

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April 14, 2004

RE: Easements to Peltier Properties

Dear

In researching the chain of title for the Peltier properties being the S½SE¼ of Section 20 and the SW¼SW¼ of Section 21, all in Township 10 North, Range 20 West, P.M.M., Ravalli County, Montana the chain of title is as follows:

LEGAL	DATE	B/P	DOC	GRANTOR	GRANTEE
S½SE¼ of SEC. 20 SW¼SW¼ of SEC.21	1-6-1998	224-655	WD	RUFFFATTO LAND & CATTLE CO	PELTIER
SAME	2-28-1977	142-423	WD	FERONATO	RUFFFATTO LAND & CATTLE CO
SAME	2-25-1972	130-137	WD	FERONATO	FERONATO
SAME	10-11-1950	102-463	DEED	BROWN	FERONATO
SAME	10-11-1950	103-343	DEED	FERONATO	BROWN
SAME	10-26-1949	101-157	DEED	ESTATE OF JOHNSON	FERONATO
SAME	10-6-1949	101-131	ORDER	ESTATE OF JOHNSON	
SW¼SW¼ of SEC.21	9-25-1943	11-541 (MIS)	BILL OF SALE TIMBER	JOHNSON	WOJCIECHOWSKI
S½SE¼ of SEC. 20	9-4-1943	11-535 (MIS)	BILL OF SALE TIMBER	JOHNSON	WOJCIECHOWSKI
S½SE¼ of SEC. 20 SW¼SW¼ of SEC.21	1-23-1926	99-403	DEED	WHALEY	JOHNSON
SAME	1921	59-634	BOND	WHALEY	JOHNSON
SAME	10-17-1895	12-133	PATENT	USA	WHALEY

In reviewing Ravalli County plat books and deeds for adjacent properties, I located where Otto Johnson (past owner of the Peltier property) also owned contiguous property to the North of the SW¼SW¼ of Section 21 this property was 208 feet wide and a mile long and would connect with the present day Sweeney Creek Loop Road. The chain of title for Otto Johnson's ownership of this strip is listed as follows.

LEGAL	DATE	B/P	DOC	GRANTOR	GRANTEE
STRIP 208 FEET BY 5280 FEET	10-26-1949	101-158	DEED	ESTATE OF JOHNSON	ALVSTAD

BIOGRAPHY

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Randall A. Snyder obtained his BA with honors in Speech Communication from UM – Missoula in 1977 and J.D. from UM law school in 1980. He practices primarily in real estate, business, estate planning and probate. He frequently teaches “access” issues to lawyers, title examiners and real estate agents and teaches Sunday School to teenagers. He writes private reports and opinions on access for attorneys and has served as a professional witness on easement issues. He serves on the State Bar CLE Institute and belongs to the Montana and Northwest Bar Associations. Snyder skis, sails and lives on five acres in Bigfork with his wife, teenage son, twin daughters and numerous animals.

C

CONSERVATION EASEMENTS



Robert Knight, Esq.
Missoula

CONSERVATION EASEMENTS

ANNUAL REAL ESTATE CLE
STATE BAR OF MONTANA

FEBRUARY 18, 2005
FAIRMONT HOT SPRINGS RESORT

Robert M. Knight

*Graduate of Colorado College, BA (1967) and University of Michigan Law School, JD (1970).
Admitted to Practice in Colorado (1970- inactive) and Montana (1971).*

*Private practitioner in Missoula, Montana since 1971 with concentration on real estate law with
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Member of the State Bar of Montana and the American College of Real Estate Lawyers.

*Listed in Chambers USA Leading Business Lawyers (Real Estate-MT) and Best Lawyers of
America (Real Estate-MT).*

OUTLINE

- I. REVIEW OF APPLICABLE MONTANA STATUTES AND LEGISLATIVE HISTORY**
- II. ADVISING A CLIENT WITH RESPECT TO THE GIFT OR SALE OF A CONSERVATION EASEMENT**
- III. TYPICAL THRESHOLD PROBLEMS IN PLANNING A PROPOSED CONSERVATION EASEMENT GRANT**
- IV. FORMATS FOR CONSERVATION EASEMENTS**
- V. RECENT LEGISLATION AND "HOT TOPICS"**
- VI. GENERAL ADDITIONAL INFORMATION AND SOURCE REFERENCES**

APPENDICES

- A. MONTANA OPEN SPACE AND VOLUNTARY CONSERVATION EASEMENT ACT (§ 76-6-101, M.C.A., ET SEQ.)**
- B. LISTING OF MONTANA BASED LAND TRUSTS AND CONTACT INFORMATION**
- C. NATURE CONSERVANCY- CONSERVATION EASEMENT TEMPLATE**
- D. FIVE VALLEYS LAND TRUST DEED OF CONSERVATION EASEMENT TEMPLATE**
- E. MONTANA LAND RELIANCE- SAMPLE DEED OF CONSERVATION EASEMENT**
- F. U.S. FISH AND WILDLIFE SERVICE CONSERVATION EASEMENT FORMATS**
- G. COPY OF ARTICLE BY STEPHEN J. SMALL, ESQ., "UNDERSTANDING THE IRC 2031(C) ESTATE TAX PROVISIONS"**
- H. ORDER FORM AND PUBLICATION LIST FROM LAND TRUST ALLIANCE CONSERVATION LIBRARY**

NOTE: The conservation easement formats which have been included in the Appendices have been graciously provided by several conservation organizations. However, the formats which have been offered are included with the express proviso that the formats are only to be used for general, illustrative purposes. It should be emphasized that the final terms of each conservation easement are subject to negotiation and should appropriately reflect protection requirements, the nature and extent of reserved rights, etc., for each site specific project.

CONSERVATION EASEMENTS

I.

REVIEW OF APPLICABLE MONTANA STATUTES AND LEGISLATIVE HISTORY

A. Legislative History —Montana Open-Space Land and Voluntary Conservation Easement Act. (For the complete text of the Act, see Appendix A.)

1. 1974 Session
2. 1975 Session

B. Statutory Provisions.

1. Section 76-6-102, 103. Note the broad-based findings, policies and purposes.
2. Section 76-6-104, Definitions. Note in particular Subparagraph (2) which defines “conservation easement”. In addition, note Subparagraph (4) which defines “public body”, and Subparagraph (5) which defines “qualified private organization”.

Criteria must be present in order to be a “qualified private organization”.

- (a) Competent to own interest in real property;
- (b) Qualifies and holds a general tax exemption under the U.S. Internal Revenue Code, Section 501(c); and
- (c) Has organizational purposes designed to further the purposes of this Chapter.

3. Section 76-6-107, Conversion or Diversion of Open-Space Land. Note that open-space land may not be converted or diverted from open-space use unless the conversion or diversion is necessary to the public interest, not in conflict with the program of comprehensive planning for the area, and permitted by conditions imposed at the time of the creation of the conservation easement. Note also the statutory requirements for substituted property if conversion or diversion is permitted. Substituted property must be of at least equal fair market value, of as nearly as feasible equivalent usefulness and location, and substitution must be accomplished within one year from the conversion or diversion. Substituted property also becomes subject to the original constraints on use.

4. Section 76-6-202, Duration of Conservation Easements. Permits perpetual

easements or easements for a minimum term of fifteen years.

5. Section 76-6-203, Types of Permissible Easements. Note the broad-based provisions. Note also the catch-all “other acts” provisions of Subparagraph (8).

6. Section 76-6-205, Assignability of Easements. Conservation easements are assignable unless the instrument of conveyance or ownership expressly stipulates otherwise. Assignees must be qualified under the terms of the applicable statutes to hold a conservation easement.

7. Section 76-6-205, Review of Local Planning Authority. All conservation easements are subject to review by the appropriate local planning authority prior to recording. Review is made in the county within which the land lies. The acquiring entity must present the conservation easement for review. Local planning authority has 90 days from receipt to review and comment, and the proposed conveyance may not be recorded until comments have been received, the planning authority has waived the right to comment in writing, or 90 days have elapsed, whichever first occurs. Local planning comments are advisory in nature.

8. Section 76-6-207, Recording and Description of Easement. Note the need for an adequate legal description or reference to recorded plat. Submit three copies of easement to county clerk and recorder. One is recorded at \$6.00 per page; one copy is maintained by clerk and recorder in a separate conservation easement file (fee may vary, depending on county –should check); and one copy is mailed to the Department of Revenue (no charge).

9. Section 76-6-208, Taxation of Property Subject to Conservation Easements. Note that the assessment of property subject to a conservation easement is determined on the basis of the restrictive purposes for which the property is used. There are two major provisos: the minimum assessed value may not be less than the actual assessed value in the calendar year 1973, and the property may not be classified into a class affording a lesser assessed valuation “solely by reason” of the easement. (Note that there has been no change from the base year 1973 to-date.)

The value of the interest held by the public body or qualified private organization is exempt from taxation. Term easements will not be reassessed if the easement is renewed, executed and properly filed not later than 15 days after the date of expiration.

10. Section 76-6-209, Easements to Run With the Land. Conservation easements run with the land, even if not so stipulated in the instrument of conveyance.

11. Section 76-6-210, Enforcement. Conservation easements are enforced in injunction or proceedings in equity, and the recipient may enter the land in a reasonable manner, at reasonable times, to assure compliance. Note that the statute eliminates in subsection (2) historical legal prohibitions against conveyance of such an interest in real property.

12. Section 76-6-105(2), "Construction". Note that the law specifically provides that the statute does not diminish powers granted by general or special law to acquire by purchase, gift, eminent domain, or otherwise, and to use land for public purposes.

II.

ADVISING A CLIENT WITH RESPECT TO THE GIFT OR SALE OF A CONSERVATION EASEMENT

1. At the outset, you should make some assessment of the client's motivation and personal priorities in considering a gift or sale of a conservation easement. For purposes of framing the discussion with your client, the following areas should be considered:

- (a) Preservation of property in perpetuity.
- (b) Comprehensive-systematic preservation of a series of properties.
- (c) Limitation of real property taxes.
- (d) Restriction on value for estate tax purposes.
- (e) Income generation or income tax deductions– tax issues can become complicated– work with outside counsel and advisors. For example:
 - i) Meeting the federal requirements for income tax deduction
Federal requirements include the following:
 - a) A qualified real property interest must be granted in perpetuity. IRC §170(h)(2)(C).
 - b) The conservation easement must be given to a qualified organization, including a governmental unit, a publicly supported charitable organization under I.R.C. § 501(c)(3), or an organization controlled by one of the above. IRC §170(h)(3) and IRC §170(b)(1)(A)(v) or (vi).
 - c) The grantee must have the commitment and resources to enforce the easement's restrictions. Treas. Reg. § 1.170A-14(c)(1). The IRS looks to the donee as an organization and its history of legitimately protecting conservation values in the past. Thus the conservation easement should indicate that both the donor and the donee have bona fide interests in protecting natural values. See McLennan v. United States, 24 Cl. Ct. 102, 106-07 (1991); Sugarman, "Legal Challenges to Conservation Easements: the French and Pickering Creeks Conservation Trust Experience," *The Back Forty*, Jan./Feb. 1992, pp. 9-10; Knight & Dana, "Coordinated Conservation Easement Donations: Problems and a Proposed Solution (Part I)," *The Back Forty*, March/April 1993, pp.1-6.

d) The conservation easement must be transferable only to other qualified organizations, which include qualified government bodies and private organizations. Treas.Reg § 1.170A-14(c)(2). Montana law has a similar requirement at MCA § 76-6-205.

e) The gift of a conservation easement must be given for conservation purposes defined as accomplishing at least one of the following:

- (i) Preserve land areas for outdoor recreation by the general public;
- (ii) Preserve land areas for the education of the general public;
- (iii) Protect a relatively natural habitat of fish, wildlife, or plants or similar ecosystem;
- (iv) Preserve open space, including farmland or forest land, for the scenic enjoyment of the general public, and which will yield a significant public benefit;
- (v) Preserve a historically important land area; OR
- (vi) Preserve a certified historic structure.

f) The donation of a conservation easement must be exclusively for conservation purposes. This exclusivity is demonstrated if the conservation easement:

- (i) Protects the land in perpetuity;
- (ii) Does not permit surface mining; However, if the ownership of the surface and mineral estates has been and remains separated, there may still be a charitable donation where the probability of surface mining occurring on the property is so remote as to be negligible; AND
- (iii) Subordinates all existing mortgages (Treas. Reg. § 1.170A-14(g)(2).

I.R.C. § 170(h)(5) and Treas. Reg. § 1.170A-14(g).

ii) Valuation methodology

iii) What is the deduction worth?

- a) 30% of donor's adjusted gross income
- b) May be subject to alternative minimum tax
- c) Five year carry-forward.

2. The aforementioned assessment should be made with an awareness, which should be communicated to the client in appropriate situations, that the client may achieve legitimate objectives by use of other alternatives.

3. It is important to consider how your client's motivation and priorities match with other practical considerations, and though the following checklist is not intended to be inclusive, it will provide a frame of reference for discussion with your client.

(a) Age and family status.

(b) Current and projected estate valuation —is there any legitimate long-range

planning objective to be accomplished through the gift or sale of a conservation easement?

(c) What is the relationship of the asset proposed to be made subject to a conservation easement to estate assets as a whole?

(d) Income — can a charitable contribution be effectively utilized to the extent and within the time permitted by law? (Consideration of deferred gifting program.) In the case of sale or partial sale of a conservation easement, what will be the effect in terms of taxable income?

(e) Appraisal — extinguish the myth regarding conservation easement valuation (out with the before and after test — in with the market valuation). Review cost and difficulty of obtaining expert assistance.

(f) Familiarity with the property and reserved rights (perpetual restrictions — difficulty of amendment).

(g) Potential zoning regulations, legislation, etc., which will affect land use. (Taking of interest in land by governmental action without compensation versus gift or sale of a conservation easement with compensatory benefits.)

(h) The relationship of the client's property to adjacent or adjoining property.

i) Problems of restriction on use resulting in substantial benefit to adjacent landowners.

ii) The need for comprehensive systematic preservation to maintain the integrity of important game habitat, water quality, etc.

iii) Partial donations — offsetting gain on other donor unrestricted property.

(i) Utilization of an escrow agreement for purposes of assuring adjacent or adjoining landowner participation. See Knight and Dana article "Coordinated Conservation Easement Donations: Problems and a Proposed Solution" (II, page 5-6, supra).

4. Form of entity. Are you dealing with a corporation or form of entity subject to restrictions on amount of income deduction; severable ownership interests which require participation by other individuals, etc. Should the entity which owns the property to be subject to a conservation easement be reorganized prior to consideration of a gift or sale of a conservation easement..

BOB KNIGHT: GATED COMMUNITY CONCEPT

2-3 AREAS WHERE CE DOESN'T DOMINATE (AND MAY HAVE VALUE)
BLACK FOOT, (BOULDER?, !)

TO THE EXTENT ZONING REMOVES RIGHTS, NO DEDUCTION FOR VALUES LOST DUE TO C.E.

III.

TYPICAL THRESHOLD PROBLEMS IN PLANNING A PROPOSED CONSERVATION EASEMENT GRANT

A. Condition of Title.

1. The importance of accounting for all parties having an ownership or security interest in the subject property.
2. Examination of underlying contracts, previous deeds, mortgages, etc., to determine if there are existing prohibitions against gifts, conveyances, or other title matters which would affect the ability to convey or the value of the interest conveyed.
3. The importance of reserving the right to convey a conservation easement, and to plan for the conveyance prior to execution of a purchase and sale agreement (you may want to require consent of the contract seller and underlying contract purchasers and sellers as a condition of purchase).
4. The presence of restrictive covenants, zoning regulations and other restrictions, such as county comprehensive plans, sanitary restrictions, etc., which impair land use and restrict the value of a gift or sale.
5. Is the property proposed for conveyance of a conservation easement the quid pro quo for subdivision concessions, etc., thereby defeating the "donation". (You may want to make an independent examination of commissioners' minutes, etc., if you are dealing with a remainder parcel in a subdivision or proposed subdivision.)
6. Access —does access afford or permit the development potential which can be restricted in a gift or sale of a conservation easement (beware of prescriptive easements with limited duration and burden).
7. Mineral estate —With recent law changes, all mineral reservations involve "the remoteness test" (e.g., is the possibility of surface mining so remote as to be negligible). It is imperative that a title report regarding the mineral estate be obtained and any reservations of minerals or outstanding interest in the mineral estate be examined in detail.
 - a) Reservation of gravel, sand and comparable materials
 - b) Great Northern Nekoosa Corporation and subsidiaries v. United States, 38 Fed. C.L. 645, 659 (United States Court of Federal Claims, 1997).
8. Do the underlying contracts prohibit the grant of easements or in the case of mortgages, cause the acceleration by conveyance without consent of the mortgage lender.

Gravel mining OK if limited impact and no irremedial conservative impacts 8
But now a tiny cost RAS said we can't see anyway to have surface mining.
Land trusts now exclude gravel area from easement or from appraisal coverage

(Example —should there be concern for waste prohibition provisions?) Note changes in relevant law which now require consent and subordination by a mortgagee for a viable gift.

9. Are there other outstanding interests which need to be accommodated or which will affect the value or enforceability of the conservation easement (examples —long-term farm lease or grazing lease vs. agricultural restriction; prescriptive or record easements providing third parties access or other use rights).

10. Does the property pose a potential problem from an environmental standpoint. (Note holding a real property interest in a conservation easement does not subject the donee to CERCLA liability as the owner of the property. See Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 Fed.3d 1364 (9th Cir. 1994). However, the holder of an easement may be considered an “operator” subject to liability under CERCLA where the easement holder has the ability and/or authority to control operational decisions of another who is the facility manager— highly unlikely.)

11. Insuring title to the conservation easement (issues of valuation and co-insurance problems).

B. Selecting the qualified recipient —public body or qualified private organization. See Appendix B for a listing of Montana based land trusts.

1. Assessment of monitoring and management capability.
2. Longevity —are you facing potential or probable assignment to another qualified entity?
3. Must have willing recipient who will work with your client to achieve mutual goals.

C. Timing of the conveyance.

1. Allow sufficient time to negotiate the terms and conditions of the conveyance, to complete baseline data study, and to have the conveyance executed and delivered to recipient if conveyance in a particular year is of importance.

2. Preparation of baseline documentation and acknowledgment that it accurately reflects the condition of the property at the time of the transfer (query — does this mean that the baseline documentation report must be completed at the time of the gift?) *No, but need*

reasonable documentation at that time

3. Recommend that review process be completed and recording authorized and accomplished by the end of year if conveyance in a particular year is of importance.

4. Allow sufficient time for the appraisal process to be completed

- a. Need to select a truly qualified
- b. Use of the appraiser for assistance in planning.
- c. Penalties associated with improper appraisal.

D. Incorporating the consent to easement in a contract for deed or other purchase and sale agreement.

1. Sample, general clause: "Conservation Easement—The parties hereto acknowledge and recognize that the real property which is the subject of this agreement is currently in agricultural and livestock ranching use, and that the buyers may desire to preserve the natural value and character of said property for such use, and to prevent the use and development of said property for any purpose or manner inconsistent therewith. In this regard, seller is aware, and agrees, that buyers, pursuant to the provisions of the Open Space and Voluntary Conservation Easement Act of the Montana Code Annotated, 1978, as amended, may grant to a public body and/or qualified private organization, a conservation easement or a series of conservation easements, over the whole or a portion of the real property which is the subject of this agreement, and that the buyers shall have the exclusive right to select the property to be subject to the terms and conditions of such conservation easement or conservation easements, and to determine the date or dates upon which a grant or grants of conservation easement may be made. Buyers agree that any such conservation easement shall be substantially in accord with the purposes, terms, limits and restrictions as set forth in the form of conservation easement to be attached to this agreement at closing, and incorporated herein by reference. Provided, however, that seller acknowledges and agrees that the purposes, terms, limits and restrictions set forth in the form of conservation easement to be attached to this agreement at closing, may be modified by buyers so long as the modification does not have a material effect on the conduct of the general agricultural and ranching uses of the property which is the subject of this agreement."

2. Modifying the sample clause to accommodate the seller.

(a) Restricting the gift of conservation easement based on reduction in value — percentage limitation, unpaid balance limitation, etc.

(b) Requiring advance approval of modification of limitations and restrictions set forth in the sample document.

3. Modification of the default clause —sample clause: "In the event the buyers have, at the time of default hereunder, made a grant or grants of conservation easement pursuant to paragraph ___ of this agreement, seller acknowledges that said conservation easement or easements, and the purposes, terms, limits and restrictions therein contained, shall remain in full force, and shall in no way be modified, removed or extinguished or otherwise affected by the exercise of seller's remedies upon default hereunder."

4. Attachment of a proposed form of conservation easement — the pros and cons.

5. Execution of a consensual agreement in recordable form.
6. Problems of amendment.
 - a. Concerns regarding private inurement.
 - b. Other restrictions on development of improvements, etc.

IV.

FORMATS FOR CONSERVATION EASEMENTS

A. General Format for a Montana Conservation Easement (see Nature Conservancy general conservation easement template, Appendix C attached).

1. Identification of parties — make sure you have all parties properly identified so as to insure a complete chain of title.
 - (a) Advisability of obtaining an ownership title report/mineral report.
 - (b) Ascertain that you are dealing with a qualified donee or grantee.
 - i) Request 501(c) ruling, and confirmation that 501(c) status is still in effect.
 - ii) Request certificate of good standing be furnished.
 - iii) Public entity.
2. Whereas clause —sets the tone of the easement, and generally includes a statement of the qualification of the recipient, the qualification of the property, and the conservation purpose for which the conservation easement is taken.
3. General terms and conditions.
 - a. Statement of general purpose.
 - b. Reference to easement documentation report
 - c. General rights of charitable recipient.
4. Consistent uses and practices.
5. Inconsistent uses and practices.
6. Consent requirements (prior notice and approval).
7. Remedies for breach and restoration, and general enforcement provision.

8. General provisions.
 - a. Indemnity.
 - b. Responsibility for taxes and costs.
 - c. Restrictions on access.
 1. Consideration of handling public access by other than a conservation easement — term management agreements.
 - d. Assignment rights and restrictions.
 - e. Provisions for proceeds application in the event of condemnation or extinguishment—accommodating the extinguishment of the restrictions.
(Note: benefit of corroborating values in separate agreement.)
 - f. Amendment.
 - g. Interpretation.
 - h. Benefit and binding effect, severability, and entirety of agreement.
 - i. Signature and notarial acknowledgment.

9. Baseline data.

- (a) Importance of baseline data from the standpoint of grantor and grantee
- (b) Baseline data requirements imposed by private qualified organizations.

B. Other examples — Private vs. Government.

1. Montana Land Reliance and Five Valleys Land Trust conservation easement formats (Appendices E and D).
2. U.S. Fish and Wildlife conservation easement format (Appendix F)
3. Appropriateness of detailed vs. generalized document.
 - (a) Enforcement and monitoring considerations.
 - (b) Need for clarification and particular considerations unique to the property and of particular importance to the landowner.
4. Exhibits to a deed of conservation easement.
 - (a) Overlay for use zones —other mapping details which don't fit well with standard property descriptions.
 - (b) Baseline data — advantages of recording vs. non-recording.
5. Use of multi-tiered zone easements.

V.

RECENT LEGISLATION AND HOT TOPICS

1. Taxpayer Relief Act of 1997 includes a modified version of the American Farm and Ranch Protection Act.
 - A. The new provisions are intended to offer an additional benefit for estate tax purposes.
 - B. Provisions are effective for decedents dying after December 31, 1997. Provides an opportunity for post-mortem easement donation.
 1. Potential for estate tax exclusion for qualified property and estate tax charitable deduction for qualified conservation easement donated after death.
 2. Dearth of regulations and guidance— example: what is meant by prohibition of “de minimus commercial recreational activities”.

For a good summary article regarding the topic, see Stephen J. Small article “Understanding the IRC 2031(c) Estate Tax Provisions”.

2. Changes in evaluation of the mineral estate with the common “remoteness test” applying.
3. Potential modification of laws and regulations relating to conservation easements.
 - A. Federal level.
 - B. Montana legislative challenges.

VI.

GENERAL ADDITIONAL INFORMATION AND SOURCE REFERENCES

1. There are several excellent references which should be consulted for further detail regarding conservation easements. Those which I recommend are as follows:
 - (a) Conservation Easement Handbook by Janet Diehl and Thomas S. Barrett, published by the Land Trust Alliance, 1319 F Street NW, Suite 501, Washington, D.C. 20004-1106 (see order form attached).
 - (b) The New Revised Model Conservation Easement and Historic Preservation Easement, 1999 (see order form).
 - (c) Appraising Easements –Guidelines for Valuation of Land Conservation and Historic Preservation Easements, the Land Trust Alliance (see order form).

(d) The Federal Tax Law of Conservation Easements (with supplements) by Stephen J. Small, published by the Land Trust Alliance (see order form).

(e) The Journal of the Land Trust Alliance "Exchange", published quarterly by the Land Trust Alliance and distributed to its members and subscribers (see order form).

(f) The Back Forty (The Newsletter of Land Conservation Law), published by Hastings College of Law, 200 McAllister Street, San Francisco, CA 94108 (telephone 415-565-4857, fax 415-565-4818).

APPENDIX A

**MONTANA OPEN SPACE AND VOLUNTARY CONSERVATION
EASEMENT ACT (§76-6-101, M.C.A., ET SEQ.)**

Montana Code Annotated 2003

[Search](#) · [MCA Contents](#)

Table of Contents

TITLE 76. LAND RESOURCES AND USE CHAPTER 6. OPEN SPACES

Part 1. General Provisions

[Back Up One Level in Table of Contents](#)

[76-6-101. Short title.](#)

[76-6-102. Intent, findings, and policy.](#)

[76-6-103. Purposes.](#)

[76-6-104. Definitions.](#)

[76-6-105. Construction of chapter.](#)

[76-6-106. Acquisition and designation of real property by public body.](#)

[76-6-107. Conversion or diversion of open-space land.](#)

[76-6-108. Conveyance or lease of open-space lands.](#)

[76-6-109. Powers of public bodies -- county real property acquisition procedure maintained.](#)

[76-6-110. Authorization and funding for planning commission.](#)

Montana Code Annotated 2003

76-6-101. Short title. This chapter may be cited as the "Open-Space Land and Voluntary Conservation Easement Act".

History: En. Sec. 1, Ch. 337, L. 1969; amd. Sec. 1, Ch. 489, L. 1975; R.C.M. 1947, 62-601.

76-6-102. Intent, findings, and policy. (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Open-Space Land and Voluntary Conservation Easement Act. It is the legislature's intent that the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) The legislature finds that:

(a) the rapid growth and spread of urban development are creating critical problems of service and finance for the state and local governments;

(b) the present and future rapid population growth in urban areas is creating severe problems of urban and suburban living;

(c) this population spread and its attendant development are disrupting and altering the remaining natural areas, biotic communities, and geological and geographical formations and thereby providing the potential for the destruction of scientific, educational, aesthetic, and ecological values;

(d) the present and future rapid population spread throughout the state of Montana into its open spaces is creating serious problems of lack of open space and overcrowding of the land;

(e) to lessen congestion and to preserve natural, ecological, geographical, and geological elements, the provision and preservation of open-space lands are necessary to secure park, recreational, historic, and scenic areas and to conserve the land, its biotic communities, its natural resources, and its geological and geographical elements in their natural state;

(f) the acquisition or designation of interests and rights in real property by certain qualifying private organizations and by public bodies to provide or preserve open-space land is essential to the solution of these problems, the accomplishment of these purposes, and the health and welfare of the citizens of the state;

(g) the exercise of authority to acquire or designate interests and rights in real property to provide or preserve open-space land and the expenditure of public funds for these purposes would be for a public purpose; and

(h) the statutory provision enabling certain qualifying private organizations to acquire interests and rights in real property to provide or preserve open-space land is in the public interest.

History: En. Sec. 2, Ch. 337, L. 1969; amd. Sec. 2, Ch. 489, L. 1975; R.C.M. 1947, 62-602(part); amd. Sec. 25, Ch. 361, L. 2003.

76-6-103. Purposes. In accordance with the findings in 76-6-102, the legislature states that the purposes of this chapter are to:

(1) authorize and enable public bodies and certain qualifying private organizations voluntarily to provide for the preservation of native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interest;

(2) provide for the preservation of other significant open-space land anywhere in the state either in perpetuity or for a term of years; and

(3) encourage private participation in such a program by establishing the policy to be utilized in terminating the property tax to be levied upon the real property which is subject to the provisions of this chapter.

History: En. Sec. 2, Ch. 337, L. 1969; amd. Sec. 2, Ch. 489, L. 1975; R.C.M. 1947, 62-602(part).

76-6-104. Definitions. The following terms whenever used or referred to in this chapter shall have the following meanings unless a different meaning is clearly indicated by the context:

(1) "Comprehensive planning" means planning for development and shall include:

(a) preparation of general physical plans with respect to the pattern and intensity of land use and the provision of public facilities, including transportation facilities, together with long-range fiscal plans for such development as a guide for long-range development;

(b) programming and financing plans for capital improvements;

(c) coordination of all related plans and planned activities at both the intragovernmental and intergovernmental levels; and

(d) preparation of regulatory and administrative measures in support of the foregoing.

(2) "Conservation easement" means an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.

(3) "Open-space land" means any land which is provided or preserved for:

(a) park or recreational purposes;

(b) conservation of land or other natural resources;

(c) historic or scenic purposes; or

(d) assisting in the shaping of the character, direction, and timing of community development.

(4) "Public body" means the state, counties, cities, towns, and other municipalities.

(5) "Qualified private organization" means a private organization:

(a) competent to own interests in real property;

(b) which qualifies and holds a general tax exemption under the federal Internal Revenue Code, section 501(c); and

(c) whose organizational purposes are designed to further the purposes of this chapter.

(6) "Urban area" means any area which is urban in character, including surrounding areas which form an economic and socially related region, taking into consideration such factors as present and future population trends and patterns of urban growth, location of transportation facilities and systems, and distribution of industrial, commercial, residential, governmental, institutional, and other activities.

History: En. Sec. 3, Ch. 337, L. 1969; amd. Sec. 3, Ch. 489, L. 1975; R.C.M. 1947, 62-603(part).

76-6-105. Construction of chapter. (1) To the extent that the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter are controlling. The powers conferred by this chapter are in addition and supplemental to the powers conferred by any other law.

(2) This chapter may not be construed to imply that any easement, covenant, condition, or restriction that does not have the benefit of this chapter is not enforceable based on any provisions of this chapter. This chapter does not diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain pursuant to Title 70, chapter 30, or otherwise and to use land for public purposes.

History: (1) En. Sec. 9, Ch. 337, L. 1969; Sec. 62-609, R.C.M. 1947; (2) En. 62-618 by Sec. 14, Ch. 489, L. 1975; Sec. 62-618, R.C.M. 1947; R.C.M. 1947, 62-609(part), 62-618; amd. Sec. 279, Ch. 42, L. 1997; amd. Sec. 94, Ch. 125, L. 2001.

76-6-106. Acquisition and designation of real property by public body. To carry out the purposes of this chapter, any public body may:

(1) acquire by purchase, gift, devise, bequest, or grant title to or any interests or rights in real property, including land and water, that will provide a means for the preservation or provision of significant open-space land or the preservation of native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interest, or both;

(2) designate any real property, including land and water, in which it has an interest to be retained and used for the preservation and provision of significant open-space land or the preservation of native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interests, or both.

History: En. Sec. 4, Ch. 337, L. 1969; amd. Sec. 4, Ch. 489, L. 1975; R.C.M. 1947, 62-604(part).

76-6-107. Conversion or diversion of open-space land. (1) No open-space land, the title to or interest or right in which has been acquired under this chapter, shall be converted or diverted from open-space land use unless the conversion or diversion is:

(a) necessary to the public interest;

(b) not in conflict with the program of comprehensive planning for the area; and

(c) permitted by the conditions imposed at the time of the creation of the conservation easement.

(2) Other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land shall be substituted within a reasonable period not exceeding 1 year for any real property converted or diverted from open-space land use. Property substituted is subject to the provisions of this chapter.

History: En. Sec. 5, Ch. 337, L. 1969; amd. Sec. 5, Ch. 489, L. 1975; R.C.M. 1947, 62-605(1).

76-6-108. Conveyance or lease of open-space lands. A grantee may convey or lease any real property it has acquired or which has been designated for the purposes of this chapter. The conveyance or lease shall be subject to contractual arrangements that will preserve the property as open-space land and which are consistent with the express terms and conditions of the grant unless the property is to be converted or diverted from open-space land use in accordance with the provisions of 76-6-107.

History: En. Sec. 5, Ch. 337, L. 1969; amd. Sec. 5, Ch. 489, L. 1975; R.C.M. 1947, 62-605(2).

76-6-109. Powers of public bodies -- county real property acquisition procedure maintained. (1) A public body has the power to carry out the purposes and provisions of this chapter, including the following powers in addition to others granted by this chapter:

- (a) to borrow funds and make expenditures necessary to carry out the purposes of this chapter;
- (b) to advance or accept advances of public funds;
- (c) to apply for and accept and use grants and any other assistance from the federal government and any other public or private sources, to give security as may be required, to enter into and carry out contracts or agreements in connection with the assistance, and to include in any contract for assistance from the federal government conditions imposed pursuant to federal laws as the public body may consider reasonable and appropriate and that are not inconsistent with the purposes of this chapter;
- (d) to make and execute contracts and other instruments necessary or convenient to the exercise of its powers under this chapter;
- (e) in connection with the real property acquired or designated for the purposes of this chapter, to provide or to arrange or contract for the provision, construction, maintenance, operation, or repair by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities, or other facilities or structures that may be necessary to the provision, preservation, maintenance, and management of the property as open-space land;
- (f) to insure or provide for the insurance of any real or personal property or operations of the public body against any risks or hazards, including the power to pay premiums on the insurance;
- (g) to demolish or dispose of any structures or facilities that may be detrimental to or inconsistent with the use of real property as open-space land; and
- (h) to exercise any of its functions and powers under this chapter jointly or cooperatively with public bodies of one or more states, if they are authorized by state law, and with one or more public bodies of this state and to enter into agreements for joint or cooperative action.

(2) For the purposes of this chapter, the state, a city, town, or other municipality, or a county may:

- (a) appropriate funds;
- (b) subject to 15-10-420, levy taxes and assessments according to existing codes and statutes;
- (c) issue and sell its general obligation bonds in the manner and within the limitations prescribed by the applicable laws of the state, subject to subsection (3); and
- (d) exercise its powers under this chapter through a board or commission or through the office or officers that its governing body by resolution determines or as the governor determines in the case of the state.

(3) Property taxes levied to pay the principal and interest on general obligation bonds issued by a city, town, other municipality, or county pursuant to this chapter may not be levied against the following property:

- (a) agricultural land eligible for valuation, assessment, and taxation as agricultural land under 15-7-102;
 - (b) forest land as defined in 15-44-102;
 - (c) all agricultural improvements on agricultural land referred to in subsection (3)(a);
 - (d) all noncommercial improvements on forest land referred to in subsection (3)(b); and
 - (e) agricultural implements and equipment described in 15-6-138(1)(a).
- (4) This chapter does not supersede the provisions of 7-8-2202.

History: En. Sec. 6, Ch. 337, L. 1969; R.C.M. 1947, 62-606; amd. Sec. 145, Ch. 584, L. 1999; amd. Sec. 1, Ch. 463, L. 2001; amd. Sec. 194, Ch. 574, L. 2001; amd. Sec. 123, Ch. 114, L. 2003; amd. Sec. 2, Ch. 430, L. 2003.

76-6-110. Authorization and funding for planning commission. (1) The state, counties, cities, towns, or other municipalities in an urban area, acting jointly or in cooperation, are authorized to perform comprehensive planning for the urban area and to establish and maintain a planning commission for this purpose and related planning activities.

(2) Funds may be appropriated and made available for the comprehensive planning. Financial or other assistance from the federal government and any other public or private sources may be accepted and utilized for the planning.

History: En. Sec. 7, Ch. 337, L. 1969; R.C.M. 1947, 62-607.

Montana Code Annotated 2003

[Search](#) · [MCA Contents](#)

Table of Contents

TITLE 76. LAND RESOURCES AND USE CHAPTER 6. OPEN SPACES

Part 2. Conservation Easements

[Back Up One Level in Table of Contents](#)

- [76-6-201. Conservation easements in general.](#)
- [76-6-202. Duration of conservation easements.](#)
- [76-6-203. Types of permissible easements.](#)
- [76-6-204. Acquisition of conservation easements by qualified private organizations.](#)
- [76-6-205. Assignability of easements.](#)
- [76-6-206. Review by local planning authority.](#)
- [76-6-207. Recording and description of easement.](#)
- [76-6-208. Taxation of property subject to conservation easement.](#)
- [76-6-209. Easements to run with the land.](#)
- [76-6-210. Enforcement.](#)
- [76-6-211. Who may enforce easement.](#)

76-6-201. Conservation easements in general. (1) Where a public body acquires under this chapter an interest in land less than fee, this acquisition shall be by conservation easement.
(2) A conservation easement may be applied to urban or nonurban land.

History: En. Secs. 3, 4, Ch. 337, L. 1969; amd. Secs. 3, 4, Ch. 489, L. 1975; R.C.M. 1947, 62-603(part), 62-604(part).

76-6-202. Duration of conservation easements. Conservation easements may be granted either in perpetuity or for a term of years. If granted for a term of years, that term may not be less than 15 years. An easement granted for a term of years may be renewed for a term of 15 or more years upon the execution of a new granting instrument by the parties.

History: En. Sec. 3, Ch. 337, L. 1969; amd. Sec. 3, Ch. 489, L. 1975; R.C.M. 1947, 62-603(part).

76-6-203. Types of permissible easements. Easements or restrictions under this chapter may prohibit or limit any or all of the following:

- (1) structures--construction or placing of buildings, camping trailers, housetrailer, mobile homes, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
- (2) landfill--dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials;
- (3) vegetation--removal or destruction of trees, shrubs, or other vegetation;
- (4) loam, gravel, etc.--excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance;
- (5) surface use--surface use except for such purposes permitting the land or water area to remain predominantly in its existing condition;
- (6) acts detrimental to conservation--activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat and preservation;
- (7) subdivision of land--subdivision of land as defined in 76-3-103, 76-3-104, and 76-3-202;
- (8) other acts--other acts or uses detrimental to such retention of land or water areas in their existing conditions.

History: En. 62-610 by Sec. 7, Ch. 489, L. 1975; R.C.M. 1947, 62-610; amd. Sec. 16, Ch. 266, L. 1979.

76-6-204. Acquisition of conservation easements by qualified private organizations. Any qualified private organization may acquire by a conservation easement, by purchase, or by gift, devise, bequest, or grant title to any interest or interests in rights in real property, including land and water, that will provide a means for the preservation or provision of permanent significant open-space land and/or the preservation of native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interest.

History: En. 62-611 by Sec. 8, Ch. 489, L. 1975; R.C.M. 1947, 62-611.

76-6-205. Assignability of easements. For the purposes of this chapter, all conservation easements all be assignable unless the instrument of conveyance or ownership expressly stipulates otherwise. No conservation easement shall be unenforceable on account of the benefit being assignable or being assigned to any other government body or private organization unless such assignment has violated the express terms of the instrument of conveyance or ownership. The assignees must be qualified under the terms of this chapter to hold a conservation easement.

History: En. 62-613 by Sec. 10, Ch. 489, L. 1975; R.C.M. 1947, 62-613.

76-6-206. Review by local planning authority. In order to minimize conflict with local comprehensive planning, all conservation easements shall be subject to review prior to recording by the appropriate local planning authority for the county within which the land lies. It shall be the responsibility of the entity acquiring the conservation easement to present the proposed conveyance of the conservation easement to the appropriate local planning authority. The local planning authority shall have 90 days from receipt of the proposed conveyance within which to review and to comment upon the relationship of the proposed conveyance to comprehensive planning for the area. Such comments will not be binding on the proposed grantor or grantee but shall be merely advisory in nature. The proposed conveyance may be recorded after comments have been received from the local planning authority or the local planning authority has indicated in writing it will have no comments or 90 days have elapsed, whichever occurs first.

History: En. 62-614 by Sec. 11, Ch. 489, L. 1975; R.C.M. 1947, 62-614.

76-6-207. Recording and description of easement. (1) All conservation easements shall be duly recorded in the county where the land lies so as to effect their titles in the manner of other conveyances of interest in land and shall describe the land subject to said conservation easement by adequate legal description or by reference to a recorded plat showing its boundaries.

(2) The county clerk and recorder shall upon recording cause a copy of the conservation easement to be placed in a separate file within the office of the county clerk and recorder and shall cause a copy of the conservation easement to be mailed to the department of revenue.

History: En. 62-615 by Sec. 12, Ch. 489, L. 1975; R.C.M. 1947, 62-615.

76-6-208. Taxation of property subject to conservation easement. (1) Assessments made for taxation on property subject to a conservation easement either in perpetuity or for a term of years, where a public body or a qualifying private organization holds the conservation easement, shall be determined on the basis of the restricted purposes for which the property may be used. The minimum assessed value for land subject to an easement conveyed under this chapter may not be less than the actual assessed value of such land in calendar year 1973. Any land subject to such easement may not be classified into a class affording a lesser assessed valuation solely by reason of the creation of the easement. The value of the interest held by a public body or qualifying private organization shall be exempt from property taxation.

(2) Expiration of an easement granted for a term of years shall not result in a reassessment of the land for property tax purposes if the easement is renewed and the granting instrument reflecting the renewed easement is executed and properly filed not later than 15 days after the date of expiration.

History: En. Sec. 8, Ch. 337, L. 1969; amd. Sec. 6, Ch. 489, L. 1975; R.C.M. 1947, 62-608.

76-6-209. Easements to run with the land. The provisions of 70-17-202 and 70-17-203(1) and (2) notwithstanding, for the purposes of this chapter, all conservation easements, whether held by public bodies or qualifying private organizations, shall be considered to run with the land, whether or not such fact is stipulated in the instrument of conveyance or ownership.

History: En. 62-612 by Sec. 9, Ch. 489, L. 1975; R.C.M. 1947, 62-612(part).

76-6-210. Enforcement. (1) Conservation easements may be enforced by injunction or proceedings in equity. Representatives of the grantee of the conservation easement shall be entitled to enter the land in a reasonable manner and at reasonable times to assure compliance.

(2) No conservation easement shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of such conservation easement not being an appurtenant easement or because such easement is an easement in gross.

History: En. 62-612, 62-616 by Secs. 9, 13, Ch. 489, L. 1975; R.C.M. 1947, 62-612(part), 62-616.

76-6-211. Who may enforce easement. (1) The owner of any estate in a dominant tenement or the occupant of such tenement may maintain an action for the enforcement of an easement attached thereto.

(2) Public bodies holding conservation easements shall enforce the provisions of these easements.

History: (1)En. Sec. 1258, Civ. C. 1895; re-en. Sec. 4515, Rev. C. 1907; re-en. Sec. 6757, R.C.M. 1921; Cal. Civ. C. Sec. 809; Field Civ. C. Sec. 253; re-en. Sec. 6757, R.C.M. 1935; Sec. 67-609, R.C.M. 1947; redes. 62-617 by Sec. 15, Ch. 489, L. 1975; Sec. 62-617, R.C.M. 1947; (2)En. Sec. 4, Ch. 337, L. 1969; amd. Sec. 4, Ch. 489, L. 1975; Sec. 62-604, R.C.M. 1947; R.C.M. 1947, 62-604(part), 62-617.

APPENDIX B

LISTING OF MONTANA BASED LAND TRUSTS AND CONTACT INFORMATION

Contact Information for Montana Land Trusts

January 12, 2005

Andy Baur

Prickly Pear Land Trust
P.O. Box 892
Helena, MT 59624
P ~ (406) 442-0490
F ~ (406) 442-1790
andy@pricklypearlt.net

Suzanne Sawyer

Clark Fork-Pend' Oreille Conservancy
307 N 2nd St #12
Sandpoint, ID 83864
P ~ (208) 263-9471
cfpoconserancy@sandpoint.net

Debbie Deagan

Gallatin Valley LT
Box 7021
Bozeman, MT 59771-7021
P ~ (406) 587-8404
F ~ (406) 582-1136
debbie@gvlt.org

Alex Diekmann

Project Manager
The Trust for Public Land
Emerson Cultural Center
111 South Grand Ave, Suite 202 A
Bozeman, MT 59715
P ~ (406) 585-8692
F ~ (406) 585-8864
Alex.Diekmann@tpl.org

Robert Rasmussen

Trust for Public Land
432 N. Last Chance Gulch
P.O. Box 200
Helena, MT 59624
P ~ (406) 443-4017
F ~ (406) 443-3831

Fred Fox

Flathead Land Trust
Box 1913
Kalispell, MT 59903
P ~ (406) 752-8293
F ~ (406) 257-3523

Rock Ringling

Montana Land Reliance
Box 355
Helena, MT 59624
(406) 443-7027
bill@mtlandreliance.com

Wendy Ninteman

Five Valleys Land Trust
211 North Higgins Avenue, Suite 4A
P.O. Box 8953
Missoula, MT 59807
(406) 549-0755
fvlt@montana.com

Kristine Komar

Bitter Root Land Trust
120 South Fifth Street, Suite 202
Hamilton, MT 59840-9919
(406) 375-0956 (O)
(406) 360-7019 cell
kristine.komar@att.net

???

Mid Yellowstone Land Trust
1 South Broadway, #202
Billings, MT 59101
(o) 255-7150
(h) 690-5451

Gates Watson

The Conservation Fund
125 Bank St., Suite 612
Missoula, MT 59802
Phone: (406) 541-8555
Fax: (406) 541-8556
gwatson@conservationfund.org

Jamie Williams
The Nature Conservancy
32 South Ewing, Suite 215
Helena, MT 59601
(406) 443-0303
(406) 443-8311
jwilliams@tnc.org

Keith Lenard
Rocky Mountain Elk Foundation
2291 W. Broadway
Missoula, MT 59808
(406) 523-4561
klenard@rmef.org

Janet Sproull
Save Open Space
PNB 411
1001 E. Broadway, Suite 2
Missoula, MT 59802
(406) 549-6083
ssproull@montana.com

APPENDIX C

NATURE CONSERVANCY- CONSERVATION EASEMENT TEMPLATE

ORDING REQUESTED BY AND
N RECORDED RETURN TO:
Nature Conservancy
ern Resource Office
Broadway, Suite 230
er, Colorado 80302
ion: Western Regional Attorney

DEED OF CONSERVATION EASEMENT
(Site-Tract) MT

THIS DEED OF CONSERVATION EASEMENT is made this ____ day of _____, 200__ by
between _____, whose address is _____ (the "Grantor") and THE NATURE
SERVANCY, a District of Columbia nonprofit corporation, whose principal address is 4245 North
ax Drive, Suite 100, Arlington, Virginia 22209 (the "Conservancy").

Exhibits to this Deed of Conservation Easement include the following:

- Exhibit A - Legal Description of the Property
- Exhibit B - Map of the Property
- Exhibit C - Acknowledgment of Easement Documentation Report

WITNESSETH THAT:

A. Grantor is the owner of certain real property in _____ County, Montana, consisting of
__ acres, more or less, more particularly described and shown in Exhibits A and B attached hereto
ncorporated herein by this reference (the "Property");

B. The Property currently remains in a relatively natural state and has significant ecological
open-space values as defined in Section 76-6-104, et seq., Montana Code Annotated (MCA), and
des significant relatively natural habitat for native plants and wildlife;

C. Protection of the Property will contribute to the ecological integrity of _____
(**Rocky Mountain Front, Blackfoot River, etc.**), and conserve significant relatively
al habitat for wildlife and plants, presently including but not limited to _____
_____;

D. All of these natural elements and ecological values are of great importance to Grantor
o the people of the State of Montana, and are worthy of preservation;

E. Grantor, as owner of the Property, owns the affirmative rights to identify, preserve, and
ect in perpetuity its open space character and its significant relatively natural features and values;

F. Grantor desires and intends to transfer such rights to the Conservancy;

G. The State of Montana has recognized the importance of private efforts toward the
ervation of natural systems in the state by enactment of Section 76-6-101, et seq., MCA; and

H. The Conservancy is a private organization organized to protect and conserve natural areas and ecologically significant land for scientific, charitable and educational purposes, and is a "holder" under the terms of Section 76-6-104(5) and Section 76-6-204, MCA, and is a "qualified organization" within the provisions of Section 170(h) of the Internal Revenue Code of 1986, as amended (the "IRS Code"), qualified to acquire and hold conservation easements and meets the requirements of the IRS Code as a Sec. 501(c)(3) exempt organization.

TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and for other good and valuable consideration, pursuant to Section 76-6-101, et seq., MCA, Grantor hereby convey to the Conservancy, its successors and assigns, a perpetual Conservation Easement consisting of the rights and restrictions enumerated herein, over and across the Property (the "Easement").

1. Purposes. It is the purpose of the Easement to preserve and protect in perpetuity, to enhance upon mutual agreement, and in the event of their degradation or destruction, to restore the open space and significant relatively natural features and values of the Property. It is further the specific purpose of this Easement to conserve important habitat for wildlife; to protect rare or unique native plants; and to conserve the diverse (**choose which apply - forest, meadow, grassland, and riparian**) vegetative communities and the wildlife inhabiting these communities (collectively the "Conservation Values"). In achieving these purposes, it is the intent of the Easement to ensure the continuation of such ranching, agricultural, and other uses of the Property as may be conducted consistent with the Conservation Values protected herein. Any and all rights or interests of the Grantor not specifically conveyed to the Conservancy or specifically prohibited by the Easement are reserved to the Grantor.

2. Easement Documentation Report. A collection of baseline data on the Property and its resources has been prepared and the data and explanatory text are presented in the "Easement Documentation Report", dated _____, 200__ (the "Report"). A copy of the Report is on file with both Grantor and the Conservancy and by this reference made a part hereof. The parties acknowledge that the Report is intended to establish the condition of the Property subject to the Easement as of the date written above and that both Grantor and the Conservancy have acknowledged in a signed statement, a copy of which is attached hereto as Exhibit C, that the Report accurately represents the condition of the Property at the time of conveyance.

The parties agree that, in the event a controversy arises with respect to the nature and extent of the biological or physical condition of the Property, the parties shall not be foreclosed from utilizing all other relevant or material documents, surveys, reports, and other information to assist in the resolution of the controversy.

3. Rights of the Conservancy. The rights conveyed to the Conservancy by the Easement are the following:

A. To identify, to preserve and protect in perpetuity, and in the event of their degradation or destruction to restore, the Conservation Values of the Property.

B. To enter upon the Property to enforce the rights herein granted, to study and make scientific observations of its ecosystems, and to determine that Grantor's activities are in compliance

the terms of the Easement, all upon prior notice to Grantor and in a manner that does not reasonably disturb the use of the Property by Grantor consistent with the Easement.

C. To enjoin any activity on or any use of the Property that is inconsistent with the Easement to enforce the restoration of such areas or features of the Property as may be damaged by such activities.

Consistent Uses of the Property. The following uses and practices by Grantor, though not an exhaustive recital of consistent uses and practices, are consistent with the Easement. Certain of these consistent uses and practices are identified as being subject to specified conditions or to the requirement of and procedures for prior approval by the Conservancy; procedures for prior approval are listed below. The remainder of these consistent uses shall not be precluded, prevented, or limited by the Easement.

A. Grazing of livestock, including cattle, horses, and bison, provided that:

i. the range conditions shall be maintained at or improved from the conditions documented in the Report and conducted in accordance with standards set forth by the USDA Natural Resources Conservation Service, and such grazing may not cause significant deterioration of streambanks, riparian vegetation, or water quality. **(alternatively use language that specifies TNC standards)**

ii. In the event that the Conservancy determines that range conditions have declined from those documented in the Report and that livestock grazing has caused such significant deterioration, the Conservancy shall so inform Grantor. In response, Grantor shall develop a Grazing and Riparian Management Plan for review and approval by the Conservancy and Grantor shall then implement the approved plan.

B. Use, maintenance, and repair, of all existing and permitted buildings and structures, including but not limited to existing or authorized residences, garages, corrals, and barns, and in the event of their destruction, the right to reconstruct them with structures of similar size, function, capacity, site location.

C. Construction of new non-residential agricultural buildings and structures as are necessary for the uses authorized herein.

D. Maintenance and improvement of existing roads, and construction of new roads to access buildings and such roads as may be necessary to carry out the agricultural and ranching activities provided herein.

E. Maintenance, repair, and reconstruction of existing fencing and construction of new fences. New or reconstructed boundary or pasture-division fences may not exclude or prevent wildlife from moving through the Property, but other fencing may exclude wildlife from residential yards, gardens, haystacks, newly-seeded areas and temporary vegetative restoration areas.

F. Use of agricultural chemicals, including fertilizers, pesticides, herbicides, insecticides and fungicides. The use of such agents shall be conducted in such a manner as to minimize adverse

effects upon the natural values of the Property and the natural ecosystem. Aerial spraying of chemical agents requires advance approval by the Conservancy.

G. Raising and harvesting of hay and other crops, including plowing, planting, irrigating and harvesting on those areas that have been previously cultivated as depicted in the Report. Establishment and maintenance of a garden for personal use shall also be allowed.

H. Introduction of biological weed and pest control agents.

I. Removal of surface sand and gravel in limited quantities, for use solely in ranch operations and on roads and driveways on the Property, consistent with historical practices. Under no circumstances is any commercial use of sand or gravel located on the Property permitted by this Easement, nor may any sand or gravel be mined for any purpose, either commercial or non-commercial. All sand and gravel extraction permitted hereunder shall have only limited, localized impacts, and shall be suspended if the Conservancy determines such removal impairs any of the Conservation Values protected by this Easement.

J. Construction of utility systems for the uses permitted in this Easement.

K. Maintenance, repair, and reconstruction of existing agricultural and residential water facilities and the development of new water resources and facilities, including the diversion, withdrawal and use of water, consistent with valid water rights, for wildlife habitat enhancement and other uses provided for herein; provided that any maintenance, repair, reconstruction, construction or development activities do not cause significant or long-term impairment of water quality or riparian values.

L. Harvesting of timber using Best Management Practices, including stringent protection of soil and watershed values, riparian areas, and wildlife habitat; provided that such harvest is consistent with the following provisions:

i. Live or dead trees may not be harvested from the riparian zone, unless such harvest is necessary to control forest disease or to protect persons or property from falling trees or other hazards.

ii. On other timbered areas of the Property:

a. Timber harvest is permitted for uses on the Property, including firewood, fencing, and construction materials for the buildings and structures approved hereunder; for controlling forest disease; for the protection of persons and property; for controlling encroachment of timber into grassland areas; and for enhancing wildlife habitat.

b. Prior approval by the Conservancy is required for any timber harvest for commercial sale and for any timber harvest for uses off the Property. Grantor must submit a written Timber Harvest Plan for review by the Conservancy. The Timber Harvest Plan must include timber inventory data, purpose of the harvest, anticipated future stand condition, selection criteria for tree removal, provisions for the protection of streamside zones and wildlife habitat, harvest and skidding methods, slash disposal techniques, reforestation plans, and other relevant information necessary to an evaluation of the proposed harvest and its effects on the ecological values of the Property.

c. Prior approval by the Conservancy is not required for the following commercial forestry activities:

(1) The commercial harvest as Christmas trees, or for other uses, of young live trees encroaching on grassland habitat.

(2) The annual harvest and sale of no more than ____ cords of dead coniferous timber for use off the property as firewood.

Inconsistent Uses of the Property. The following uses and practices on the Property shall be prohibited, except as specifically provided for under Section 4 herein.

A. Storage, dumping or other disposal of toxic and/or hazardous materials.

Notwithstanding anything in this Easement to the contrary, this prohibition does not make the Conservancy an owner of the Property, nor does it permit the Conservancy to control any use of the Property by the Grantor which may result in the storage, dumping or disposal of hazardous or toxic materials; provided, however, that the Conservancy may bring an action to protect the Conservation Values of the Property, as described in this Easement. (This prohibition does not impose liability on the Conservancy, nor shall the Conservancy be construed as having liability as a "responsible party" under RCRA or similar federal or state statutes.)

B. Dumping or other disposal of garbage, tires, inoperable machinery, or other refuse.

C. Filling, excavating, dredging, mining, drilling, and the exploration for or extraction of minerals, hydrocarbons, soils, sand, gravel, rock, or other materials on or below the surface of the Property.

D. Establishment or maintenance of any commercial or industrial activity, including but not limited to game farms, motels or hotels, trailer or recreational vehicle parks. Prohibited commercial and industrial uses shall not include **(ranching, agriculture, and timber harvest)**, all as specifically provided for in Section 4, and any commercial activity that can be conducted from existing or authorized structures in a manner that is otherwise consistent with the conservation purposes of the Easement, **other commercial uses that may be permitted with prior approval of the Conservancy (this shall not affect the value of the easement)**. In order to preserve the potential for further reduction of estate taxes in accordance with Subsection 2031(c) of the IRS Code only *de minimus* commercial recreational use shall be allowed.

E. Intentional introduction of non-native plant species or farming, plowing, discing, chiseling, reseeded, or any type of cultivation.

F. Intentional introduction of non-native animal species.

G. Establishment or maintenance of a commercial feed lot. For purposes of this Easement, "commercial feed lot" is defined as a permanently constructed confined area or facility within which the Property is not grazed or cropped annually, and which is used and maintained for purposes of engaging in the business of the reception and feeding of livestock for hire. Nothing in this section or Section 5. D.

shall prevent Grantor from seasonally confining Grantor's livestock into an area for feeding and nothing in this section shall prevent Grantor from leasing pasture for the grazing of livestock owned by others.

H. The partition, division, subdivision, or de facto subdivision of the Property. The sale, exchange, devise or gift ("Transfer") of a portion of the Property for boundary adjustment, agricultural, or timber management purposes shall be allowed, provided that no more than _____ parcels may be created from the Property covered by this Easement, and provided further that any such Transfer(s) must be effected with an express provision reflecting that said land is subject to the terms and conditions of the Easement, without modification or expansion of such terms. In the event of any such Transfer(s), no additional structures shall be allowed upon any portion of the Property beyond those structures already authorized in this Easement, and all other terms of this Easement shall continue to apply. With the exception of such authorized Transfers, no subdivision or de facto subdivision of the Property shall be allowed. Transfer of any portion of the Property for residential use shall be expressly prohibited. Furthermore, if the Property is so divided, the Grantor must comply with all applicable federal, state, and local laws, ordinances, and regulations concerning subdivision, including, if required, the surveying of the parcels to be conveyed and the submission of the proposed separate tract(s) to state and/or local review authority for approval. The Conservancy shall be furnished with a copy of the pertinent portion of any document or conveyance utilized to effect such a transfer at least thirty (30) days prior to the execution of the same.

I. Construction or placement of any buildings, temporary living quarters of any sort, mobile homes, utility towers, or other structures, except as provided for in the Easement and except that vehicular campers owned by Grantor or guests may be parked on the Property as appropriate to accommodate normal visitation.

J. Construction of any new roads or vehicle trails.

K. The change, disturbance, alteration, or impairment of the significant relatively natural ecological features and values; or the destruction of any of the Conservation Values on the Property.

L. Any change in the topography of the Property through the placement therein of soil, land fill, dredging spoils, or other material, except as incidental and necessary to the activities permitted hereunder.

M. Rip-rapping and any other manipulation, diversion, or other alteration of natural water courses, wetlands, shorelines, or other bodies of water; any activity which may destabilize the banks of any course or body of water; and any uses or activities which would pollute, degrade, or drain the Property's surface or sub-surface waters.

N. The application or release of agricultural chemicals or other chemicals to the land, vegetation or air.

6. Prior Notice and Approval. Grantor shall not undertake or permit any activity requiring prior approval by the Conservancy without first having notified and received approval from the Conservancy as provided herein.

Prior to the commencement of any such activity, Grantor shall send the Conservancy written notice of his/her intention to undertake or permit such activity. The notice shall inform the Conservancy

all aspects of the proposed activity, including location, design, materials or equipment to be used, costs and duration, and any other relevant information, and shall be sent by registered or certified mail, return receipt requested, to The Nature Conservancy, Montana Field Office, 32 South Ewing, Helena, Montana 59601, with a copy to the Western Regional Attorney, The Nature Conservancy, 2060 Broadway, Suite 230, Boulder, CO 80302, or such other addresses as Grantor may from time to time be informed of in writing by the Conservancy.

The Conservancy shall have forty five (45) days from receipt of the notice, as indicated by the date of the return receipt, to review the proposed activity and to notify Grantor of any objections thereto; provided that the 45-day period shall not begin until such time as the Conservancy has received adequate information from Grantor to evaluate the proposed activity. In the event that the Conservancy requires additional information to evaluate the proposed activity, the Conservancy shall request the information from Grantor as soon as practicable and in any case not later than 30 days after the receipt of the notice of the proposed activity.

The Conservancy's decision to approve or disapprove the activity proposed by Grantor shall be sent by registered or certified mail, return receipt requested, to Grantor at the address first stated above, or to such other address as the Conservancy may from time to time be informed of in writing by Grantor.

A decision by the Conservancy to disapprove a proposed activity must be based upon the Conservancy's determination that the proposed activity is inconsistent with the conservation purposes of the Easement. If in the Conservancy's judgment it is possible that the proposed activity can be modified to be consistent with the easement, the Conservancy's decision notice shall inform Grantor of the modification(s). Once modification is made to the satisfaction of the Conservancy or the Conservancy otherwise concurs with the matters set forth in Grantor's notice, the proposed activity may thereafter be conducted in a manner that is acceptable to the Conservancy.

Should the Conservancy fail to post its response to Grantor's notice within forty five (45) days of receipt of notice or within forty five (45) days of the time that the Conservancy has received adequate information to evaluate the proposed activity, whichever is later, the proposed activity is automatically deemed consistent with the terms of the Easement, the Conservancy having no further right to object to the activity identified by such notice.

Remedies, Breach and Restoration. In the event a violation of any restriction contained herein, whether by Grantor or a third party, comes to the attention of the Conservancy, the Conservancy shall notify Grantor in writing of the violation. Grantor shall have thirty (30) days after the receipt of such notice to undertake actions, including restoration of the Property, that are reasonably calculated to fully correct the conditions caused by such violation. If Grantor fails to take such corrective action, the Conservancy may at its discretion undertake such actions, including appropriate legal proceedings, as are reasonably necessary to effect such corrections, and the cost of the corrections, including the Conservancy's expenses, court costs, and legal fees, shall be paid by Grantor, provided either Grantor, Grantor's family, any shareholders in the Property, agents, guests, employees or other persons permitted by Grantor are determined to be responsible for the violation.

In the event that Grantor undertakes any activity requiring approval of the Conservancy without in advance of securing such approval, or undertakes any activity in violation of the terms of the Easement, the Conservancy shall have the right to force, by appropriate legal or equitable action,

including an action for injunction or specific performance, the restoration of that portion of the Property affected by the activity to the condition that existed prior to the undertaking of the unauthorized activity. In such case, the costs of restoration and the Conservancy's costs of suit, including reasonable attorneys' fees, shall be borne by Grantor or those of his/her heirs, personal representatives, or assigns against whom a judgment is entered, or, in the event that the Conservancy secures redress without a completed judicial proceeding, by Grantor or those of his/her heirs, personal representatives, or assigns who are otherwise determined to be responsible for the unauthorized activity.

8. Enforcement. Enforcement of the terms and provisions of this Easement shall be at the discretion of the Conservancy. Any forbearance on behalf of the Conservancy to exercise its rights hereunder in the event of any breach by Grantor or his/her respective heirs, personal representatives, successors, or assigns shall not be deemed or construed to be a waiver of the Conservancy's rights hereunder in the event of any subsequent breach. The Conservancy shall also have the right of immediate entry to the Property if such entry is necessary to prevent damage to or the destruction of the Conservation Values protected by the Easement, which will be reasonably exercised and will take into account Grantor's right to engage in ranching, agricultural, and other activities consistent with the Easement.

9. Liabilities. Grantor shall hold harmless, indemnify, and defend the Conservancy and the Conservancy's members, directors, officers, employees, agents, and contractors and the heirs, personal representatives, successors, and assigns of each of them from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorney's fees, arising from or in any way connected with the presence or release of any hazardous material or substance of any kind on the Property. This paragraph shall not apply in the case of any hazardous material or substance in any manner placed on the Property by the Conservancy or the Conservancy's representatives or agents.

10. Taxes and Costs. Grantor agrees to pay any and all real property taxes and assessments levied by competent authority on the Property and to bear all costs of operation, upkeep, and maintenance of the Property, and does hereby indemnify the Conservancy therefor.

11. Access. Nothing herein contained shall be construed as affording the public access to any portion of the Property.

12. Assignment. The Conservancy may assign this Easement with Grantor's consent, which shall not be unreasonably withheld, provided that:

A. The Conservancy requires, as a condition of such transfer, that the conservation purposes of the Easement continue to be carried out; and

B. An assignment may be made only to an organization qualified at the time of transfer as an eligible donee under the IRS Code and Section 76-6-201, et seq., MCA.

13. Change of Conditions. The fact that any use of the Property that is expressly prohibited by this Easement, or any other use as determined to be inconsistent with the purpose of this Easement, may become greatly more economically valuable than permitted uses, or that neighboring properties may in the future be put entirely to uses that are not permitted thereunder, has been considered by the Grantor in granting this Easement. It is Grantor's belief that any such changes will increase the benefit to the

c of the continuation of this Easement, and it is the intent of both Grantor and the Conservancy any changes should not be assumed to be circumstances justifying the termination or extinguishment of this Easement pursuant to this paragraph. In addition, the inability to carry on any or the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Easement considered grounds for its termination or extinguishment pursuant to this paragraph.

Condemnation and Other Extinguishment of the Easement. ^{DOES NOT INCLUDE IMPROVEMENTS CLAUSE / BUT SHOULD} Whenever all or part of the Property is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate the restrictions imposed by this Easement, or if the Easement is extinguished pursuant to paragraph 16 herein, the Grantor and the Conservancy shall join in appropriate actions at the time of taking to recover the full value of the taking and all incidental or direct damages resulting from taking. The net proceeds shall be divided between the Grantor and the Conservancy in proportion to the fair market value of their interests in the Property on the date of execution of the Easement (as provided in Treas. Reg. Section 1.170A-14(g)(6)(I)). The Conservancy shall use its share of the proceeds in a manner consistent with the purposes and intent set forth herein, or for the creation of a "relatively natural habitat of fish, wildlife, or plants or similar ecosystem," as that phrase is defined in Internal Revenue Code Section 170(h)(4)(a)(ii), as amended, and in regulations promulgated thereunder.

^{2- NEED LEGAL WORK- IN OPPOSED TO OVERLY SPECIFIC GRAZING REGS SO WE DON'T HAVE TO AMEND EASEMENTS}
Amendment. If circumstances arise under which an amendment to or modification of the Easement would be appropriate, Grantor and the Conservancy may jointly amend the Easement; provided that no amendment shall be allowed that affects the qualification of the Easement under the Code or relevant Montana law. Any such amendment shall be consistent with the purposes of the Easement, shall not affect its perpetual duration, shall not permit additional development or improvements to be undertaken on the Property other than development or improvements currently permitted by the Easement, and shall not impair any of the significant Conservation Values of the Property. Any such amendment shall be recorded in the official records of _____ County, Montana.

Extinguishment. If circumstances arise in the future that render the purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether with respect to all or part of the Property, by judicial proceeding in a court of competent jurisdiction.

Interpretation. The provisions of this Easement shall be construed to effectuate their purpose of preserving and protecting habitat for wildlife, unique native plants, and diverse (forest, meadow and riparian) vegetative communities. The parties acknowledge that each party and its counsel have reviewed and revised this Easement and that no rule of construction that ambiguities are to be resolved against the drafting party shall be employed in the interpretation of this Easement.

Miscellaneous.

A. Definitions. The terms "Grantor" and "Conservancy" as used herein shall be deemed to include, respectively, the Grantor, the Grantor's heirs, successors, personal representatives, and assigns, and the Conservancy, its successors and assigns.

B. Binding Effect. Grantor intends that the Easement shall run with and burden title to the Property in perpetuity, and shall bind Grantor, his/her heirs, successors, personal representatives, and assigns.

C. Severability. If any provision of this Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions hereof and the application of such provision to persons or circumstances other than those to which it is found to be invalid, shall not be affected thereby.

D. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with paragraph 1 above.

TO HAVE AND TO HOLD the said Easement unto the said Conservancy, its successors and assigns, forever.

IN WITNESS WHEREOF, Grantor has hereunto set its hand this ____ day of _____, 200__.

GRANTOR:

Accepted this ____ day of _____, 200__, by The Nature Conservancy.

Jamie Williams, State Director of the
Montana Chapter of

The Nature Conservancy

ACKNOWLEDGMENT

ate of _____
ounty of _____

I this _____ day of _____, 20____, _____ personally appeared before
me,

____ who is personally known to me,
____ whose identity I verified on the basis of _____,
____ whose identity I verified on the oath/affirmation of _____,
a credible witness,
be the signer of the foregoing document, and he/she acknowledged that he/she signed it.

EAL)

Print Name _____
Notary Public for the State of _____
Residing at _____
My Commission Expires _____, 20____

ACKNOWLEDGMENT

ate of _____
ounty of _____

I this _____ day of _____, 20____, _____ personally appeared before
me,

____ who is personally known to me,
____ whose identity I verified on the basis of _____,
____ whose identity I verified on the oath/affirmation of _____,
a credible witness,
be the signer of the foregoing document, and he/she acknowledged that he/she signed it.

EAL)

Print Name _____
Notary Public for the State of _____
Residing at _____
My Commission Expires _____, 20____

Property Description

All that certain real estate situated in _____ County, Montana, consisting of _____ acres, more or less, more particularly described as follows:

Map of the Property

Acknowledgement of Easement Documentation Report

Grantor and the Conservancy acknowledge that each has read the "_____ Easement Documentation Report", dated _____, 200__, and that the report accurately reflects the condition of the Property subject to the Easement as of the date of conveyance of the Easement.

Grantor:

_____ Date _____

The Nature Conservancy:

_____ Date _____

APPENDIX D

FIVE VALLEYS LAND TRUST DEED OF CONSERVATION EASEMENT TEMPLATE

DRAFTED BY:

Tom Hensley

+
Andy DANA

w/ + JTA Review

DEED OF CONSERVATION EASEMENT

This Deed of Conservation Easement is executed as of _____, 20____, by _____, [husband and wife] [a corporation/limited liability company/partnership formed under the laws of the state of _____] [as Trustees of the _____ Trust, dated _____] whose address is _____ ([collectively] referred to in this Easement as the "Grantor"), and Five Valleys Land Trust, Inc., a Montana non-profit corporation whose address is PO Box 8953, Missoula, Montana 59807 (referred to in this Easement as "Five Valleys").

RECITALS

1. The Grantor is the owner of real property located in _____ County, Montana, consisting of _____ acres, more or less, as described in Exhibit "A" which is attached hereto and incorporated herein by this reference (referred to in this Easement as the "Property"); and

2. The Property consists of significant open-space land, as defined in Montana's Open-Space Land and Voluntary Conservation Easement Act, Section 76-6-104(3), M.C.A.; and

3. The Property provides significant benefit to the people of Montana, [city and/or county, and the United States] by preserving and providing the following resources [adapt as appropriate]:

- a. Relatively natural habitat for native plants, fish and wildlife;
- b. Wetlands and riparian habitats, which are important to the ecological integrity of the _____ River Valley;
- c. Open-space lands that provide opportunities to continue traditional agricultural practices;
- d. Scenic views from members of the public traveling _____ [list public by-way];
- e. Recreational opportunities for the general public;
- f. Educational opportunities for the general public;
- g. Historic working landscapes and structures that are important to the cultural and historic fabric of Western Montana; and
- h. Etc., etc.

(hereafter collectively referred to as the "Conservation Values"); and

4. All of these natural and social elements and ecological resources are of great importance to the Grantor and to the people of the State of Montana [and the United States of America], and are worthy of preservation in perpetuity; and

5. The Grantor, as the owner of the Property, owns the rights to identify, preserve, and protect in perpetuity the Conservation Values of the Property; and

6. The State of Montana has recognized the importance of voluntary conservation of private lands by the enactment of the Open-Space Land and Voluntary Conservation Easement Act, 76-6-101, et seq., M.C.A., and, _____ County has recognized the importance of private efforts to conserve open space, agricultural, timber, and other relatively natural lands by the enactment of [CITE COUNTY ORDINANCE]; and

7. Five Valleys is organized to preserve and conserve land for natural habitat, scenic, and open-space purposes for public benefit and is a qualified private organization that is authorized to hold conservation easements and other perpetual land-use restrictions under Section 76-6-104(5), M.C.A., and Section 170(h)(3) of

the Internal Revenue Code and;

8. The Grantor wishes to preserve and protect the Conservation Values of the Property by executing the Easement and by conveying to Five Valleys the right to preserve and protect those Conservation Values in perpetuity.

NOW, THEREFORE,

[1. For a purchased easement: for \$___ Dollars and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Grantor, and in further consideration of the mutual promises and covenants contained in this Deed of Conservation Easement, the Grantor hereby grants, and conveys to Five Valleys, and the successors and assigns of Five Valleys, with warranties of title, this perpetual Easement on, over, and across the Property, in accordance with the terms and conditions set forth below.]

[2. For a bargain-sale easement: for \$___ Dollars and other good and valuable consideration, including Grantor's express intention and agreement to make an absolute, unconditional, unqualified and voluntary gift of part of the value of this Easement, and in further consideration of the mutual promises and covenants contained in this Easement, the Grantor hereby gives, grants, and conveys to Five Valleys, and the successors and assigns of Five Valleys, with warranties of title, this perpetual Easement on, over, and across the Property, in accordance with the terms and conditions set forth below.]

[3. For an easement donation: in consideration of the mutual promises and covenants contained in this Easement, and as an absolute, unconditional, unqualified and voluntary gift, the Grantor hereby gives, grants, and conveys to Five Valleys, and the successors and assigns of Five Valleys, with warranties of title, this perpetual Easement on, over, and across the Property, in accordance with the terms and conditions set forth below.]

Section I **Rights Conveyed**

The rights conveyed to Five Valleys in perpetuity by this Easement are the following:

A. Identification and protection. To identify, preserve, and protect in perpetuity the Conservation Values, including but not limited to the significant relatively natural habitat, scenic and open space values of the Property, subject, however, to the rights reserved by the Grantor in this Easement and further subject to all third-party rights of record in and to the Property that are not subordinated to the terms and conditions of this Easement.

B. Access. Upon prior notice to the Grantor, to enter upon and inspect the Property to assure that Five Valleys rights in the Property are maintained in a manner that will not unreasonably interfere with the use of the Property by the Grantor. Five Valleys shall also have the right to enter the Property to enforce the rights granted to Five Valleys in this Easement, and Grantor expressly conveys to Five Valleys a right of immediate entry onto the Property if, in Five Valleys' sole judgment, such entry is necessary to prevent damage to or destruction of the Conservation Values protected by this Easement. [FOR USE ONLY IF THE EASEMENT CONTAINS NO PUBLIC ACCESS REQUIREMENTS: Aside from the rights of access granted in this paragraph, this Easement does not grant Five Valleys, nor the public, any rights to enter upon the Property.]

C. Injunction and restoration. To enjoin any activity on the Property or use of the Property which is inconsistent with the purposes and terms of this Easement, and to enforce the reasonable restoration of any Conservation Values that may be damaged by such activities.

D. Markers. To place and replace, during inspections authorized above, small markers to identify

boundaries, corners, and other reference points on the Property. Grantor shall not remove such markers without notice to Five Valleys and without Five Valleys' consent, which will not be unreasonably denied, as provided in Section _____ below.

Section II

General Effect of Easement

A. Purposes. The purposes of this easement are to preserve, protect, enhance, and restore the Conservation Values, including but not limited to open space, scenic, and significant relatively natural features and resources of the Property in perpetuity. In achieving these purposes, it is the intent of the Grantor and Five Valleys to permit the continuation of such uses of the Property as may be conducted consistent with the purposes and terms of this Easement. If one or more of the purposes of this Easement may no longer be accomplished, such failure of purpose shall not be deemed sufficient cause to terminate the entire Easement as long as any other purpose of the Easement may be accomplished. The Grantors and Five Valleys recognize that changes in economic conditions, in agricultural technologies, in accepted farm, ranch and forest management practices, and in the situation of the Grantors may result in an evolution of agricultural, silvicultural, and other uses of the Property, and such uses are permitted provided they are and remain consistent with the conservation purposes of this Easement.

B. Dedication of the Property. The Property is declared to be open space and natural land, pursuant to Section 76-6-107, M.C.A., and may not, except as provided in this Easement, be converted or diverted from open space and natural land.

C. Perpetual restrictions. This Easement shall run with and burden title to the Property in perpetuity, and shall bind the Grantor and all future owners and tenants of the Property.

Section III

Permitted Uses and Practices

Note: add letters for appropriate uses: A.B.C. etc.

The following uses and practices, though not an exhaustive recital of consistent land uses and practices, are hereby deemed to be consistent with the purposes and terms of this Easement. Some of these consistent land uses and practices are identified below as being subject to specified conditions or to the requirement of, and procedures for, obtaining Five Valleys' prior approval, as described in Section V of this Easement. The remainder of these consistent uses shall not be precluded, prevented, or limited by this Easement, as long as they are in agreement with the specific and general purposes and terms of this Easement.

This Easement shall confine the uses of the Property to activities such as [SELECT THE APPROPRIATE USES: farming, ranching and other agricultural uses; hunting, fishing and other recreational uses; public access for the purpose of _____; limited commercial uses; and residential uses].

[ALL OF THE FOLLOWING PARAGRAPHS ARE OPTIONAL]

Agricultural activities. [THIS IS A GENERAL PROVISION; MORE DETAILED PROVISIONS ARE FOUND BELOW.] To continue ongoing farming, ranching, and other agricultural activities [and to institute and carry on new farming, ranching and other agricultural activities], including planting, raising and harvesting agricultural crops, [processing agricultural products produced on the Property,] and to raise and manage livestock, subject to the restrictions contained in paragraphs _____ of this Easement, and provided that such activities do not result in degradation of the soils, plant communities, water resources, or fish and wildlife

species and their natural habitat.

Grazing. To graze and pasture livestock provided that [SELECT FROM THESE ALTERNATIVE PROVISIONS]:

[THIS OPTION FOCUSES ON THE CONDITION OF WILDLIFE HABITAT AND RESOURCES:] Livestock grazing use shall not degrade the fish and wildlife habitat, vegetation communities, stream banks, water quality, or other resources and habitat protected by this Easement from the conditions documented in the Baseline Report.

[THESE OPTIONS FOCUSES ON RANGE CONDITION:] [In the _____ area,] livestock grazing may not cause range conditions, stream bank conditions, vegetative communities, soil structure and composition, and watershed characteristics to significantly deteriorate. The range condition, stream bank conditions, vegetative communities, soil structure and composition, and watershed characteristics as of the date of this Easement are documented in the baseline report referred to in Section ____ of this Easement.

OR:

Livestock grazing shall be limited to the _____ area.

OR:

Livestock grazing use shall not exceed the degree of use described as "moderate" by the United States Department of Agriculture Natural Resource Conservation Service Guide to Degree of Use, a copy of which is attached to this Easement as Exhibit ____.

OR:

If Five Valleys determines that livestock grazing has caused [degradation][significant deterioration] of the condition of [fish and wildlife habitat, vegetation communities, stream banks, water quality, or other resources and habitat protected by this Easement] [range conditions, stream bank conditions, vegetative communities, soil structure and composition, and watershed characteristics] from the condition documented in the Baseline Report, Five Valleys will give notice of this deterioration to the Grantor consistent with the provisions of Section _____. Upon Grantor's receipt of such notice, Grantor must develop for review and approval by Five Valleys, within the time set forth by Section VI of this Easement, a [grazing][riparian] recovery plan which prescribes a grazing management system to allow the [range conditions][riparian areas] to recover to the state documented in the Baseline Report. If Five Valleys approves of a [grazing] [riparian] recovery plan proposed by Grantor, Grantor must implement the plan. Five Valleys will periodically review the plan and Grantor's implementation of the plan.

Any grazing plan, and the grazing practices implemented by Grantor under the plan, must at a minimum restore the degraded resources to the state documented by the Baseline Report and must maintain these resources in a condition that is consistent with protection of the Conservation Values. If the Grantor does not propose a grazing recovery plan that is acceptable to Five Valleys, or the conditions fail to recover to conditions similar to those described in the Baseline Report, Five Valleys may require the Grantor to cease all grazing until conditions recover and to pursue any and all other remedies for violation of breach of this Easement, as provided to FVLT under Section VI hereof.

Buffer zone. If and when the area bordering _____ [NAME OF WATER FEATURE] is used for livestock grazing, a fenced buffer zone [encompassing the riparian plant community of the stream] [extending at least ____ feet from the centerline of the stream] shall be established and maintained at the Grantor's expense. The purposes of the buffer zone are: to promote plant and wildlife production and diversity; to improve stream bank stability; to reduce erosion and runoff; to improve water quality; and consequently, to enhance fish and wildlife habitat. Livestock grazing shall be limited within the buffer zone to appropriate seasons and duration of use. Limited stock watering on the stream is permitted using water gaps or other appropriate means of limiting livestock access. No agricultural crops shall be cultivated within the buffer zone without the prior approval of Five Valleys.

Water resources. To maintain, restore, develop, and enhance those water resources on the Property

which are necessary or desirable for permitted farming, ranching and other agricultural uses, wildlife, domestic needs, and private recreation, in a manner which is consistent with the purpose and terms of this Easement. [OPTIONAL EXAMPLES: Permitted uses include but are not limited to the construction, repair, maintenance, and expansion of irrigation systems; drilling wells for agricultural or residential purposes; and the development of stock watering facilities. Grantor may create and develop ponds and wetlands for fishery and wildlife improvement using the water resources on the Property only with the prior approval of Five Valleys, as provided in Section ____ below.]

Agrichemicals. To use biological control agents or agrichemicals, including but not limited to fertilizers, pesticides, herbicides, insecticides, and rodenticides, but only in those amounts and frequencies necessary to accomplish reasonable agricultural, ranching and residential objectives.

Predators/problem animals. The Grantor may control predatory and problem animals by the appropriate use of legal control techniques. Wherever possible, all measures used for such control shall be limited in their application to specific animals which have caused damage to livestock or other property; provided, however, that if it is not possible to identify a specific predatory or problem animal, the Grantor may use appropriate preventive control techniques. Grantor reserves the right to control rodents without identifying specific problem animals.

Residence-based business. Persons living on the Property may conduct businesses, trades, or professions within their residence so long as customers or clients do not visit the Property for business purposes on a regular basis, except as may be specifically permitted in this Easement.

Hunting, fishing, etc. To use the Property for [SELECT APPROPRIATE ACTIVITIES: hunting of game animals and birds, fishing, camping, hiking, birdwatching, and photography] by the Grantor and the Grantor's family, employees and invitees [on a non-commercial basis].

Fences. To construct, maintain, repair, modify, and replace fences on the Property. All fences on the Property must permit the reasonable passage of small game, deer, elk, bear, bighorn sheep, ____, Grantor reserves the right to construct impassable fences around haystacks, harvested crops, residential gardens, and kennels or enclosures for pets, chickens, and similar animals.

Improvements. To maintain, repair, remodel, and make limited additions to all existing residences, structures and other improvements on the Property, including: barns, sheds, shops, garages, corrals, fences, roads, irrigation structures, ditches, and pipelines. If any or all of such structures are removed or destroyed, to replace them with similar structures of the same approximate size in the same general locations. For the purpose of this paragraph, the term "limited additions" shall mean any addition in which the overall exterior footprint of the original structure is expanded by no more than ____ percent and the height of the principal roofline of the is increased by no more than ____ feet. [To place upon the Property additional structures and other improvements as may be necessary for agricultural purposes, pursuant to the purpose and terms of this Easement.]

New residence(s). The Grantor shall have the right to construct, [FOR USE IF MODULAR HOMES ARE PERMITTED: place,] maintain, remodel, repair, make limited additions to, and in the even of [its/their] destruction, replace ____ additional single family residence(s), and associated garage(s), which shall be [attached/detached] to the residences, and [____ other detached residential outbuildings] If any or all of such structures are removed or destroyed, to replace them with similar structures of the same approximate size in the same general locations. For the purpose of this paragraph, the term "limited additions" shall mean any addition in which the overall exterior footprint of the original structure is expanded by no more than ____ percent and the height of the principal roofline of the is increased by no more than ____ feet. The term "associated residential outbuildings" is defined to include, but is not limited to greenhouses, gazebos, barns, workshops,

sheds, satellite dish, utility poles, septic system, and drain fields. Wells and drain fields may be located outside the Building Envelope if necessary. [The Grantor must obtain Five Valleys' prior approval of the location of the residence, which approval will not be unreasonably withheld.] [The residence(s) and associated structures shall be located _____. DESCRIBE OR LOCATE ON A MAP THE PORTION OF THE PROPERTY IN WHICH THE IMPROVEMENTS MUST BE LOCATED, OR DEFINE THE DIMENSIONS OF THE AREA WITHIN WHICH ALL IMPROVEMENTS MUST BE LOCATED.]

Relocation of residence. To move the current residence to a different location on the property or to replace the current residence with a new residence in a different location. If the Grantor replaces the current residence with a new residence in a different location, the Grantor must remove the current residence within _____ months of completion of the replacement residence. [The Grantor must obtain Five Valleys' prior approval of the new location of the residence, which approval will not be unreasonably withheld.] [The new location of the residence must be _____. DESCRIBE OR LOCATE ON A MAP THE PORTION OF THE PROPERTY IN WHICH THE IMPROVEMENTS MUST BE LOCATED, OR DEFINE THE DIMENSIONS OF THE AREA WITHIN WHICH ALL IMPROVEMENTS MUST BE LOCATED.] The new building site shall be consistent with the purpose and terms of this Easement and shall be located so as to minimize impacts to and degradation of water resources, wildlife habitat and the natural, scenic, and open space qualities of the Property or any other Conservation Values protected by this Easement..

Temporary shelters. To place tents, tarps, yurts, tepees, campers, or other shelters upon the Property on a temporary basis from time to time, provided that such non-permanent structures do not adversely effect the scenic and open-space values of the Property or any other Conservation Values protected by this Easement.

Landscaping and gardening. To clear brush and to plant either native or non-native trees, shrubs, flowers, grasses, and other plants for landscaping or gardening purposes in the area within ____ feet of the residence[s].

Cutting of trees. The removal of select trees which present a hazard to persons or property, the removal of trees in connection with the upkeep, maintenance and repair of fences, the harvesting of select trees for use by the Grantor as firewood, and the harvesting of trees for use by the Grantor on the Property as posts and poles, any of which may be performed without prior notice and approval as described in Section V of this easement. Because of their value for wildlife, the taking of standing dead trees and snags is prohibited unless such taking is necessary to control forest disease or to protect persons or property from falling trees or other hazards. All timber removed by Grantor pursuant to this paragraph ____ must be for the Grantor's personal use and disposed of on the Property and such timber removal must protect and minimize impacts on the Conservation Values identified and protected by this Easement.

Timber management activities. To use timber cutting, prescribed burning, and other silvicultural tools, such as for the purpose of controlling forest disease, for the purposes of protecting wildlife habitat, for the purposes of fostering a multi-aged forest, for purposes of returning the forest resource to a more natural state, or for the purposes of reducing the fire hazard to nearby buildings, all subject to the approval of a timber harvest plan by Five Valleys as more specifically required by Section V of this Easement. The Grantor may sell the products resulting from an approved timber harvest. Any timber harvest must be performed in accordance with forestry practices which are consistent with the purpose and terms of this Easement, must conform to state and federal forestry laws, practices, guidelines, or regulations, and must minimize soil disturbance, vegetation damage, and impacts on the integrity of the watershed, water quality, wildlife habitat, and the natural scenic and aesthetic qualities of the Property. No new roads shall be constructed on the Property for timber harvests.

Transfer of land. To sell, exchange, devise, gift, convey, or otherwise transfer the Property as not more than ____ () parcels. Whether conveyed as a single tract or whether conveyed as separate parcels

pursuant to this paragraph, the Property shall be conveyed expressly subject to all terms, conditions, rights, restrictions, and obligations contained in this Easement.

Notwithstanding any provision in this Paragraph ____ to the contrary, however, Grantor may, with the prior written approval of Grantee, convey portions of the Property by way of boundary adjustments, as long as Grantor in said boundary adjustment does not convey or transfer title to that portion of the Property underlying any permitted residences or other buildings, as long as the boundary adjustment does not effect a transfer or conveyance of any future rights to construct any such permitted structures, and as long as such boundary adjustments do not impair the conservation purposes of this Easement, in Five Valleys' reasonable judgment. Five Valleys may require as a condition of approving the boundary adjustment that the property transferred shall remain subject to the terms and conditions of this Easement.

In the event of sale, exchange, devise, gift, conveyance, transfer or other disposition of any right, title, estate, or interest in the Property of one or more of the parcels described above (except by boundary adjustment), Grantor shall expressly designate in the conveyance documents: (i) if any rights to further divide a parcel is transferred with said parcel; (ii) if any rights to construct any of the additional residences permitted in Exhibit B, paragraph 5, are transferred with said parcels; and (iii) if the right to construct the guest ranching or business structures permitted in this Exhibit B, paragraphs 10 and 11 is transferred with said parcels. If no designations are made, no additional splits in rights, title, interests or estates of the parcel, none of the additional residences and no additional structures for guest ranching/business will be permitted on the transferred parcels.

Furthermore, if Grantor elects to divide the Property as herein provided, Grantor must comply with all federal, state and local laws, ordinances and regulations concerning subdivision, as applicable, including the surveying of the parcel to be sold and the submission of the proposed creation of a separate tract to state and local review. Grantor shall furnish Five Valleys with a copy of any document or conveyance utilized to effect the transfer of the Property within thirty (30) days of the execution of said document or conveyance. Upon Grantor's exercise of any rights reserved under this Paragraph ____ to convey or transfer portions of the Property in separate tracts, Five Valleys shall be entitled to record in the Public Records of the appropriate county a "Notice of Reserved Development Right Under Deed of Conservation Easement" to document the exercise of such rights for the benefit and information of the Grantor, Five Valleys and the public.

Nothing in this Easement shall be construed to prevent Grantor, from owning the Property in cotenancy, wherein each cotenant shall have undivided interests in the whole of the Property. Grantor also retains the right to enter into leases, licenses or other transfers of indicia of a right of occupancy or use of the residences on the Property, provided such agreements are made expressly subject to the terms and conditions of this Easement. Grantor expressly conveys to Five Valleys the right to enforce this Easement against, and to seek and recover all remedies for violation of the terms of this Easement from, all tenants or other occupants residing on or using the property with Grantor's knowledge or consent.

The transfer of any development right that is now or hereafter allocated to, implied, reserved, or inherent in the Property ("Development Rights") to any other property not within the Property' the use of the Property of the Development Rights for the purpose of calculating the permissible lot yield of any property (a) that is not within the Property or (b) that includes property that is not within the Property.

INSERT THIS CLAUSE IF THE LANDOWNER WANTS TO ENGAGE IN SUBSURFACE MINERAL DEVELOPMENT:

Limited Mineral Development. Subject to the prior approval of Five Valleys as provided in Section ____ hereof, to explore for and extract oil, gas and other minerals (or to lease, sell or otherwise dispose of the rights thereto) in, on or under the Property, subject, however, to the following conditions:

a. Surface mining. There shall be no extraction or removal of any minerals by any surface mining method, within the meaning of Section 170(h)(5)(B) of the Code and the regulations promulgated thereunder; and there shall be no extraction or removal of any non-mineral substance (including but not limited to soil, sand and peat) by surface mining methods.

b. Subsurface mining. There shall be no exploration for or extraction of oil, gas or other subsurface minerals by any subsurface mining method if such activity would result in the permanent or irreparable destruction or impairment of any Conservation Value of the Property. In accordance with Treasury Regulation §1.170A-14(g)(4)(i), subsurface mineral exploration or extraction may be permitted only if the mining methods used are not irreparably destructive of the Conservation Values and if impacts are limited, localized and temporary. Any subsurface mining that is proposed on the Property shall be subject to Five Valley's prior approval. In addition to the requirements of Treasury Regulation §1.170A-14(g)(4)(i), subsurface mining methods used must adhere to the following conditions:

(i) Water. No exploration or extraction shall take place within any stream, waterway or protected wetland, and no mining operation shall materially degrade the quality of any lake, pond, well, stream, or source of water utilized by Grantor for agricultural or residential purposes. Any waste water resulting from permitted exploration or extraction activities which is of materially poorer quality than existing water supplies shall be treated so that its quality is substantially equivalent to existing natural water quality where the waste water is discharged, including groundwater, if applicable.

(ii) Surface disturbance. Any surface disturbance resulting from permitted exploration or extraction activities must be limited, localized and temporary, and the surface shall be restored upon completion of such activities to a condition similar or equivalent to its state prior to the disturbance by reclaiming land contours, by restoring soils, by replanting native vegetation, and by husbanding replanted native vegetation until the vegetation is mature, established and self-perpetuating.

(iii) Reclamation. All permitted exploration or extraction activities and associated reclamation activities shall be in compliance with other provisions of this paragraph 6, applicable state and federal laws.

(iv) Roads. Whenever possible, access to exploration or extraction sites shall be by existing roads. Any new road shall be sited and maintained so as to minimize adverse impact to the Conservation Values and shall be reclaimed after exploration and extraction activities are concluded.

(v) Structures. The number and kind of structures used in the exploration for or extraction of oil, gas and other subsurface minerals shall be limited to the minimum necessary to accomplish said exploration or extraction. All such structures shall be removed at the termination of exploration and extraction activities and the site shall be restored pursuant to subparagraph (ii) above.

(vi) Notification. Grantor shall advise Five Valleys in writing at least sixty (60) days prior to engaging in any exploration for or extraction of oil, gas and other minerals (or leasing, selling or otherwise disposing of the rights thereto) whether or not such exploration or extraction (or leasing, selling or otherwise disposing of the rights thereto) could result in any surface disturbance. For the purpose of this paragraph ____, Five Valley's period in which to grant or deny prior approval of any mineral exploration or extraction proposal under Section ____ shall be extended to sixty (60) days.

c. Limited-impact activities. Notwithstanding the foregoing provisions of this paragraph ____, subject to prior approval of Five Valleys, as provided in Section ____ hereof, Grantor may explore for and extract minerals, for non-commercial purposes, by a method of mining that has limited, localized impact on the Property but that is not irreparably destructive of any Conservation Value, within the meaning of Treasury Regulation Section 1.170A-14(g)(4)(i) or its successor provision, provided the surface alteration is

restored to its original state and approximate contour. Any such limited-impact activity shall require Grantor to adhere to the conditions set forth in subparagraph b of this paragraph ____.

Residual rights. Except as expressly limited herein, to use the Property for any purpose not inconsistent with the purpose and terms of this Easement.

Section IV Inconsistent Uses

Any use of, or activity on, the Property inconsistent with the purposes and terms of this Easement is prohibited, and the Grantor acknowledges and agrees that it will not conduct, engage in, or permit any such use or activity. Without limiting the generality of the foregoing, the following uses of or activities on, the Property, although not an exhaustive list of inconsistent uses or activities, are inconsistent with the purpose and terms of this Easement and shall be expressly prohibited.

Alteration of Land. The alteration of the surface of the land, including, without limitation, the excavation or removal of soil, sand, gravel, rock, peat, or sod, except as expressly allowed under Section III, paragraph ____ or in conjunction with a use of activity expressly allowed under Section III. The exceptions listed in this Section ____ shall not be interpreted to permit any extraction or removal of surface materials inconsistent with Section 170 (h)(5) of the Code and the applicable Treasury Regulations.

Subdivision. [Except as expressly provided in Section III, paragraph ____ above,]The legal or “de facto” division or subdivision of the Property, which shall include, but shall not be limited to, any subdivision, short subdivision, platting, binding site plan, testamentary division, or other process by which the Property is divided into lots or in which legal or equitable title to different portions of the Property are held by different owners. The Grantor shall also not indirectly subdivide all or any part of the Property through the allocation of property rights among partners, shareholders, or members of any legal entity, the creation of a horizontal property regime, leasing, partitioning among tenants-in-common, or by any other means. [FOR USE IF THE PROPERTY CURRENTLY INCLUDES TWO OR MORE PRE-EXISTING PARCELS WHICH COULD BE SOLD SEPARATELY: [Except as expressly provided in Section III, paragraph ____ above,]The legal or “de facto” division or subdivision of any of the parcels which make up the Property, or the transfer of any of the parcels which make up the Property separately from the other parcels which make up the Property, which shall include, but not be limited to, any subdivision, short subdivision, platting, binding site plan, testamentary division, or other process by which the Property is divided into lots or in which title to different portions of the Property are held by different owners. The Grantor shall also not indirectly subdivide all or any part of the Property through the allocation of property rights among partners, shareholders, or members of an entity, the creation of a horizontal property regime, leasing, partitioning among tenants-in-common, or any other means [It is the intent of this Easement that the entire Property be maintained in unified title as a single unit.] [Notwithstanding any other provision of this Paragraph to the contrary, however, Grantor may lease the Property to different tenants for agricultural purposes, provided agricultural leases must include a minimum of ____ acres.]

Structures and housing. The construction or placement on the Property of any buildings, camping accommodations, temporary living quarters of any sort, mobile homes, signs, billboards or other advertising materials, or other structures, except for those specifically provided for in this Easement, and except that vehicular campers owned by the Grantor or the Grantor’s guests may be parked on the Property on a temporary basis as appropriate to accommodate normal visitation.

Commercial facilities. The establishment of any commercial or industrial facilities or activities (other than those necessary in the operation or uses of the Property expressly permitted by this Easement), including, but

not limited to, guest ranching, outfitting, any small business, restaurant, night club, campground, trailer park, motel, hotel, commercial swimming pool, gas station, retail outlet, or facility for the manufacture or distribution of any product [other than products to be grown or produced on the Property in connection with purposes expressly permitted under Section III of this Easement]. [However, the Grantor may pursue business activities in the residence on the Property, including home craft activities, as long as they are not retail businesses open to the general public on a regular basis, and as long as the operation of the business does not significantly increase the vehicle traffic to the Property.]

Rights of Way, Easements, and Utilities. The granting of right-of-way or easements for utilities, roadways, or other purposes that may be inconsistent with the purpose and terms of this Easement, or the installation of utility structures, lines, conduits, cables, wires or pipelines upon, over, under, within or beneath the Property, except in connection with the construction of permitted agricultural structures or residences on the property, as provided in Section III of this Easement. By granting this Easement the Grantors have released and transferred to Five Valleys all of Grantors' right to grant or convey any such easements or right-of-ways that are inconsistent with the purpose and terms of this Easement, so any easements or rights-of-way that the Grantors attempt to grant after the date of this Easement will be void without the express written approval of Five Valleys. However, easements and rights-of-way may be granted by mutual agreement of Grantors and Five Valleys in cases where eminent domain statutes apply and clear public necessity has been demonstrated to Grantors and Five Valleys. In the event that utilities are permitted on or across the Property, said utilities must be buried, and the site restored to native or pre-existing conditions.

Roads. The construction of any new roads or vehicle trails on the Property, or the use of vehicles off of the existing road(s) in a manner which damages vegetation, or which creates permanent tracks or trails [LANGUAGE FOR USE IF SOME NEW ROADS WILL BE PERMITTED: except for agricultural purposes, or the construction of roads except in connection with farming, ranching and other agricultural uses; hunting, fishing and other recreational uses; and residential access. Any road constructed for one or more of such purposes shall be sited and maintained so as to minimize adverse impact on the natural habitat, scenic and open space values of the Property. Any road construction shall be subject to the prior written approval of Five Valleys, as set forth in Section ___ below. The Grantor's written notice required by Section V, Paragraph B, shall include a construction plan describing the purpose of the road, its location on a topographic map and, to the extent deemed necessary by Five Valleys, discussion of the following: road grade, drainage, erosion/sedimentation impacts and mitigating efforts, areas of cut and fill, and special concerns like culvert placement, bridges, fords, buffer strips between roads and streams, and fish and wildlife impacts and mitigating efforts, including site reclamation and reseeding and reestablishment of cover vegetation on exposed cuts, fills, and banks.

Dumping. The dumping or other disposal of public or domestic hazardous or toxic materials or substances or non-compostable refuse on the Property, except non-hazardous wastes generated by normal agricultural and ranching operations. [Hazardous substances means any substances, materials, or wastes that are hazardous, toxic, dangerous, or harmful or are designated as, or contain components that are designated as, hazardous, toxic, dangerous, or harmful or as a pollutant by any federal, state, or local law, regulation, statute, or ordinance, including, but not limited to, petroleum or any petroleum product].

Mining. The filling, excavating, dredging, mining, drilling, exploration for, or extraction of minerals, coal, hydrocarbons, including oil and gas, bentonite, or other material on or below the surface of the Property, [except as permitted in Section III, Paragraph ____].

Ground or surface water and wetlands. Any use or activity that pollutes or degrades the surface or sub-surface waters or wetlands located on or underlying the Property, or which would alter or disturb any watercourse or wetland on the Property. [Water resources on the property may be developed in accordance with Section III(C), provided that such development is accomplished in a manner consistent with the maintenance and

protection of the Conservation Values.] [In accordance with applicable state and federal regulations, the restoration and enhancement of water resources, including bank stabilization measures and development of ponds, shall be permitted.]

Grazing. The grazing of domestic livestock, except as expressly permitted in Section III of this Easement.

Alternative Livestock. The raising or confinement for commercial purposes of (i) "alternative livestock" and "game animals" as defined in MCA Section 87-4-406 or its successor statute, (ii) native or exotic fish, except that "private fish ponds," as defined by MCA Section 87-4-603, or its successor statute, may be maintained for recreational use, (iii) game birds, (iv) furbearers, including mink and fox, or (v) other "wild animals" as defined in MCA Section 87-4-801, or its successor statute, and "nongame wildlife" as defined in MCA Section 87-5-102(6), or its successor statute

Commercial feed lot. The establishment or maintenance of any commercial feedlot is prohibited. A commercial feedlot shall be defined for purposes of this easement as a confined area or facility, within which the land is not grazed or cropped annually, for the purpose of engaging in the business of receiving, confining and feeding of livestock for hire. Nothing in this Easement shall be construed to prevent Grantor from seasonally confining livestock in areas for feeding, lambing, calving, or similar activities, and nothing herein shall prevent Grantor from leasing pasture, corrals and agricultural improvements to third parties, subject to the terms of this Easement.

Timber harvest. All timber harvests on the Property must comply with the conditions set forth in paragraph __, Section III, of this Easement.

THIS SECTION CAN BE USED IF THERE IS CONCERN OVER INTRODUCING SPECIES

Non-native species. The introduction of any non-native plant or animal species, except where such introduction is associated with permitted residential gardening and permitted agricultural uses of the property or is intended as a biological control against non-native pest species or used for erosion control, restoration or other habitat improvements. For such purposes, the Grantor may not use non-native species that will compete with and result in the decline or elimination of native species on the Property.

Section V

Prior Notice by Grantor and Approval of Five Valleys

A. Requirements for Notice. Except as may be otherwise expressly provided for herein, any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be (a) in writing; (b) either (i) delivered in person with a signed and dated proof of delivery, (ii) sent by certified United States mail (postage prepaid and with return receipt requested), or (iii) by Federal Express or other reputable "overnight" service, provided that the sender requests next-business-day delivery and obtains a signed proof of delivery; and (c) addressed as follows:

To Grantor: Five Valleys Land Trust
PO Box 8953
Missoula, MT 59807

To Grantee: _____

or to such other address as either party from time to time shall designate by written notices to the other. Where notice to Grantor of entry upon the Property by Five Valleys is required under this Easement, Five Valleys may notify Grantor or any agent of Grantor by telephone, mail, or in person prior to such entry.

B. Grantor's request for permission. Grantor shall not undertake or permit other to undertake any activity requiring prior approval of Five Valleys without first notifying Five Valleys of the proposed activity and without receiving written approval from Five Valleys. The request must inform Five Valleys of all material aspects of the proposed activity, including, but not limited to (as appropriate to the proposal), the location, size, capacity and number of structures, improvements, facilities or uses, and the dates and duration of the activity. The request must provide Five Valleys with an address to which responses should be sent, and the names and addresses of persons to contact about the request.

C. Time for response. Unless otherwise provided by this Easement, Five Valleys shall have thirty (30) days from the receipt of a request for prior approval, as indicated by the registered or certified return receipt or other proof of delivery, to review the proposed activity, use or enterprise and to notify the Grantor of any objection to that activity, use, or enterprise. The 30-day period shall not begin until Five Valleys has received adequate information from the Grantor to evaluate the proposed activity. If Five Valleys requires additional information to evaluate the proposed activity, Five Valleys shall request the information from the Grantor as soon as practicable, and in any case not later than 20 days after receiving the request for permission. In the case of requests for permission to engage in a timber harvest or prescribed burn on the Property, in recognition of the significant impacts which these activities could have upon the Property, Five Valleys will have sixty (60) days in which to review the request.

D. Response to a request for permission. Five Valleys' decision to approve or disapprove the activity proposed by the Grantor shall be sent by registered or certified mail, return receipt requested, or by other delivery or courier service with proof of delivery, to the Grantor at the address provided to Five Valleys in the request. A decision by Five Valleys to disapprove a proposed activity must be based upon Five Valleys' determination that the proposed activity is inconsistent the purposes and terms of this Easement. If, in Five Valleys' judgment, it is possible that the proposed activity can be modified to be consistent with the purposes and terms of this Easement, Five Valleys' response shall inform the Grantor of the manner in which the proposed activity can be modified to conform with the purposes and terms of this Easement. Once a request for permission has been modified to the satisfaction of Five Valleys, or Five Valleys otherwise concurs with the matters set forth in the Grantor's request, the proposed activity may thereafter be conducted in the manner approved by Five Valleys. Except as provided in the next section, a proposed activity, use, or enterprise may be commenced or conducted only after the Grantor has received Five Valleys' express written approval, and only in the manner requested by the Grantor and approved by Five Valleys.

E. Five Valleys' failure to respond. If Five Valleys fails to post its response to the Grantor's request within the response time established within Section V, Paragraph C, above, the proposed activity shall be allowed, and Five Valleys will have no further right to object to the specific activity identified by the request. Five Valleys' failure to respond to any individual request for approval shall not be deemed to be a waiver of any other duty and obligation of the Grantor to seek prior approval for other specific activities for which Five Valleys approval is necessary.

F. Acts beyond the Grantor's control. The Grantor will not be liable for failure to request permission to undertake prudent actions taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any similar cause which is beyond the control of the Grantor.

G. Timber Harvest. Any request to perform timber harvest or thinning, including those for the

abatement of a disease or infestation, must be accompanied by a timber harvest plan prepared by qualified, professional forester or other natural resource professional with expertise in forest management. The Grantor and Five Valleys will mutually determine the completeness of the timber harvest plan and its adherence to the general and specific intentions of this Easement prior to the approval of the plan and the initiation of any timber harvest. The Grantor shall contact Five Valleys prior to preparation of a timber harvest plan to obtain the required information to be included in such a plan.

Section VI

Breach and Restoration

A. Notice of violation. If a violation of the purposes or terms of this Easement, whether by the Grantors or by a third party, comes to the attention of Five Valleys, Five Valleys shall notify the Grantors in writing of the violation and demand corrective action sufficient to cure the violation.

B. Five Valleys remedies. Where the violation involves injury to the Property resulting from any use or activity inconsistent with the purposes of this Easement, Grantors shall restore the portion of the Property so injured to the condition that existed prior to the injury. If the Grantors: (i) fail to cure the violation within thirty (30) days after receiving a notice of the violation from Five Valleys; or (ii) under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fail to begin curing the violation within thirty (30) days of the date on which Grantors receive notice of the violation; or (iii) fail to diligently pursue efforts to cure the violation until it is finally cured, then Five Valleys may bring an action in a court of competent jurisdiction to enforce the purpose and terms of this Easement, to enjoin the violation by temporary or permanent injunction, to recover any damages, if any, to which it may be entitled for violation of the terms of this Easement, and to require the restoration of the Property to the condition that existed prior to any such injury. If Five Valleys, in its sole discretion, determines that a violation is threatened or imminent or that circumstances require immediate action to prevent or mitigate significant damage to any protected resource, Five Valleys may pursue its remedies under this paragraph without waiting for the period provided for notice and cure to expire. Five Valleys' rights under this paragraph apply equally in the event of either actual or threatened violations of the terms of this easement, and the Grantors agree that Five Valleys' remedies at law for any violation of the terms of this easement are inadequate to restore the Conservation Values protected by this Easement and that Five Valleys shall be entitled to the injunctive relief described in this paragraph, both prohibitive and mandatory, in addition to such other relief to which Five Valleys may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Five Valleys' remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

C. Costs of enforcement. If Five Valleys prevails in any action to enforce the terms of this Easement against Grantor, any costs incurred by Five Valleys in enforcing the terms of this Easement against Grantor, including reasonable costs of suit and reasonable attorneys' fees, and any costs of restoration necessitated by Grantor's violation of the terms of this Easement, shall be borne by Grantor. If Grantor prevails in any action to enforce the terms of this Easement, Grantor's reasonable costs of suit, including reasonable attorneys' fees, shall be borne by Five Valleys.

D. Five Valleys' discretion. Enforcement of the terms of this Easement shall be at the discretion of Five Valleys, and any forbearance by Five Valleys to exercise its rights under this Easement in the event of any breach of any provision of this Easement shall not be deemed or construed to be a waiver by Five Valleys of such provision or of any subsequent breach of the same or any other provision of this Easement or of any of Five Valleys' rights under this Easement. No delay or omission by Five Valleys in the exercise of any right or remedy upon any breach by the Grantor shall impair such right or remedy or be construed as a waiver.

E. Acts beyond the Grantor's control. Nothing contained in this Easement shall be construed to entitle Five Valleys to bring any action against the Grantor for any injury to or change in the Property resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

F. Mediation. If a dispute arises between Grantor and Five Valleys concerning interpretation of the meaning of this Easement or concerning the consistency of any proposed use or activity with the terms or purpose of this Easement, and if Grantor agrees in writing not to proceed with the use or activity pending resolution of the dispute, either Grantor or Five Valleys may refer the dispute to mediation by request made in writing to the other party. Within ten (10) days of receipt of such referral, Grantor and Five Valleys will select an impartial mediator who shall conduct the mediation and thereby assist the parties in resolving the dispute cooperatively. Each party shall pay an equal share of the mediator's fee. In referring any matter arising under this easement to mediation, Grantor and Five Valleys agree that mediation offers an alternative to the expense and time required to resolve disputes by litigation and is therefore often preferable to litigation. Nevertheless, mediation pursuant to this Paragraph E shall be voluntary, and this mediation provision shall not be interpreted as precluding or limiting the parties from seeking legal or equitable remedies available under this Section VI.

Section VII
Maintenance and Taxes

The Grantor retains all responsibilities and agrees to bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the control of noxious weeds in accordance with Montana law, and agrees to defend and indemnify Five Valleys against such costs and liabilities.

The Grantor shall pay any and all taxes, assessments, fees, and charges levied by competent authority on the Property, except any lawful tax or assessment on this Easement which shall be paid by Five Valleys.

SECTION VIII
Indemnities

A. Control of Risks Associated with Property Ownership. Grantor and Five Valleys acknowledge and agree that Grantor retains primary ownership of the Property and therefore Grantor controls day-to-day activities on, and access to, the Property, except for Five Valleys' limited rights to monitor the condition of the Conservation Values and to enforce the terms of this Easement. Except as specifically provided in Paragraph C of this Section VIII, Grantor therefore agrees that general liability for risks, damages, injuries, claims, or costs arising by virtue of Grantor's continued ownership, use, and control of the Property shall remain with Grantor as a normal and customary incident of the right of Property ownership. [POSSIBLE INSERTION: Nothing in this Easement shall be construed as giving rise to any right or ability in Five Valleys to exercise physical or managerial control over activities on the Property or to become an "operator" of the Property within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), or the Montana Hazardous Waste Act, Sections 75-10-401, et seq., and 75-10-601 et seq., M.C.A., and similar state and federal statutes.]

B. Grantor's Obligation to Indemnify. Grantor agrees to hold harmless and indemnify Five Valleys from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, Five Valleys' reasonable attorneys' fees and costs of defense, arising from or in any way connected with: (i) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, except as set forth in Paragraph C below; (ii) the obligations specified in Section VII; and (iii) the obligations arising from past, present or future presence of any hazardous substance on the Property, and any obligation associated with the generation, discharge, transport, containment, or cleanup of any such hazardous substance.

C. Five Valleys' Obligation to Indemnify. Five Valleys shall hold harmless and indemnify Grantor from and against all liabilities, claims, penalties, costs, demands, or judgments, including reasonable attorneys' fees and costs of defense, arising from or in any way connected with injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, provided such acts or omissions are related to or associated with the duties and obligations of Five Valleys under the terms of this Easement.

D. Definitions. For the purposes of this Section VIII, Grantor's and Five Valleys' agreement to hold harmless and indemnify will extend to their respective directors, officers, employees, and agents and their heirs, personal representatives, successors and assigns. The term "hazardous substance" shall mean any chemical, compound, material, mixture, or substance that is now or hereafter defined or classified as hazardous or toxic by federal, state or local law, regulation, or ordinance.

Section IX

Assignment of Easement

Five Valleys may assign its interests in this Easement; provided that any assignment may be made only to an organization [or governmental agency] qualified at the time of transfer as an eligible donee under Internal Revenue Code Section 170(h)(3), and any regulations issued thereunder, and that is organized or operated primarily or substantially for one or more of the conservation purposes specified in Section 170(h)(4)(A) of the Internal Revenue Code. Five Valleys must require, as a condition of such transfer, that the conservation purposes of this Easement shall be enforced in perpetuity. Five Valleys represents that it will make a reasonable effort in the event of any assignment to suggest an assignee which is a qualified organization other than a governmental unit referred to in Section 170(c)(1) of the Code, which has conservation of natural resources as a substantial organizational purpose. Five Valleys represents to the Grantor that its present intention is to assign its interest in this Easement only in connection with dissolution of Five Valleys.

Section X Resource Data

Competent naturalists have studied the Property and have collected data, photographs, maps, surveys, studies, reports, and other documentation that documents the condition of the Property and its resources as of the date of execution of this Easement (which documentation is referred to in this Easement as the "Baseline Report"). The Grantors acknowledge receipt of a copy of the Baseline Report. The parties have signed a written acknowledgment, attached hereto as Exhibit C, that the Baseline Report accurately represents the condition of the Property at the time of conveyance of this Easement, as required by Treasury Regulation Section 1.170A-14(g)(5)(i). The original Baseline Report is attached hereto and incorporated in this Conservation Easement [OR, shall be maintained in the files of Five Valleys and shall be made available to Grantor for inspection and reproduction at Grantor's request.] The parties intend that the documentation shall be used by Grantee to monitor Grantor's compliance with the terms and conditions of this Easement. The parties also agree that if a dispute arises concerning the condition of the Property on the date of execution of this easement, the parties may use the Baseline Report and all other relevant data, photographs, maps, surveys, studies, reports, and other documentation to assist in the resolution of the dispute. The parties further agree that if the Baseline Report contains any summaries of, or representations about the terms or conditions of this Easement, including Exhibits _____ hereof, any conflict or inconsistency between the terms and conditions of this easement and the Baseline Report shall be governed by the express terms and conditions herein and not in the Baseline Report.

FOR USE IF BASELINE REPORT CAN'T BE COMPLETED BY DATE OF DONATION:

Grantor has made available to Five Valleys, prior to the execution of this Easement, information sufficient to document the condition of the Conservation Values of the Property. The parties acknowledge that this information shall be compiled and appended to a final written Baseline Report within ____ months of the execution of this Easement. The parties have signed a written acknowledgment, attached hereto as Exhibit ____ and incorporated by this reference, that the information compiled prior to the time of the grant of this Easement, which shall be incorporated into the Baseline Report, accurately represents the condition of the Conservation Values of the Property as of the date of the grant of this Easement in accordance with Treasury Regulation §1.170A-14(g)(5)(i). The parties intend that the documentation shall be used by Five Valleys to monitor Grantor's compliance with the terms and conditions of this Easement. The parties also agree that if a dispute arises concerning the condition of the Property on the date of execution of this easement, the parties may use the Baseline Report and all other relevant data, photographs, maps, surveys, studies, reports, and other documentation to assist in the resolution of the dispute. The parties further agree that if the Baseline Report contains any summaries of, or representations about the terms or conditions of this Easement, including Exhibits A - E hereof, any conflict or inconsistency between the terms and conditions of this easement and the Baseline Report shall be governed by the express terms and conditions herein and not in the Baseline Report. The final

Baseline Report shall be maintained in the files of Five Valleys and shall be made available to Grantor for inspection and reproduction at Grantor's request.

Section XI Extinguishment and Condemnation

A. Extinguishment of Easement. As provided for in Section 1.170A-14(g)(6)(i) of the Treasury Regulations, if a subsequent unexpected change in the conditions surrounding the property arise in the future which makes impossible or impractical the continued use of the Property for the conservation purposes set forth herein, this Easement may only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction. If this easement is terminated or extinguished by judicial proceedings, Five Valleys will be entitled to receive compensation from the Grantor in an amount determined in accordance with Paragraph B of this section XI, unless Montana law in effect at that time provides otherwise. The court shall provide for the compensation to be paid to Five Valleys at the time of a subsequent sale, exchange, or involuntary conversion of the Property. This easement will remain in full force and effect and will not be extinguished until (i) the full compensation has been received by Five Valleys; or (ii) Five Valleys has received a note in the amount of the compensation bearing interest at the rate payable by statute and payable at the time of the next sale, exchange, or involuntary conversion of the Property, which note is secured by a mortgage or trust indenture on the Property with a lien priority which is as of the date of recording of this easement. Five Valleys must use the compensation received with respect to the extinguishment in a manner which is consistent with the conservation purposes of this easement.

B. Compensation payable to Five Valleys if this Easement is extinguished. The Grantor and Five Valleys agree that this Easement creates a real property interest, immediately vested in Five Valleys, which will have a fair market value to be determined by multiplying the fair market value of the Property unencumbered by the Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of the conservation easement at the time of this grant to the value of the Property without deduction for the value of the easement at the time of the grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Internal Revenue Code Section 170(h). For the purposes of this paragraph, the ratio of the value of the easement to the value of the Property unencumbered by the easement shall remain constant. Within one (1) year of completion of the qualified appraisal, Grantor, Five Valleys, and Grantor's appraiser shall sign a written acknowledgement of the values thus established on a form similar to the sample attached hereto as Exhibit _____. The original of said acknowledgment shall be held on file with Five Valleys at their normal place of business. If the parties cannot agree upon the fair market value of the Property unencumbered by this Easement, as of the date of extinguishment, then this fair market value will be determined by an appraisal and the Grantor shall pay the cost of the appraisal.

Compensation payable to Five Valleys if this Easement is extinguished. [THIS PARAGRAPH TO BE USED WHEN A OWNER IS NOT SEEKING TAX BENEFITS AND THERE IS NO APPRAISAL]. This Easement constitutes a real property interest immediately vested in Grantee, which, for purposes of paragraph A or C of this Section XI, Grantor agrees that Five Valleys shall be compensated for the fair market value of its property right measured on the date of Easement termination, extinguishment, or condemnation. Grantor and Five Valleys agree that they shall endeavor in good faith to reach mutual agreement on the proceeds to which Five Valleys shall be entitled, if any, if this Easement is terminated, extinguished or condemned, without the need for appraisal. If mutual agreement cannot be reached by the parties, an appraisal of the value of this Easement, or portion thereof, that has been terminated, extinguished or condemned shall be conducted by a licensed, certified appraiser, who is acceptable to both parties. The appraiser shall apply appraisal standards for determining value

of conservation easements which are contained in the Internal Revenue Code, and Treasury Regulations promulgated thereunder, at the time this Easement is terminated, extinguished or condemned, or by any other method agreed to by Grantors and Five Valleys. Grantors and Five Valleys shall share equally in the cost of any appraisal pursuant to this paragraph.

C. Eminent Domain. If part or all of the Property is taken by right of eminent domain, the Grantor and Five Valleys may join in appropriate actions to recover the full value of the Property or portion of the Property taken and all incidental or direct damages resulting from the taking. Any expense incurred by the Grantor or Five Valleys in any such action shall be first reimbursed out of the condemnation award or settlement, and the remainder of the proceeds shall be divided between the Grantor and Five Valleys in proportion to their interest in the Property, as determined by Paragraph B of this section. Five Valleys must use the compensation which it receives with respect to the condemnation in a manner which is consistent with the conservation purposes of this Easement.

Section XII **Interpretation**

The provisions of this Easement shall be liberally construed to effectuate the purpose and terms of this Easement. The parties acknowledge that each party and its counsel have reviewed and revised this Easement and that no rule of construction that ambiguities are to be resolved against drafting party shall be employed in the interpretation of this Easement.

Section XIII **Liens and Mortgages**

Grantor represents that as of the date of this grant there are no liens or mortgages outstanding against the Property. Grantor has the right to use the Property as collateral to secure the repayment of debt, provided that any lien, mortgage, deed of trust, or other rights granted for such purpose are subordinate to Five Valleys' rights under this Easement. Under no circumstances may Five Valleys' rights be extinguished or otherwise affected by the recording, foreclosure, or any other action taken concerning any subsequent lien or other interest in the Property, and division or subdivision of the Property pursuant to foreclosure of a mortgage, deed of trust, or comparable instrument is expressly prohibited by this Easement.

OR

At the time of conveyance of this Easement, the Property is subject to a mortgage [deed of trust/contract for deed] in favor of _____ securing a promissory note executed by Grantor. Said mortgage [deed of trust/contract for deed] was recorded on _____, in Book/Roll _____, page _____, under Document No. _____, Records of _____ County, Montana. In accordance with Treasury Regulation §1.170A-14(g)(2), the holder of this mortgage has agreed by separate "Mortgage Subordination Agreement," which will be recorded immediately after this Easement is granted, to subordinate its rights and remedies in the Property to the extent necessary to permit Five Valleys to enforce the conservation purposes of this Easement in perpetuity and to prevent any modification or extinguishment of this Easement by the exercise of any rights of the mortgage [deed of trust/contract for deed] holder.

Grantor has the right to use the Property as collateral to secure the repayment of debt in the future, provided that any lien, mortgage, deed of trust, or other rights granted for such purpose are subordinate to Five Valleys' rights under this Easement. Under no circumstances may Five Valleys' rights be extinguished or otherwise affected by the recording, foreclosure, or any other action taken concerning any subsequent lien or other

interest in the Property, and division or subdivision of the Property pursuant to foreclosure of a mortgage, deed of trust, or comparable instrument is expressly prohibited by this Easement.

All provisions concerning subordination contained in this Section ____ shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

Section XIII Miscellaneous Provisions

A. Partial invalidity. If any provision of this Easement or the application of any provision of this Easement to any person or circumstance is found to be invalid, the remainder of the provisions of this Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected by the finding of invalidity.

B. Grantor" and "Five Valleys". The terms "Grantor" and "Five Valleys", as used in this Easement, and any pronouns used in place of those terms, shall mean and include the Grantor named above and Grantor's heirs, personal representatives, executors, successors and assigns, and Five Valleys Land Trust, Inc., and its successors and assigns, respectively.

C. Titles. Section and paragraph titles and subtitles are for convenience only and shall not be deemed to have legal effect.

D. Subsequent deeds. The Grantor agrees that reference to this Easement will be made in any subsequent purchase and sale agreements, deeds, or other legal instruments conveying an interest in the Property (including any leasehold interest).

E. Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the Grantor and Five Valleys may jointly amend this Easement; provided that no amendment shall be allowed that affects the qualification of the Easement or the status of Five Valleys under any applicable laws, including Section 170(h) of the Internal Revenue Code of 1986, as amended, or Section 76-6-101, et seq., MCA. Any such amendment shall be consistent with the purposes of this Easement, shall not affect its perpetual duration, shall not permit additional development or improvements to be undertaken on the Property other than development or improvements currently permitted by this Easement, and must either enhance or have no effect on any of the Conservation Values protected by this Easement. Amendments made pursuant to this paragraph may not result in prohibited inurement or private benefit to any party. Any amendment shall be in writing, shall be signed by the Grantor and Five Valleys, and shall be recorded in the official records of _____ County, Montana.

F. Governing law. If any dispute arises over the interpretation or enforcement of the terms and conditions of this Easement, the laws of the State of Montana shall govern the resolution of such dispute.

G. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Section ____ above.

IN WITNESS WHEREOF, this Easement has been executed by the Grantor and Five Valleys on _____, 20__.

[GRANTOR'S NAME]

FIVE VALLEYS LAND TRUST, INC.

By: _____
John Talbot, President

By: _____
Ann Boone, Secretary

STATE OF MONTANA)
 :SS
COUNTY OF MISSOULA)

This instrument was acknowledged before me on _____, 20__, by _____ as
_____ of _____.

(SEAL)

Notary public for the state of Montana
Residing at _____
My commission expires _____

STATE OF MONTANA)
 :SS
COUNTY OF MISSOULA)

This instrument was acknowledged before me on _____, 20__, by _____ as
_____ of Five Valleys Land Trust, Inc.

(SEAL)

Notary public for the state of Montana
Residing at _____
My commission expires _____

STATE OF MONTANA)
 :SS
COUNTY OF MISSOULA)

This instrument was acknowledged before me on _____, 20__, by _____ as
_____ of Five Valleys Land Trust, Inc.

(SEAL)

Notary public for the state of Montana

Residing at _____

My commission expires _____

EXHIBIT A

The Property LEGAL DESCRIPTION:

EXHIBIT B
Map of Easement Property

EXHIBIT C
BASELINE DOCUMENTATION REPORT
[TO BE USED WHEN THE BASELINE REPORT IS RECORDED WITH THE CONSERVATION
EASEMENT]
**TO BE INCLUDED AS THE LAST PAGE OF THE BASELINE REPORT WHICH WILL BE
ATTACHED HERE:**

This acknowledgment is made by _____ whose address is _____
Montana 59801, (referred to in this acknowledgment as the "GRANTOR"), and Five Valleys Land Trust,
Inc., whose address is P.O. Box 8953, Missoula, Montana 59807 (referred to in this acknowledgment as the
"Five Valleys").

1. The Grantor is the owner of approximately ____ acres of real property located in Missoula County,
Montana (referred to in this acknowledgment as the "Property"), and intends to grant Five Valleys a
conservation easement on that Property.

2. Attached to this acknowledgment is documentation sufficient to establish the condition of the
Property on the date of execution of the conservation easement. The data and photographs contained in this
documentation were obtained during visits to the Property in _____.

3. The Grantor and Five Valleys mutually acknowledge and agree that the documentation attached to
this acknowledgment constitutes an accurate representation of the condition of the Property as of the date of
this acknowledgment.

4. A copy of this acknowledgment will be attached to the conservation easement as an exhibit in
order to provide evidence in the real estate records of compliance with Section 1.170A-14(g)(5)(i) of the
Internal Revenue Service Regulations.

Dated 20 .

[Grantor's NAME]

FIVE VALLEYS LAND TRUST, INC.

By: _____
[Name of FVLT Stewardship Staff responsible for baseline report preparation/ review]

EXHIBIT C

ACKNOWLEDGMENT OF BASELINE DOCUMENTATION SITE VISIT [TO BE USED WHEN THE BASELINE REPORT IS FINISHED AFTER THE CONSERVATION EASEMENT IS RECORDED]

_____ of _____, as Grantor of the Deed of Conservation Easement to which this Exhibit C is attached and into which it is incorporated by reference, and Five Valleys Land Trust, Inc., whose address is P.O. Box 8953, Missoula, Montana 59807 (referred to in this acknowledgment as the "Five Valleys"), hereby mutually acknowledge, declare and agree as follows:

1. Grantor has made available to a representative of Five Valleys prior to the grant of this Easement, information sufficient to document the condition of the Conservation Values associated with the Property that is subject to this Easement.
2. A representative of Five Valleys has collected and compiled documentation sufficient to establish the condition of the Conservation Values of the Property as of the date of the grant of this Easement and has shared this documentation with Grantor.
3. The documentation was compiled by a representative of Five Valleys on a site visit to the Property on _____, and consists of mapping of physical features and resources, photographs of structures, developments and improvements, and gathering of other appropriate information to document the Conservation Values of the Property.
4. Grantor and Five Valleys mutually acknowledge and agree that this information constitutes an accurate representation of the Conservation Values of the Property to be subject to this Easement at the time of its grant.
5. Additional information and documentation will be gathered as historical, government and archival documents and aerial photographs are made available to Grantor and Five Valleys.
6. Grantor and Five Valleys further agree that a final resource documentation report shall be completed from the above mentioned information by _____, or sooner. Upon its completion, the final resource documentation report shall be reviewed and approved in final form by both Grantor and Five Valleys, and shall be on file with Five Valleys in Five Valleys' normal place of business.

DATED this ___ day of _____, 20__.

GRANTOR: _____

FIVE VALLEYS LAND TRUST, INC.:

Jim Berkey, Stewardship and Land Protection
Coordinator

EXHIBIT D

**FORM OF
ACKNOWLEDGMENT OF VALUE OF CONSERVATION EASEMENT
(NOT TO BE RECORDED)**

_____, of _____, Montana, Grantor of a Deed of Conservation Easement dated _____, 20____, and recorded on _____, 20____, at (book and page), Record of _____ County, Montana, the Five Valleys Land Trust of Missoula, Montana, Grantee of said Conservation Easement, and _____, of _____, Montana, appraiser of the Property subject to the Conservation Easement, hereby acknowledge, declare and agree as follows:

1. That the value of the Property immediately prior to encumbrance by the grant of the Conservation Easement was _____, and the value of the Property immediately after the conveyance of the Conservation Easement to the Five Valleys Land Trust, Inc., was _____.
2. Thus, the parties hereto agree that the grant of the Conservation Easement reduced the value of the Grantor's interest in the Property by _____ percent (_____%).

The original of this Acknowledgment will be retained in the files of Five Valleys Land Trust, Inc., or its successors and assigns, at its normal place of business.

DATE

GRANTOR(S)

DATE

PRESIDENT
FIVE VALLEYS LAND TRUST

DATE

APPRAISER

APPENDIX E

MONTANA LAND RELIANCE- SAMPLE DEED OF CONSERVATION EASEMENT

DEED OF CONSERVATION EASEMENT

THIS GRANT DEED OF CONSERVATION EASEMENT ("Easement") is made this _____ day of _____, 20_____, by _____, whose mailing address is _____, (hereinafter together with their heirs, personal representatives, successors, and assigns collectively referred to as "Grantor") and THE MONTANA LAND RELIANCE, a nonprofit Montana corporation with a principal office at 324 Fuller Avenue, Helena, Montana 59601 (hereinafter referred to as "Grantee");

R E C I T A L S:

WHEREAS, Grantor is the owner of certain real property in Anaconda-Deer Lodge County, Montana, more particularly described in Exhibit A attached hereto and incorporated by this reference (hereinafter the "Property"); and,

WHEREAS, the Property has significant scenic and open space values as recognized in the Montana Open Space Land and Voluntary Conservation Easement Act, Montana Code Annotated (MCA) Section 76-6-101, et seq.; and,

WHEREAS, the Property constitutes a valuable element of the Big Hole River Valley and its scenic and open space lands (hereinafter the "Conservation Values") which are of great importance to Grantor and to the people of the State of Montana, and are worthy of preservation; and,

WHEREAS, it is the intent of this Easement to maintain the rural, agricultural and natural scenic qualities of the area by the retention of significant open space for a variety of uses including wildlife habitat, recreation and agricultural purposes; and,

WHEREAS, the Anaconda-Deer Lodge County, Montana, Commissioners have expressly recognized in the County Master Plan, adopted in 1992 and revised in June, 1992, the importance of preserving open space and agricultural lands in Anaconda-Deer Lodge County, Montana, as a result of rapid urban and suburban development of formerly rural lands; and,

WHEREAS, the Anaconda-Deer Lodge County Master Plan specifically encourages use of conservation easements to preserve open space and agricultural lands in the area; and,

WHEREAS, Grantor and Grantee intend to preserve the Conservation Values of the Property in their largely undeveloped condition to protect and preserve the natural scenery enjoyed by the general public traveling Highway 43 and recreating on the Big Hole River; and,

WHEREAS, Grantor desires and intends that the Conservation Values of the Property be preserved and maintained by a continuation of land uses that will not substantially impair those Values; and,

WHEREAS, the State of Montana has recognized the importance of private efforts toward voluntary conservation of private lands in the state by the enactment of MCA Sections 76-6-101, et seq., and 76-6-201, et seq.; and,

WHEREAS, Grantee is a qualified organization under MCA Sections 76-6-104(5) and 76-6-204, organized to conserve land for scenic open space purposes, and is an organization described in Section 170(h)(3) of the Internal Revenue Code of 1986 (hereinafter the "Code") qualified to receive and hold conservation easements;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and further, pursuant to MCA Section 76-6-201, et seq., Grantor does hereby convey to Grantee this Easement in perpetuity, consisting of the rights hereinafter enumerated on, over and across the Property.

SECTION I

Purpose and General Effect of Easement

A. Purpose. It is the purpose of this Easement to assure that the Conservation Values will be maintained forever and to prevent any use of, or activity on, the Property that will significantly impair those Values. Grantor intends that this Easement will limit the use of the Property to such activities as are consistent with that purpose (including ranching activities; hunting, fishing and other recreational uses; guest ranching activities; and operation of a bed and breakfast business consistent with the terms hereof). Grantor and Grantee recognize that changes in economic conditions, in technologies, in accepted farm, ranch and forest management practices, and in the situation of Grantor may result in an evolution of land uses and practices related to the Property provided that such uses and practices are consistent with the purpose of this Easement.

B. Perpetual restrictions. This Easement shall run with and burden title to the Property in perpetuity and shall bind Grantor and all future owners and tenants.

C. Dedication. The Property is hereby declared to be open space and may not, except as specifically provided herein, be converted from open space.

SECTION II

Rights Conveyed

The rights conveyed by this Easement are the following:

A. Identification and protection. To identify, preserve and protect in perpetuity the Conservation Values, subject, however, to Grantor's reserved rights as herein provided and further subject to all third party rights of record in the Property existing at the time of conveyance of this Easement and not subordinated to this Easement.

B. Access. Upon prior notice to Grantor, to enter upon the Property to inspect the same and to monitor Grantor's compliance with the terms of this Easement in a manner that will not unreasonably interfere with the use of the Property by Grantor. Aside from the rights of access granted in the preceding sentence of this paragraph B, this Easement does not grant to Grantee, nor to the public, any rights to enter upon the Property.

C. Injunction and restoration. To enjoin any activity on, or use of, the Property which is inconsistent with the purpose of this Easement and to enforce the reasonable restoration of such areas or features of the Property as may be damaged by such activity or use.

SECTION III
Reserved Rights and Prohibited Uses

A. **Reserved rights.** Grantor reserves to themselves and to their personal representatives, heirs, successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the terms of this Easement. Without limiting the generality of the foregoing sentence, those uses and practices described in Exhibit B, attached hereto and incorporated by this reference, are expressly permitted.

B. **Prohibited uses.** Any activity on, or use of, the Property that is inconsistent with the terms of this Easement is prohibited. Without limiting the generality of the foregoing sentence, the activities and uses described in Exhibit C, attached hereto and incorporated by this reference, are expressly prohibited.

SECTION IV
Prior Notice by Grantor and Approval of Grantee

Any enterprise, use or activity proposed to be done or undertaken by Grantor which requires the prior approval of Grantee pursuant to an express provision of this Easement (including any provision of Exhibit B or Exhibit C expressly requiring the prior approval of Grantee) shall be commenced only after satisfaction of the notice and approval conditions of this Section IV.

A. **Grantor's written notice.** Prior to the commencement of any enterprise, use or activity requiring Grantee's approval, Grantor shall send Grantee written notice of the intention to commence or undertake such enterprise, use or activity. Said notice shall inform Grantee of all aspects of such proposed enterprise, use or activity, including, but not limited to, the nature, siting, size, capacity, and number of structures, improvements, facilities, or uses.

B. **Grantee's address.** Said notice shall be sent by registered or certified mail, return receipt requested, or by a private delivery service and shall be addressed to Grantee at P.O. Box 355, Helena, MT 59624, or to such other address as Grantor from time to time may be informed of in writing by Grantee.

C. **Grantee's response.** Grantee shall have thirty (30) days from the mailing of such notice, as indicated by the registered or certified return receipt, or the date of delivery by a private delivery service, to review the proposed enterprise, use or activity and to notify Grantor of any objection thereto. Such objection, if any, shall be based upon Grantee's opinion that the proposed enterprise, use or activity is inconsistent with the purpose of this Easement. If, in Grantee's judgment, conformity with the purpose of this Easement is possible, said notice shall inform Grantor of the manner in which the proposed enterprise, use or activity can be modified to be consistent with this Easement. Except as provided in paragraph E of this Section IV, only upon Grantee's express written approval may the proposed enterprise, use or activity be commenced and/or conducted, and only in the manner explicitly represented by Grantor and approved by Grantee.

D. **Grantor's address.** Grantee's response to Grantor's notice shall be sent by registered or certified mail, return receipt requested, or by a private delivery service and shall be

addressed to Grantor at _____, or to such other address as Grantee from time to time may be informed of in writing by Grantor.

E. Grantee's failure to respond. Should Grantee fail to post its response to Grantor's notice within thirty (30) days of the posting of said notice, the proposed enterprise, use or activity shall automatically be deemed consistent with the purpose of this Easement, Grantee having no further right to object to the enterprise, use or activity identified by such notice.

F. Acts beyond Grantor's control. Grantor shall be under no liability or obligation for any failure in the giving of notice with regard to any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate significant injury to the Property or to any person resulting from causes beyond Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any other cause beyond the control of Grantor similar to those occurrences specified.

SECTION V

Breach and Restoration

A. Grantee's remedies. If Grantee determines that Grantor, or a third party sanctioned by Grantor, is in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantor:

(i) fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee;

(ii) under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing such violation within thirty (30) days of the date mutually agreed to between Grantor and Grantee as the date when efforts to cure such violation can reasonably begin; or,

(iii) fails to continue diligently to cure such violation until finally cured,

Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation by a temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement, and to require the restoration of the Property to the condition that existed prior to any such injury. If Grantee, in its reasonable discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values, Grantee may pursue its remedies under this paragraph (other than an action for damages) without waiting for the period provided for a cure to expire. Grantee's rights under this paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this paragraph, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

B. Costs of enforcement. Any costs incurred by Grantee in enforcing the terms of this Easement against Grantor, including reasonable costs of suit and attorneys' fees, and any costs of restoration necessitated by Grantor's violation of the terms of this Easement shall be borne by Grantor. If Grantor prevails in any action to enforce the terms of this Easement, Grantor's reasonable costs of suit, including reasonable attorneys' fees, shall be borne by Grantee.

C. Grantee's discretion. Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any provision of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such provision or of any subsequent breach of the same or any other provision of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.

D. Acts beyond Grantor's control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate significant injury to the Property resulting from such causes.

SECTION VI

Costs and Taxes

Grantor shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including responsibility for the control of noxious weeds in accordance with Montana law. Grantor shall pay any and all taxes, assessments, fees, and charges levied by competent authority on the Property, except any tax or assessment on this Easement herein granted. Any lawful tax or assessment on this Easement shall be paid by Grantee. Grantor shall also be responsible for and shall bear all costs associated with ensuring compliance with all federal, state and local laws, regulations, rules, and ordinances.

SECTION VII

Indemnities

A. Control of risks associated with Property ownership. Grantor and Grantee acknowledge and agree that Grantor retains primary ownership of the Property and therefore Grantor controls day-to-day activities on, and access to, the Property, except for Grantee's limited rights to monitor the condition of the Conservation Values and to enforce the terms of this Easement. Except as specifically provided in paragraph C of this Section VII, Grantor therefore agrees that general liability for risks, damages, injuries, claims, or costs arising by virtue of Grantor's continued ownership, use and control of the Property shall remain with Grantor as a normal and customary incident of the right of Property ownership.

B. Grantor's obligation to indemnify. Grantor agrees to hold harmless and indemnify Grantee from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, Grantee's reasonable attorneys' fees and costs of defense, arising from or in any way connected with: (i) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, except as set forth in paragraph C below; (ii) the obligations of Grantor specified in Section VI;

and (iii) the obligations arising from past, present or future presence of any hazardous substance on the Property, and any obligation associated with the generation, discharge, transport, containment, or cleanup of any such hazardous substance, except as set forth in paragraph C below.

C. Grantee's obligation to indemnify. Grantee shall hold harmless and indemnify Grantor from and against all liabilities, claims, penalties, costs, demands, or judgments, including reasonable attorneys' fees and costs of defense, arising from or in any way connected with injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, while Grantee is on the Property in the course of carrying out the duties and obligations of Grantee under the terms of this Easement.

D. Definitions. For the purposes of this Section VII, Grantor's and Grantee's agreement to hold harmless and indemnify will extend to their respective directors, officers, employees, and agents and their heirs, personal representatives, successors and assigns. The term "hazardous substance" shall mean any chemical, compound, material, mixture, or substance that is now or hereafter defined or classified as hazardous or toxic by federal, state or local law, regulation or ordinance.

SECTION VIII

Assignment of Easement

The benefits of this Easement shall be assignable, but Grantee may not transfer or assign its interest in the Property created by this Easement except to a "qualified organization," within the meaning of Section 170(h)(3) of the Code. In the event assignment of this Easement becomes necessary, Grantee shall seek an assignee which is mutually acceptable to Grantee and Grantor. Any such qualified organization shall agree to enforce in perpetuity the conservation purpose of this Easement. Grantee agrees that it will make a reasonable effort in the event of any assignment to suggest an assignee which is a qualified organization other than a governmental unit referred to in Section 170(c)(1) of the Code, which has conservation of scenic open space as a substantial organizational purpose, and Grantee further represents to Grantor that its present intention is to assign its interest in this Easement only in connection with a dissolution of Grantee.

SECTION IX

Documentation

Grantor has made available to Grantee, prior to the execution of this Easement, information sufficient to document the condition of the Conservation Values of the Property. The parties acknowledge that this information shall be compiled and developed into a final resource documentation report as soon as is practically feasible after the grant of this Easement. The parties have signed a written acknowledgment, attached hereto as Exhibit D and incorporated by this reference, that the information compiled prior to the time of the grant of this Easement, which shall be incorporated into the final resource documentation report, accurately represents the condition of the Conservation Values of the Property as of the date of the grant of this Easement in accordance with Treasury Regulation §1.170A-14(g)(5)(i). The parties intend that the documentation shall be used by Grantee to monitor Grantor's compliance with the terms and conditions of this Easement. The documentation shall be on file with Grantee.

SECTION X
Extinguishment: Grantee's Entitlement to Proceeds

A. **Extinguishment.** If circumstances arise in the future which render the purpose of this Easement impossible to accomplish, this Easement may only be terminated or extinguished (as provided for in Treasury Regulations Section 1.170A-14(g)(6)(i)), whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, and the amount of the compensation to which Grantee shall be entitled from any sale, exchange or involuntary conversion of all or any portion of the Property, subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by Montana law at the time, in accordance with paragraph B of this Section X. Grantee shall use any such proceeds in a manner consistent with the purpose of this Easement.

B. **Compensation.** This Easement constitutes a real property interest immediately vested in Grantee, which, for purposes of paragraph A of this Section X, the parties stipulate to have a fair market value determined by multiplying the fair market value of the Property unencumbered by the Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of the Easement at the time of this grant to the value of the Property, without deduction for the value of the Easement, at the time of this grant. The values referred to in the preceding sentence shall be those values established by Grantor's qualified appraisal (pursuant to Treasury Regulation §1.170A-13) for federal income, gift or estate tax purposes. For the purpose of this paragraph, the ratio of the value of the Easement to the value of the Property unencumbered by the Easement, as established at the time of this grant, shall remain constant. Within one (1) year of completion of the qualified appraisal, Grantor, Grantee and Grantor's appraiser shall sign a written acknowledgment of the values thus established on a form similar to the sample attached hereto as Exhibit E. The original of said acknowledgment shall be held on file with Grantee at Grantee's normal place of business.

C. **Eminent domain.** If all or a portion of the Property is taken in exercise of eminent domain by public, corporate or other authority, so as to abrogate the restrictions imposed by this Easement, Grantor and Grantee may join in appropriate actions to recover the full value of the Property (or portion thereof) taken and all incidental or direct damages resulting from such taking. Any expense incurred by Grantor or Grantee in any such action shall be first reimbursed out of the recovered proceeds. If the full value of the Property (or portion thereof) taken and all incidental and direct damages recovered in such eminent domain proceedings is determined to be the fair market value of the Property (or portion thereof) taken unencumbered by this Easement, the remainder of such proceeds shall be divided between Grantor and Grantee in proportion to their interest in the Property (or portion thereof) as established by paragraph B of this Section X. Grantor shall receive all proceeds, however, if the fair market value and damages recovered in such eminent domain proceeding are determined to be the fair market value of the Property (or portion thereof) taken as encumbered by this Easement. Nothing herein shall prevent Grantee from independently seeking just compensation for the taking or condemnation of its conservation easement interest in the Property and for any incidental or direct damages to the Conservation Values protected by this Easement which are caused by such taking or condemnation.

SECTION XI
Miscellaneous Provisions

A. **Partial invalidity.** If any provision of this Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this

Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

B. "Grantor" and "Grantee". The terms "Grantor" and "Grantee," as used herein, and any pronouns used in place thereof, shall mean and include the above-named Grantor and their heirs, personal representatives, executors, successors in interest, and assigns, and The Montana Land Reliance and its successors and assigns, respectively.

C. Titles. Section and paragraph titles and subtitles are for convenience only and shall not be deemed to have legal effect.

D. Subsequent transfers. Grantor agrees that reference to this Easement and reference to its dates and places of recording in the Public Records of Anaconda-Deer Lodge County will be made in any subsequent deed or other legal instrument by which they convey any interest in the Property, including any leasehold interest.

E. Governing law. In the event any dispute arises over the interpretation or enforcement of the terms and conditions of this Easement, the laws of the State of Montana shall govern resolution of such dispute.

F. Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualifications of this Easement under any applicable laws, including MCA Section 76-6-101, et seq., and the Code. Any amendment must be consistent with the conservation purpose of this Easement, may not affect its perpetual duration, and either must enhance, or must have no effect on, the Conservation Values which are protected by this Easement. Furthermore, the provisions concerning valuation of this Easement, which are set forth in Section X above and in Exhibit E, may not be amended. Any Easement amendment must be in writing, signed by both parties, and recorded in the Public Records of Anaconda-Deer Lodge County.

G. Conservation intent. Any ambiguities in this Easement shall be construed in a manner which best effectuates its Conservation Values.

IN WITNESS WHEREOF, Grantor and Grantee have hereunto set their hands.

GRANTOR:

By: _____

GRANTEE:

THE MONTANA LAND RELIANCE,
a corporation

By: _____
[Name and title]

EXHIBIT A
LEGAL DESCRIPTION

EXHIBIT B PERMITTED USES AND PRACTICES

The following uses and practices, though not an exhaustive recital of consistent uses and practices, are hereby deemed to be consistent with the purpose of this Easement and are expressly permitted:

1. Ranching activities. To conduct ranching activities, including raising and managing livestock and leasing of the Property for grazing purposes. Also, rangeland restoration and improvement practices are permitted provided the subsurface of the soil is not disturbed by deep plowing or exposed to the effects of wind and water erosion (no tillage methods of rangeland reseeding and cultivation are preferable).
 2. Hunting and fishing. To use the Property for hunting of game animals and fishing.
 3. Water resources. To maintain, enhance and develop water resources on the Property for permitted agricultural uses, fish and wildlife uses, domestic needs, and private recreation. Permitted uses include, but are not limited to, the following: the right to restore, enhance and develop water resources, including ponds and dams; to locate, construct, repair, and maintain irrigation systems; and to develop stock watering facilities.
 4. Maintenance and structures. All existing structures and structural remains, roads, etc., on the Property are identified in Exhibit F, attached hereto and incorporated by reference. The existing old log barn and log structure remains noted in Exhibit F and located near LaMarche Creek shall at no time be replaced with new structures. Grantor retains the right to remove these structures should they prove a hazard to persons or property. Except as limited in the preceding sentences, Grantor retains the right to maintain, repair, remodel, and make additions to any existing or subsequently constructed structures and improvements expressly permitted by this Easement. In the event of removal or destruction of any or all of said structures and improvements, to replace them with structures and improvements of a similar function and use, of the same approximate size and in the same general locations. To place upon the Property additional non-residential structures and other improvements as may be necessary for agricultural purposes, or as may be ancillary to the existing residence (such as garages or outbuildings) pursuant to the terms hereof. All such new non-residential structures shall be located within Development Area No. 2 delineated in Exhibit G, attached hereto and incorporated by reference, on the north and east side of the road on the bench, above the creek bottom and below the existing residence.
 5. New residence. To construct, maintain and repair one (1) additional single family residence with an associated garage or garages or other ancillary outbuildings. The additional residence shall at no time exceed 4,000 square feet, not including any attached garage, and shall be located within Development Area No. 1 delineated in Exhibit G, between the west side of the road and base of the hill.
- In the event of removal or destruction of any residence or structure described in this paragraph 5, Grantor may replace the same with a similar structure in the same general location.
6. Mineral exploitation. There shall be no exploration for, extraction or removal of any minerals (including oil, gas, hydrocarbons, and hard-rock minerals) by any surface or subsurface mining method; there shall be no exploration for, or exploitation of, hydrothermal resources; and there shall be no extraction or removal of any non-mineral substance (including peat, but other than timber as permitted by this Exhibit B, paragraph 8) resulting in significant

disturbance to, or degradation of, topsoil, vegetation, or water quality. Notwithstanding the foregoing sentence, subject to the prior approval of Grantee, as provided in Section IV hereof, Grantor may extract minerals or non-mineral substances, for non-commercial use on the Property, by a method that has limited, localized impact on the Property but that is not irretrievably destructive of any Conservation Value, within the meaning of Treasury Regulation Section 1.170A-14(g)(4)(i) or its successor provision, provided the surface alteration is restored to its original state and approximate contour.

7. Transfer of land. To grant, sell, exchange, devise, gift or otherwise convey or dispose of all or any portion of Grantor's right, title, estate, and interest in the Property as one (1) parcel only. Grantor shall furnish Grantee with a copy of any document or conveyance utilized to effect the transfer of the Property within thirty (30) days of the execution of said document or conveyance.

8. Timber removal. To remove select trees that present a hazard to persons or property, or the cutting of firewood, posts and poles for non-commercial use. Further, Grantor retains the right to selectively harvest trees to use in construction of residential or non-residential structures as permitted in this Exhibit B. All timber removed by Grantor pursuant to this paragraph 8, must be used or disposed of on the Property or, in the case of firewood, given away free of charge, and, such timber removed must protect and minimize impact on the Conservation Values. In connection with the upkeep, maintenance and repair of structures and residences, Grantor specifically reserves the right to clear brush, and prune, trim and remove trees, or to plant trees, shrubs, flowers, and other native or non-native species for landscaping or gardening purposes.

In the event of widespread disease, or insect infestation; or unforeseen natural events, such as wind-throw or fire, which jeopardizes the overall forest health and may require more than limited, selective harvest to control, Grantor and Grantee may, by mutual agreement, expand the provisions of this paragraph 8, for non-commercial or commercial timber harvest, to protect the Conservation Values of the Property in accordance with the terms and conditions of Section IV.

9. Bed and breakfast business and/or residence-based business. To use one (1) of the residences on the Property for the operation of a bed and breakfast business.

Persons living on the Property may also conduct businesses within their residence so long as any such business, other than the bed and breakfast business permitted above, is not a sales or service business involving dealing with the general public on the Property on a regular basis.

10. Guest ranching operation. To use the Property, or enter into agreements with third parties to enable them to use the Property for a commercial guest ranching operation. Any agreement between Grantor and others pertaining to the use of the Property for commercial guest ranching activities must be made expressly subject to the terms and conditions of this Easement. Consistent with this paragraph, Grantor may use in its guest ranching operation all existing or subsequently constructed structures and improvements expressly permitted by this Easement or replacements thereof. However, Grantor and third parties may not construct any facilities or structures on the Property, except as provided for in this Exhibit B, paragraphs 4 and 5, to accommodate the guest ranching operation.

----- END EXHIBIT B -----

EXHIBIT C PROHIBITED USES AND PRACTICES

The following uses and practices, though not an exhaustive recital of inconsistent uses and practices, are hereby deemed to be inconsistent with the purpose of this Easement and are expressly prohibited:

1. Subdivision. The division, subdivision or de facto subdivision of the Property.
2. Mineral exploitation. Exploration for, or the removal or extraction of any mineral or non-mineral substance by any surface or subsurface mining or extraction method, except as provided in Exhibit B.
3. Commercial facilities. Except as expressly permitted under Exhibit B, the establishment of any commercial or industrial facilities including, but not limited to, guest ranching, outfitting, commercial feed lot, any retail sales or service business, restaurant, night club, campground, trailer park, motel, hotel, commercial recreation facility, gas station, retail outlet, or facility for the manufacture or distribution of any product (other than products to be grown or produced on the Property in connection with purposes expressly permitted in Exhibit B hereto).
4. Dumping. The dumping or other disposal of non-compostable refuse on the Property, except nonhazardous wastes generated by normal ranching and land management operations.
5. Construction. The construction of any structures except as provided in Exhibit B.
6. Billboards. The construction, maintenance or erection of any billboards. Roadside signs are permitted only for the purposes of posting the name of the Property, advertising any business permitted on the Property, controlling public access, providing public notification of this Easement, or advertising the Property for sale.
7. Roads. The construction of roads except in connection with access to residences and structures permitted in Exhibit B. Any road constructed shall be sited and maintained so as to minimize adverse impact to the Conservation Values.

Aside from right-of-way easements Grantor may elect to grant to the appropriate governmental authority in relation to the improvement and/or expansion of Highway 43, the granting of road right-of-way easements upon or across the Property, except on existing or permitted roads, is prohibited. However, right-of-way easements may be granted by mutual agreement of Grantor and Grantee in cases where eminent domain statutes apply and clear public necessity has been demonstrated to Grantor and Grantee.

8. Utilities. The granting of major utility corridor right-of-way easements. However, such right-of-way easements may be granted by mutual agreement of Grantor and Grantee in cases where eminent domain statutes apply and clear public necessity has been demonstrated to Grantor and Grantee. Nothing in this paragraph is intended to preclude Grantor from installing utility structures, lines, conduits, cables, wires, or pipelines upon, over, under, within, or beneath the Property to existing and subsequently constructed structures and improvements expressly permitted by this Easement, or from granting right-of-way easements for utility services along or adjacent to the county and/or state roads or existing and permitted roads on the Property.

9. Mobile homes, etc. The placing, use or maintenance of any trailer, mobile home or other moveable living unit (including any such unit placed on a permanent foundation); provided, however, that Grantor or Grantor's guests may park or use a recreational vehicle on the Property on a temporary basis.

10. Game, fur or fish farms. The raising or confinement for commercial purposes of (i) "alternative livestock" and "game animals" as defined in MCA Section 87-4-406 or its successor statute, (ii) native or exotic fish, except that "private fish ponds," as defined by MCA Section 87-4-603, or its successor statute, may be maintained for recreational use, (iii) game birds, (iv) furbearers, including mink and fox, or (v) other "wild animals" as defined in MCA Section 87-4-801, or its successor statute, and "non-game wildlife" as defined in MCA Section 87-5-103(5), or its successor statute.

11. Commercial timber harvest. Except as provided in Exhibit B, paragraph 8, the harvest of timber on the Property for commercial purposes. For the purposes of this Easement, the term "commercial timber harvest or thinning" is defined as any timber harvest in which the product of such harvest is sold, traded, exchanged, or used off of the Property.

12. Farming. Farming or cultivation of the Property, except as provided in Exhibit B, paragraph 1. Grantor retains the right, however, to have vegetable gardens on the Property for personal use.

----- END EXHIBIT C -----

EXHIBIT D
PROPERTY RESOURCE DOCUMENTATION REPORT &
ACKNOWLEDGMENT OF ITS ACCURACY

In accordance with Treasury Regulation §1.170A-14(g)(5)(i), _____, Grantor of this Deed of Conservation Easement to THE MONTANA LAND RELIANCE, Grantee of said Conservation Easement, hereby acknowledge, declare, and agree that they have reviewed the information contained in the Resource Documentation Report and that the Resource Documentation Report is an accurate representation of the real property to be protected by this Conservation Easement at the time of the transfer.

DATED this ____ day of _____, 20_____.

GRANTOR:

By: _____

GRANTEE:

THE MONTANA LAND RELIANCE,
a corporation

By: _____
[Name and title]

EXHIBIT E
SAMPLE OF FORM TO BE USED FOR
ACKNOWLEDGMENT OF VALUE OF THE
CONSERVATION EASEMENT

_____ of _____, Grantor of a Deed of Conservation Easement dated _____, 20____, and recorded on _____, 20____, at Book __, Page __, Records of _____ County, Montana; THE MONTANA LAND RELIANCE, of Helena, Montana, Grantee of said Conservation Easement; and, _____, appraiser of the property subject to the Conservation Easement, (hereinafter the "Property"), hereby acknowledge, declare and agree as follows:

1. That the value of the Property immediately prior to encumbrance by the grant of the Conservation Easement was _____, and the value of the Property immediately after the conveyance of the Conservation Easement to the Montana Land Reliance was _____.

2. Thus, the parties hereto agree that the grant of the Conservation Easement reduced the value of Grantor's interest in the Property by _____ percent (____%).

The original of this Acknowledgment is to be retained in the files of The Montana Land Reliance, or its successors and assigns, at its normal place of business.

DATE By: _____

THE MONTANA LAND RELIANCE

DATE By: _____
[Name and title]

APPRAISER

DATE _____

EXHIBIT F
EXISTING STRUCTURES, ETC.

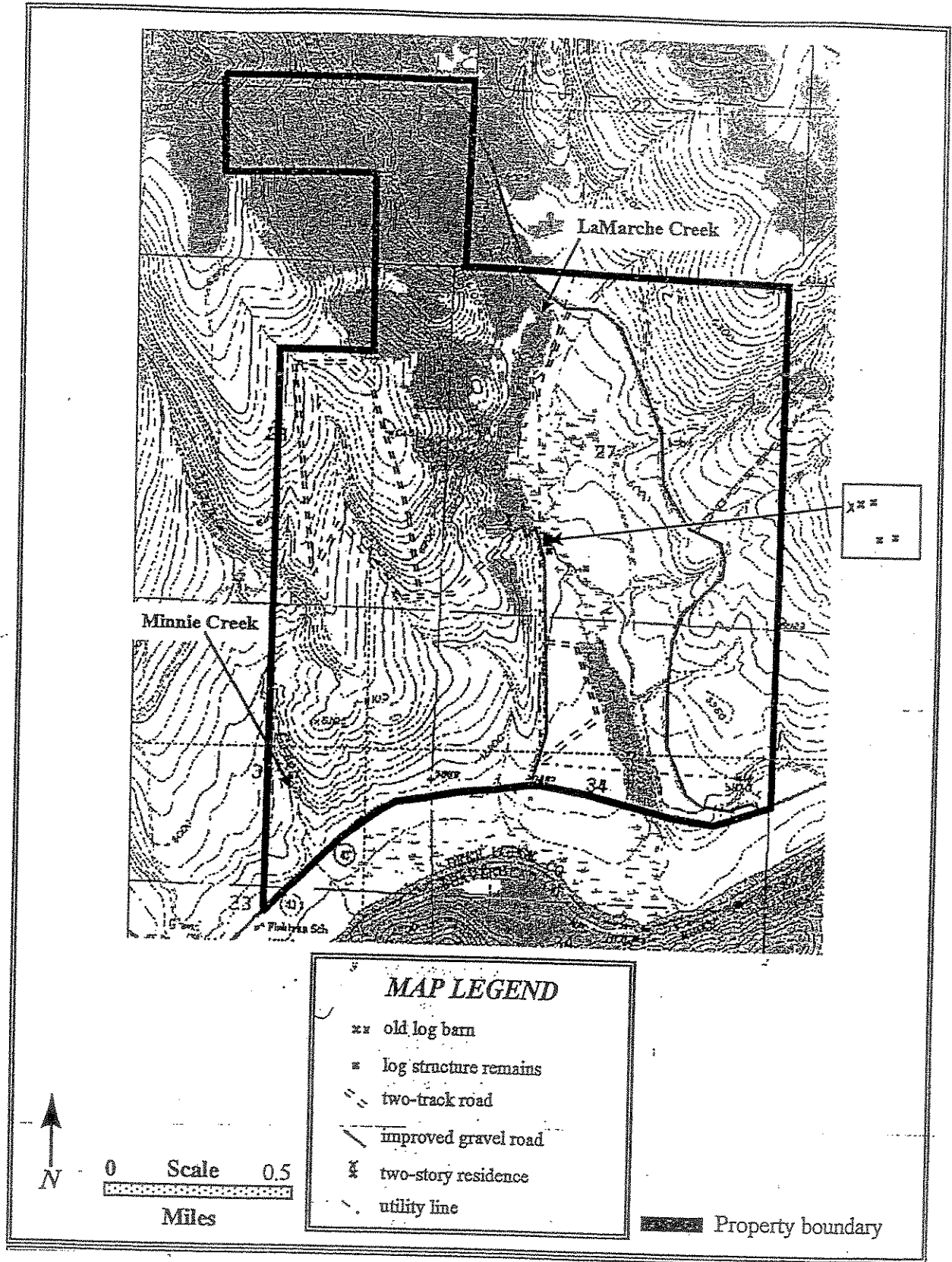
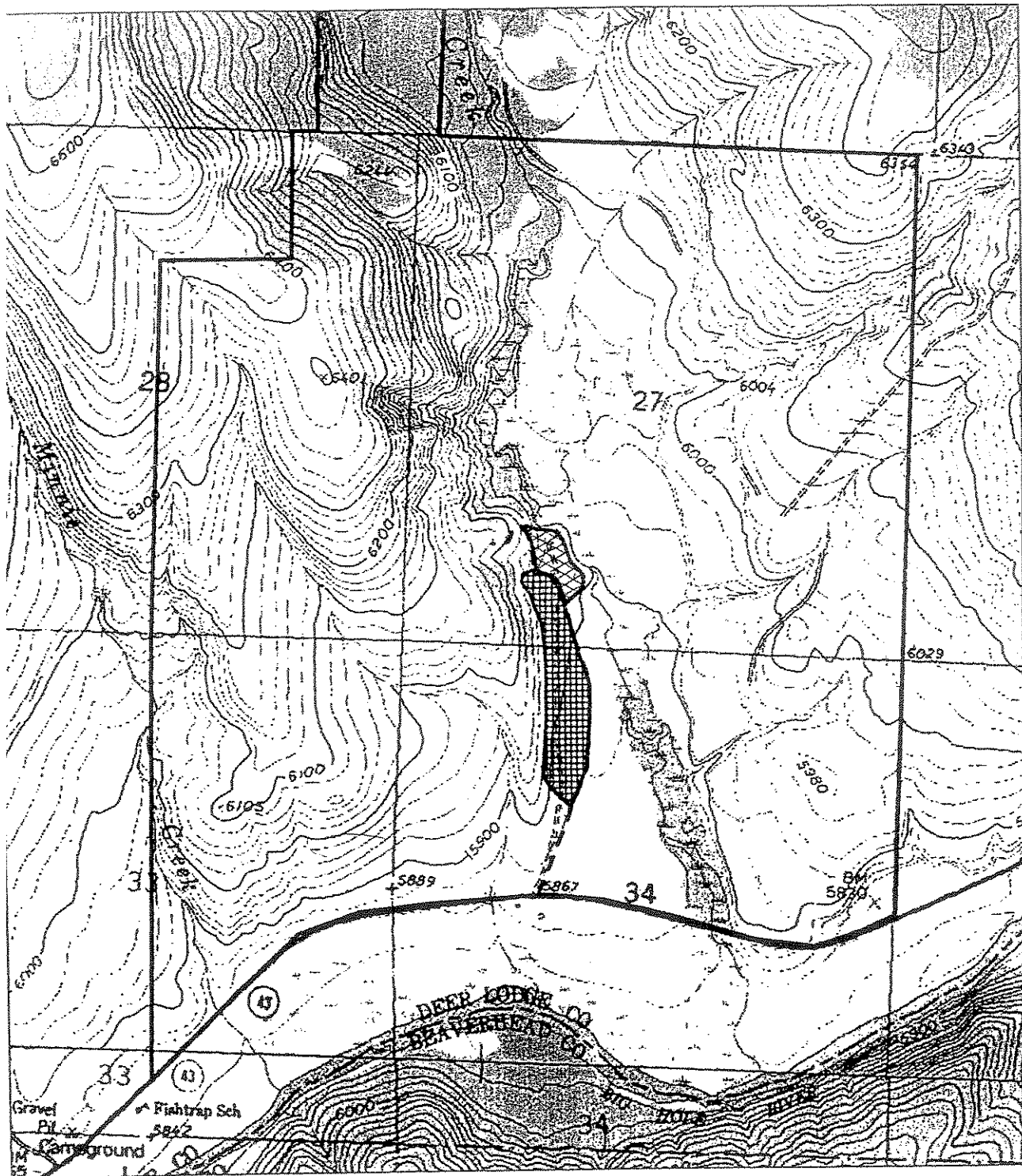


Exhibit G - Development Areas



— Easement Boundary

- - - Roadway



Development Area #1

Area Between the west side of the road and base of hill where new residences will be located



Development Area #2

Areas north and east of the road on the bench above the creek bottom, where new non-residential structures will be located.



the Montana LAND RELIANCE

STATE OF _____)

County of _____)

This instrument was acknowledged before me on this ____ day of _____, 20____, by _____.
_____.

Notary Public for the State of _____

Residing at _____

My commission expires _____

STATE OF MONTANA)

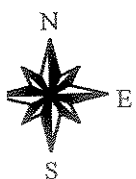
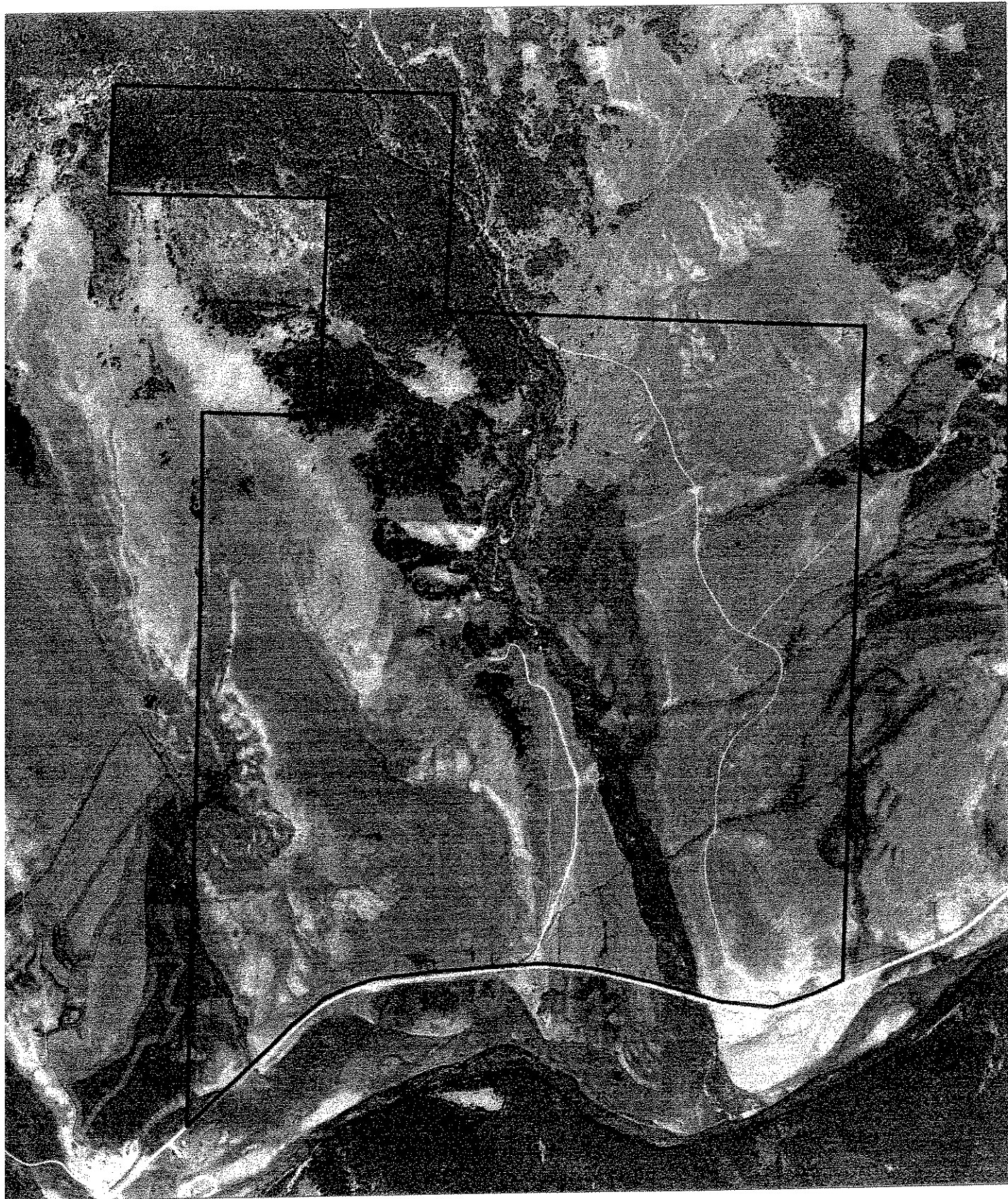
County of Lewis and Clark)

This instrument was acknowledged before me on this ____ day of _____, 20____, by _____, as _____ of The Montana Land Reliance.

Notary Public for the State of _____

Residing at _____

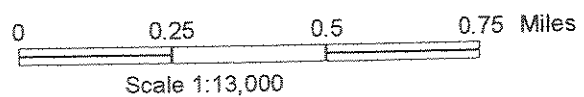
My commission expires _____



— Easement Boundary

Easement Acres - 1,631

USGS Quads - Lower Seymour Lake



APPENDIX F

U.S. FISH AND WILDLIFE SERVICE CONSERVATION EASEMENT FORMATS

**UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE
GRANT OF EASEMENT FOR WILDLIFE HABITAT CONSERVATION**

THIS INDENTURE, by and between _____ hereinafter referred to as Grantors, and
UNITED STATES OF AMERICA, hereinafter referred to as United States, acting by and through the Secretary of the
prior or his authorized representative.

WITNESSETH:

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. Secs. 715a-715e and 718d(c);
Land and Water Conservation Fund Act of 1965; the Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742j; the
Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901, authorize the Secretary of the Interior to acquire lands and
interests therein for the development, advancement, management, conservation, and protection of fish and
wildlife resources. The purpose of this easement is to preserve and protect in perpetuity fish and wildlife habitat,
including wetland, riparian and upland plant communities, described on the map(s) attached hereto as Exhibit A ;

; AND

WHEREAS, the lands described below contain habitat suitable for use as a wildlife area.

NOW, THEREFORE, for and in consideration of the sum of _____ Dollars (\$
to the Grantors in hand paid, the receipt of which is hereby acknowledged, Grantors hereby grant and convey unto the
United States, and its assigns, an estate, interest and perpetual conservation and wildlife easement, in lands of the
Grantors, together with the right of ingress and egress for the purpose of monitoring and enforcing the doing and
preventing of activities by Grantors thereupon, to be a servitude upon Grantors' said lands; and Grantors covenant with
the United States on behalf of themselves, their heirs, executors, administrators, successors, and assigns, forever, to do
and refrain from doing upon Grantors' said lands the various activities hereinafter recited, it being hereby agreed that the
doing and refraining from said activities, and each of them, upon said lands is and shall be for the benefit of the United
States through the preservation and conservation of the land. No rights herein are granted to the general public for
access to or entry upon the land subject to this grant of easement for any purpose. The lands to which the terms of this
agreement apply are described and located in _____ County, State of _____, to-wit:

See Exhibit B for Legal Description of Property

SUBJECT, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals,
electrical transmission lines, telegraph and telephone lines, cable lines, and all outstanding mineral rights in third parties.

The conveyance hereunder shall be effective on the date of the execution of this Indenture by the Secretary of
the Interior or his authorized representative; provided, however, that such acceptance must be made within _____
calendar months from date of the execution of this Indenture by the Grantors, or any subsequent date as may be
mutually agreed upon in writing by the parties hereto prior to the expiration of such date; and provided further, however,
that in the event such acceptance is not made by such date, this Indenture shall be null and void.

The Grantors, for themselves, and for their heirs, successors and assigns, lessees, and any other person
claiming under them, covenant and agree that they will cooperate in the maintenance and protection of all wetland and
wildlife habitat areas, delineated on the map(s) attached hereto as Exhibit A, for the protection of fish and wildlife
resources. The parties acknowledge that a Easement Documentation Report will be prepared for the property, at the
expense of the Fish and Wildlife Service, to document the physical and biological characteristics of the property at the
time of the grant of this easement. A copy of this Report shall be maintained on file by both the Grantor and the Fish
and Wildlife Service and by this reference made a part thereof. The parties hereby acknowledge that the Report will
accurately reflect the condition of the property subject to this easement at the time of conveyance.

This easement shall limit the use of the property to activities that are consistent with the conservation purposes
identified herein, including ranching and other agricultural uses, hunting, fishing, and those uses and practices consistent
with the terms hereof and identified in Exhibit C. The easement shall also limit the use of the property to those
recreational uses not associated with the uses and practices prohibited in Exhibit D.

The restrictions hereby imposed upon the use of said lands of the Grantors and the activities which Grantors covenant to refrain from doing upon said lands, except as may be authorized from time to time by the express prior written consent of the U.S. Fish and Wildlife Service, are identified in Exhibit D.

Copies of the above-referenced map(s), Exhibit A, are on file in the Office of the Regional Director, U.S. Fish and Wildlife Service, Denver, Colorado.

It is further understood that the rights and interests granted to the United States herein shall become part of the National Wildlife Refuge System and shall be administered by the U.S. Fish and Wildlife Service, pursuant to the National Wildlife Refuge System Administration Act, 16 U.S.C. Sec. 668dd.

SPECIAL PROVISIONS

1. This indenture shall not be binding upon the United States until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the Grantors to be presently binding upon them and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to the Grantors, by the United States, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by Grantors.

2. Notice of acceptance of this Indenture shall be given the Grantors by certified mail addressed to _____ and shall be effective upon the date of mailing, and such notice shall be binding upon all Grantors without sending a separate notice to each.

3. Payment of the consideration will be made by a United States Treasury check after acceptance of this indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the Grantors have hereunto set their hands and seals this _____ day of _____, 20__.

Landowner Signature(s)

Landowner Signature(s)

ACKNOWLEDGMENT

STATE of _____
COUNTY of _____

On this _____ day of _____ in the year 20__ before me personally appeared _____ known to me to be the persons(s) described in and who executed the foregoing instrument and acknowledged to me that (they) (he/she) executed the same as (their) (his/her) free act and deed.

Notary Public

My commission expires _____

(SEAL)

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this _____ day of _____, 20__.

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

By: _____

Title: _____
U.S. Fish and Wildlife Service

EXHIBIT B: LEGAL DESCRIPTION

EXHIBIT C: PERMITTED USES AND PRACTICES

The following uses and practices by the Grantor, though not an exhaustive recital of all uses and practices of said lands, are hereby deemed to be consistent with the conservation purposes of the Easement. Any proposed activities or uses not identified below shall require prior written approval by the Fish and Wildlife Service. In addition, certain uses and practices identified below are subject to specific conditions or require prior approval. The remainder of these consistent uses shall not be precluded, prevented, or limited by the Easement.

1. To maintain, repair and/or replace the existing dwellings and associated outbuildings, with buildings of the same purpose and/or utility, in substantially the same location, for the (insert number of residences) existing residence(s) located in (insert legal description down to the smallest aliquot part), as shown and described on Exhibit A.
2. To construct, maintain, repair and replace ONE additional single family residence within said easement lands, to be located in (insert legal description down to the smallest aliquot part), as shown on the attached Exhibit A, the exact location to be mutually agreed upon later by the parties. The Grantor is responsible for complying with all federal, state and local laws, ordinances and regulations concerning this reserved building site, as applicable.
3. To maintain, repair and replace existing agricultural buildings and structures, including but not limited to corrals, fences, hay sheds, loafing sheds, barns, or other non-residential buildings, and water facilities including but not limited to headgates, weirs, pipelines, irrigation ditches, reservoirs or wells, that support agricultural uses of the property and other uses permitted herein; and with prior written approval by the Fish and Wildlife Service, construction and/or development of new agricultural buildings, structures, water facilities, and reservoirs; provided that any maintenance, repair, replacement, construction or development activities do not create barriers that inhibit the movement or migration of wildlife or cause long-term impairment to the wetlands or wildlife habitat on lands identified in Exhibit A.
4. Livestock grazing
5. Harvesting native or tame grasses for hay production. Periodic renovation or reseeding of existing tame grass stands will be permitted with prior written approval of the Fish and Wildlife Service. Typically, approval for such renovation would be limited to no more than once every 7 to 10 years. Case by case exceptions may be granted to these time frames to deal with unforeseen situations such as a noxious weed infestations or seeding failures due to drought. No approval will be granted to break (farm) native rangeland.
6. Maintaining or establishing in-home businesses so long as they do not require any physical development or change to the land and/or construction of additional improvements, buildings, or other structures.
7. Minor surface disturbances associated with excavating small amounts of fill material or gravel for non-commercial use on the property, or constructing agricultural buildings, structures and/or water facilities as authorized under Provisions 1 or 2 of this Exhibit. The area within the easement impacted by these permitted disturbances shall total one acre or less in size.
8. Control of noxious weeds or exotic pests remains the responsibility of the Grantor, including the use of chemical pesticides and/or biological control agents in accordance with applicable Federal and State statutes and regulations.
9. Cropland areas or other parcels identified on Exhibit A are exempt from Provision 2 and/or 5 of Exhibit D.

10. Selectively harvest timber in accordance with those forestry practices which are consistent with the purpose of this easement, provided that any timber harvest permitted hereunder must conform to state and federal forestry laws, regulations, practices, and guidelines, as they may apply to the specific timber harvest activities proposed by the Grantor, and are subject to the following conditions:
- a. Non-commercial Timber Harvest - Grantor may cut, harvest or remove dead or diseased trees for non-commercial use, or trees that present a hazard to persons or property, or the cutting of firewood, posts and poles for non-commercial use, without prior approval in writing from the Fish and Wildlife Service.
 - b. Commercial Timber Harvest - For the purposes of this easement, the term "commercial timber harvest or thinning" is defined as any timber harvest in which the product of such harvest is sold, traded, exchanged, or used off the said lands. Any commercial timber harvest or thinning, including those for abatement of disease or infestation, shall require preparation of a timber harvest plan, at the Grantor's expense, by a qualified forester. Such plan shall be submitted to the Fish and Wildlife Service for prior review and approval, and if approved, all commercial timber harvest must be conducted in accordance with said plan.

EXHIBIT D: PROHIBITED USES AND PRACTICES

The following uses and practices on the property are hereby deemed to be inconsistent with the purpose of the easement, and are expressly prohibited:

1. Draining, causing or permitting the draining by construction of ditches, or by any means, direct or indirect, whether through transfer of appurtenant water rights or otherwise of any surface waters in or appurtenant to these wetland areas delineated on Exhibit A; by not filling, causing or permitting the filling in with earth or any other material or leveling, causing or permitting the leveling of any part or portion of said delineated wetland areas; and by not burning, causing or permitting the burning of any wetland vegetation on any part or portion of said delineated wetland areas. This includes lakes, ponds, marshes, sloughs, swales, swamps, potholes, and other wholly or partially water-covered areas, now existing or subject to recurrence through natural or man-made causes; provided, always, that the lands covered by this conveyance shall include any enlargements of said wetland areas resulting from normal or abnormal increased water.
2. Altering the topography or other natural features by digging, excavating, plowing, disking, cutting, filling, removing or otherwise destroying the vegetative cover, including no agricultural crop production or timber harvesting upon said lands delineated on Exhibit A, except as otherwise provided in Exhibit C.
3. Subdividing or de facto subdividing, and/or developing the area for residential, commercial, industrial or any other purposes.
4. Erecting, constructing or placing any structures, buildings or improvements including trailers, mobile homes or other temporary living quarters, except as otherwise provided in Exhibit C.
5. Exploring for and/or developing or extracting minerals, hydrocarbons, clay, sand, gravel, soil, peat, rock or any other materials on or below the surface of the property except as provided in Exhibit C.
6. Using or developing said lands for a game, fur, bird or fish farm, including the confinement, rearing, release and/or propagation of exotic or native game farm animals, birds, furbearers or fish as defined in Montana Code Annotated (MCA) Sections 87-2-101 and 87-4-406 or its successor statute.
7. Establishing or maintaining any commercial feedlot, defined for purposes of this easement as a facility used for the purpose of receiving, confining and feeding livestock for hire.
8. Dumping or disposing of non-household refuse and disposing of any material which is toxic to wildlife or considered to contaminate soil, groundwater, streams, lakes or wetlands.
9. Constructing any new roads or granting of road right-of-way easements except as provided in Exhibit C.

GRASSLAND EASEMENT SUMMARY

STATE: _____

COUNTY: _____

TRACT NAME: _____

TRACT NUMBER: _____

TOTAL ACRES COVERED BY GRASSLAND EASEMENT: _____

WETLAND ACRES COVERED BY GRASSLAND EASEMENT: _____

****GRASS ACRES INCLUDED ON REPORTS:** _____

EASEMENT DATED: _____

EASEMENT EXPIRES: _____

DATE EASEMENT ACCEPTED: _____

GRASSLAND EASEMENT CONSIDERATION: \$ _____

IF FUNDING IS OTHER THAN MBCF (CIRCLE ONE)

LWCF

NAWCA

DONATION

OTHER (Explain)

PROJECT NAME, IF ANY: _____

****Grassland Easement Acres reported do not include wetland acres in the report because they have been reported under a wetlands easement and we do not want to report them twice; however, all acres, wet and grass, are encumbered by the grassland easement.**

**UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE
CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS**

THIS INDENTURE, by and between _____ parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part

WITNESSETH:

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act, 16, U.S.C. 718d(c); the Fish and Wildlife Act of 1956, 16 S.C. 742a-742j; the Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901; and the Land and Water Conservation Fund Act, 16 S.C. 4601-9(a)(1), authorize the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas.

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of _____

Dollars (\$ _____), the parties of the first part do hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within _____ months of the execution of this indenture by the parties of the first part, of any subsequent date as may be mutually agreed upon during the term of this indenture, a permanent easement (in perpetuity) or right of use for the maintenance of the land described below as a waterfowl production area, including the right of ingress to and egress on, over, across and through any and all lands as described below by authorized representatives of the United States.

The lands covered by this conveyance are those wetland areas, including lakes, ponds, marshes, sloughs, swales, swamps, potholes, and other wholly or partially water-covered areas, now existing or subject to recurrence through natural or man-made causes, delineated on the map(s) attached hereto as Exhibit A and incorporated herein by this reference; provided, always, that the lands covered by this conveyance shall include any enlargements of said wetland areas resulting from normal or abnormal increased water. The lands described on Exhibit A, and the aforementioned right of ingress to and egress on, over, across and through any and all lands within the following described legal subdivision(s) in _____ County, State of _____, to-wit:

[Legal Description]

Subject, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, cable lines, and all mineral rights.

The parties of the first part, for themselves, their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining, causing or permitting the draining by construction of ditches, or by any means, direct or indirect, whether through the transfer of appurtenant water rights or otherwise; by not filling any surface waters in or appurtenant to these wetland areas delineated on Exhibit A; by not filling, causing or permitting the filling of any surface waters in or appurtenant to these wetland areas delineated on Exhibit A; by not burning, causing or permitting the burning of any wetland vegetation on any part or portion of said delineated wetland areas; and by not burning, causing or permitting the burning of any wetland vegetation on any part or portion of said delineated wetland areas. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Copies of the above-referenced map(s), being Exhibit A, are on file in the Office of the Regional Director, U.S. Fish and Wildlife Service.

SPECIAL PROVISIONS

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be essentially binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to _____ and such notice shall be binding upon all the parties of the first part without sending a separate notice to each _____

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

4. Payment of the consideration will be made by a United States Treasury check after acceptance of this indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this ____ day of _____, 20__

Landowner Signature

Landowner Signature

ACKNOWLEDGMENT

STATE _____
COUNTY OF _____

On this ____ day of _____, 20__ before me personally appeared _____, known to me to be the person(s) described in and who executed the foregoing instrument and acknowledged to me that they (he/she) executed the same as their (his/her) free act and deed.

Notary Public

(SEAL)

My commission expires: _____

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this ____ day of _____, 20__.

THE UNITED STATES OF AMERICA

By: _____

Title: _____
U.S. Fish and Wildlife Service

APPENDIX G

**COPY OF ARTICLE BY STEPHEN J. SMALL, ESQ., "UNDERSTANDING
THE IRC 2031(C) ESTATE TAX PROVISIONS"**

Understanding the IRC 2031(c) Estate Tax Provisions

by Stephen J. Small, Esq.

WHEN LAND PASSES FROM one generation to the next, heirs are often faced with a burdensome estate tax bill. In many parts of the country, land has so increased in value that heirs all too often must sell the land they've inherited simply to pay the estate tax.

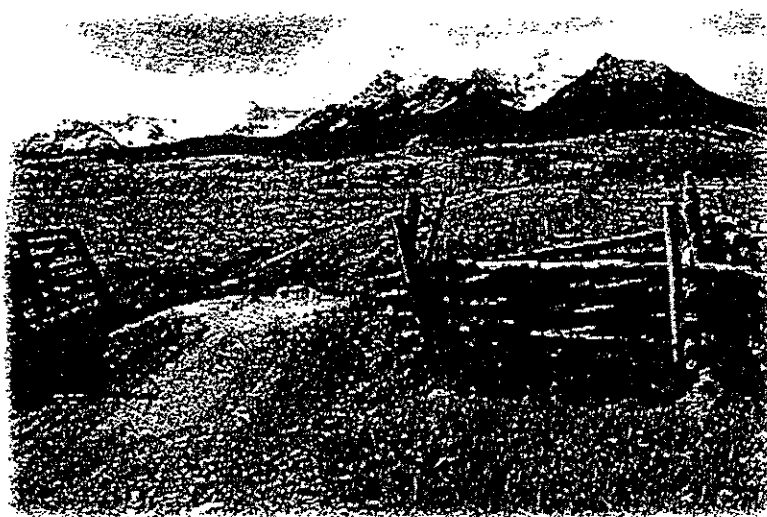
In 1997, Congress took an important step to address this problem when it passed the "Taxpayer Relief Act," which added Section 2031(c) to the Internal Revenue Code. The provision was clarified and amended under the IRS Restructuring and Reform Act of 1998. Section 2031(c) provides an exclusion from estate tax for certain land subject to a qualifying conservation easement. Section 2031(c)(9), added by the 1998 Act, allows an estate tax charitable deduction under Section 2055(f) when a qualified conservation easement is donated after the death of the decedent (a post-mortem donation) and before the decedent's estate tax return is filed.

In simple situations, understanding Section 2031(c) can be challenging. In complex situations, some of which are discussed in this article, understanding how to take advantage of the benefits of Section 2031(c), particularly the opportunity for a post-mortem easement donation, can be difficult. To date, there is no authority beyond the statute on the examples below. (There is no case law, and there are no IRS regulations, on 2031(c).) I have reviewed the statute extensively and, although some may take issue with one or more of my interpretations,

I hope these hypothetical examples provide some guidance on how the law applies in different situations.

Example 1: A Basic Example

Sue owns Diamond Farm. In 1996, Sue donates a conservation easement on 1,000 acres of open land at Diamond Farm, permitting continuing agricultural and ranching activities but otherwise permitting no further development and prohibiting commercial recreational activities. Before the donation of the easement, the land was valued at \$1.5 million. The easement met all the requirements of Section 170(h) of the Code and reduced the value of the restricted land to \$1 million. Sue dies in 1999. Assume the



Ranchland in Colorado

land is still worth \$1 million. Assume all the requirements of Section 2031(c) are met.

Analysis: Sue was entitled to a \$500,000 income tax deduction when she donated the easement and the land is valued at \$1 million in her estate. Sue's estate is eligible for the Section 2031(c) exclusion, which further reduces the value of the land to \$600,000 (by excluding 40 percent of the \$1 million), but the exclusion is limited to \$200,000 in 1999. (The exclusion increases by \$100,000 each year until 2002, when it is capped at \$500,000 for 2002 and thereafter.) If Sue's executor elects to claim the exclusion, \$800,000 of land value (\$1 million minus \$200,000) will be subject to tax in Sue's estate.

Example 2: Easement Donated in a Will

Assume the facts are the same as in Example 1, except that the easement is donated under Sue's will rather than during her lifetime.

Analysis: Because the easement was not donated during Sue's lifetime, she was not entitled to an income tax deduction. The full value of the land (\$1.5 million) is included in Sue's estate, the easement is effective on Sue's death, and Sue's estate receives an estate tax charitable deduction under Section 2055(f) for the \$500,000 value of the easement. In effect, \$1 million of land value is subject to estate tax. In addition, as in Example 1, Sue's estate is eligible for the \$200,000 Section 2031(c) exclusion in 1999.

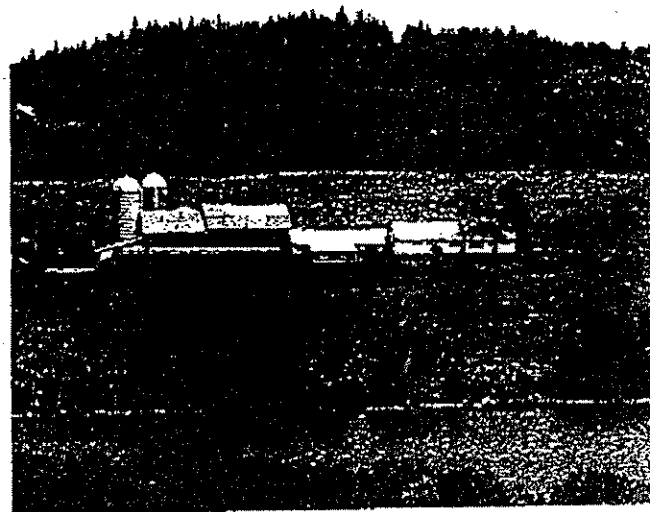
Example 3: Easement with Retained Development Rights

Assume the facts are the same as in Example 1 except that the easement reserved the right to build, subdivide, and convey into separate ownership two new residences on five-acre house lots on the land.

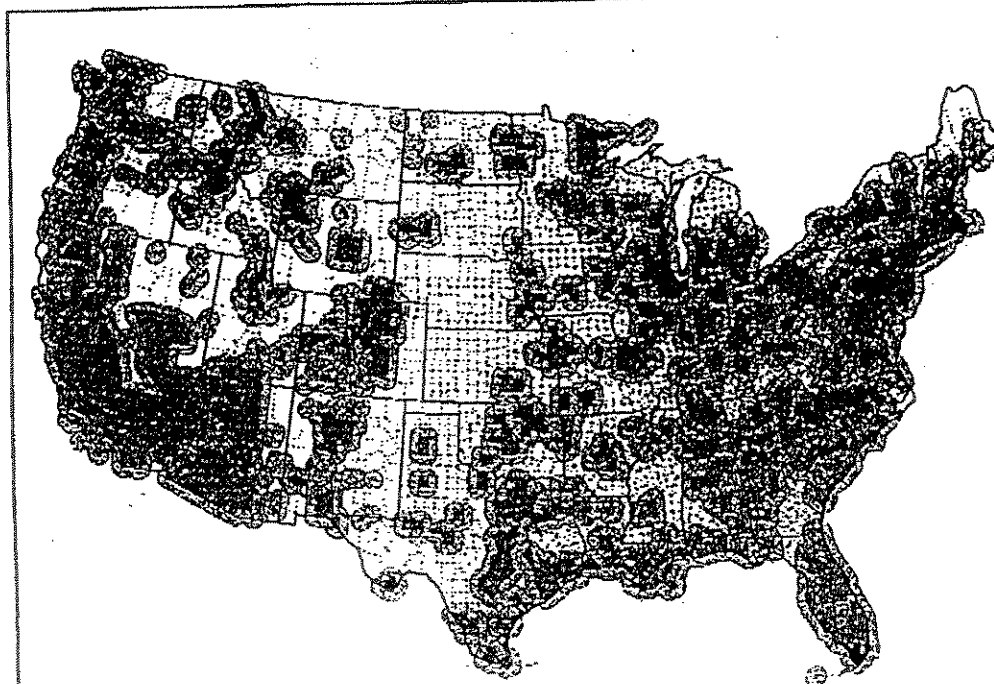
Analysis: Section 2031(c) says the exclusion does not apply to the value of "retained development rights." Section 2031(c)(5) generally defines a retained development right as a commercial right that is not "subordinate to and directly supportive of" the use of the land for farming purposes. The right to subdivide and convey two five-acre house lots certainly appears to be a retained development right. If Sue's heirs take no action, the value of the house lots will not be eligible for the 2031(c) exclusion and will be fully subject to estate tax (although the exclusion will apply to the remaining land value).

However, Section 2031(c)(5) also says that after the death of the landowner, the heirs can agree to extinguish any or all of the retained development rights; if they do that, the estate tax will be recalculated as if the extinguished development rights had not been reserved in the easement in the first place. (I use "heirs" as shorthand; the statute says that "every person in being who has an interest...in the land" can agree to extinguish retained development rights.)

If the heirs decide to do that, Section 2031(c)(5) says the:



Cahot, Vermont



Courtesy of The Nature Conservancy

The estate tax benefits of IRC 2031(c) apply only to areas within 25 miles of a metropolitan statistical area, a national park, or a federally designated wilderness area; or within 10 miles of an urban national forest (an obscure designation of the U.S. Forest Service). The shaded areas of the map show the areas covered.

The Land Trust Alliance's Public Policy Program is working with the Congress to extend 2031(c) to conservation lands throughout the country. Representative Nancy Johnson (R-CT) and Senator Max Baucus (D-MT) have both introduced legislation to make all parts of the United States eligible.

LTA will continue to work for bipartisan action to make every landowner who wishes to donate a conservation easement eligible to take advantage of IRC 2031(c).

—Russ Shay
LTA Public Policy Director



The Trustees of Reservations

Sunderland, Massachusetts

must execute an "agreement" to extinguish the retained development rights within nine months after the decedent's death (by the original due date for the estate tax return), they must file the agreement with the estate tax return (which is due nine months after the decedent's death, unless the estate receives a six-month extension), and then they have two years after the decedent's death to extinguish the development rights [see box on "Extinguishing Retained Development Rights," page 11].

It is not necessarily poor or incorrect planning to reserve certain development rights in a conservation easement, such as the right to subdivide or the right to construct additional residences. As noted above, the value of these development rights will be fully subject to estate tax (and not eligible for the 40 percent Section 2031(c) exclusion). On the other hand, the heirs may, if they so desire, extinguish some or all of those rights after the death of the decedent. This may provide an important opportunity for heirs to take a "second look" at the valuation, tax, and other issues well after the original easement has been donated.

Example 4: Commercial Recreational Activities

Once more, assume the same facts as in Example 1, except the easement does not specifically prohibit commercial recreational activities.

Analysis: Note first that for the estate to be eligible for the Section 2031(c) exclusion under Section 2031(c)(8)(B), the easement must prohibit more than *de minimis* commercial recreational activities. Without any formal guidance from the IRS to date, it is not always clear what is meant by *de minimis* commercial recreational activities. (Would a dude ranch exceed *de minimis* commercial recreation activity? Most likely. A summer camp for children? Most likely.) What is clear is that the easement must prohibit more than *de minimis* commercial recreational activities to be eligible for the benefits of Section 2031(c).

In addition, it appears that commercial recreational activities are rights that can be extinguished post-mortem, if the heirs agree to do so. [Again, see box on "Extinguishing Retained Development Rights," page 11.]

Since it is clear that the executor of an estate can donate a post-mortem

easement (more on this in Example 5), the executor of an estate can also amend an existing easement to eliminate commercial recreational activities that would otherwise make an estate ineligible for the Section 2031(c) exclusion [See Fall 1997 *Exchange*, page 14].

Example 5: Post-Mortem Conservation Easement

Sue owns Diamond Farm. She loves Diamond Farm and has always talked about putting an easement on it, but she dies without having done so. Nor did she include an easement in her will, which leaves Diamond Farm to her two daughters. The daughters are faced with a very large estate tax bill. They want to know what, if anything, they can do to protect and hold onto the farm.

Analysis: Sue's daughters can agree to donate a post-mortem conservation easement on Diamond Farm. However, depending on where they live, they may have to contend with some complex state law issues. [See Fall 1998 *Exchange* "Law Update," page 20.]

Under the law of some states, if Sue dies and leaves real estate to her

two daughters, the two daughters take title as of the date of Sue's death. In other states, if Sue dies and leaves real estate to her two daughters, the executor of Sue's estate takes title. If the executor takes title, state law may make it difficult for a fiduciary, such as an executor of an estate or a trustee of a trust, to make charitable contributions from the assets of the estate or the trust without either explicit authorization in the will or trust or without court approval. To address this problem, at least two states, Colorado and Virginia, recently passed legislation allowing executors and trustees to make conservation easement donations under certain circumstances.

Assuming Sue's daughters can deal successfully with any state law issues, once the conservation easement is donated there is an estate tax charitable deduction under Section 2055(f) for the value of the easement and the estate is eligible for the Section 2031(c) exclusion. This is exactly the same result as if Sue had included an easement in her will [see Example 2].

Please note, however, that families should not rely on the *post-mortem* provisions to protect an important piece of family land and to address an estate tax problem. There are simply too many things that need to happen in a short period of time to be able to count on getting it done this way. If at all possible, a landowner should go through the conservation easement process during lifetime or at least include an easement in the will.

To date my office has received a number of calls from families in which a family member has recently died and left land to their children. The callers wonder whether the heirs can donate a *post-mortem* easement. In each case I tell them, "Talk to your siblings and make sure they all agree." Most of the callers have called back to tell me that all of the siblings did not agree with the idea of donating an easement on the family's land. At that point, it is extremely unlikely that a *post-mortem* easement will be possible.

Extinguishing Retained Development Rights

Although Section 2031(c)(5) is clear that heirs can extinguish retained development rights, nowhere does the statute or the legislative history suggest how to extinguish them.

I think there may be three ways to extinguish retained development rights.

Since it is already clear that heirs can amend existing easements to eliminate commercial recreational activities (as in Example 4), and can donate *post-mortem* conservation easements where none existed before (as in Example 5), I think heirs can either (1) use a fairly short and simple document to amend an existing easement to extinguish retained development rights, or (2) prepare a brand new (*post-mortem*) conservation easement that in effect accomplishes the same thing by amending and restating the entire prior recorded easement. In some cases the family may want to achieve other conservation or planning goals with an entirely new document while in other cases the simpler option of a targeted amendment may be better; the preferred alternative is likely to depend on the particular set of facts in each situation.

There may be a third way to extinguish retained development rights. It may be possible to execute and record an "Extinguishment of Retained Development Rights" that identifies the prior recorded easement and clearly articulates what rights are being terminated. There is no law on this, as with so many of the other questions raised by Section 2031(c). One experienced attorney with whom I spoke thinks this works and another is not certain; the result may depend on state law issues. In any case, an experienced advisor should be consulted whenever the matter of extinguishing retained development rights comes up.

—Stephen J. Small

Example 6: Land Owned By a Corporation

Assume the same facts as Example 1, except that Diamond Farm Corp., not Sue, owns Diamond Farm, and at her death Sue owns 60 percent of the stock of Diamond Farm Corp. To keep this as simple as possible, assume that Diamond Farm Corp.'s only asset is the 1,000 acres under easement. Does the Section 2031(c) exclusion work? How?

Analysis: Section 2031(c)(10) states that the benefits of Section 2031(c) are available if the decedent owned 30 percent or more of the interests in a partnership, corporation, or trust. In the legislative history for the statute, this is referred to as a "look-through" rule.

Based on the statute, this is how I believe it works: (1) the assets of Diamond Farm Corp. are valued at \$1 million; (2) since Sue owns 60 percent of the stock, assume her Diamond Farm Corp. stock is valued at \$600,000 in her estate; (3) her executor elects to take the Section 2031(c) exclusion, and

that reduces the estate tax value of Sue's Diamond Farm Corp. stock to \$400,000 (\$600,000 minus \$200,000).

Example 7: Reserved Development Rights on Corporate-Owned Land Under Easement

Assume the same facts as in Example 1 but the easement reserves the right to create two more house lots (as in Example 3) and does not prohibit commercial recreational activities (as in Example 4).

Analysis: Based again on the "look through" rule, I believe the shareholders of Diamond Farm Corp. can vote to extinguish the retained development rights (the right to create additional house lots), and can amend the easement to eliminate the right to carry on commercial recreational activities. Alternatively, the shareholders could treat both the subdivision rights and the commercial recreational activities as retained development rights and agree to extinguish them.

Some Planning Tips

1. Landowners should donate the easement during their lifetimes. When drafting easements, landowners and land trusts should be aware of the particular Section 2031(c) rules on retained development rights (the value of which will not be eligible for the Section 2031(c) exclusion, but which can be extinguished), and the reserved right to carry on more than de minimis commercial recreational activities (which will make the easement ineligible for Section 2031(c) benefits, but which can also be extinguished or otherwise eliminated).
2. If there is no lifetime donation, the easement should be included in the landowner's will. Even on the landowner's deathbed, a codicil can be added to the will including an easement in the will.
3. As a matter of course in every situation where it might be relevant, language should be included in the landowner's will authorizing (but not directing) the executor and/or the heirs to donate a *post-mortem* conservation easement. One can even have a deathbed codicil authorizing the executor and/or the heirs to donate a *post-mortem* conservation easement.
4. Start the planning early.

—Stephen J. Small

If the reserved house lot sites and the commercial recreational activities are eliminated, (1) the value of Diamond Farm is reduced; (2) the value of Diamond Farm Corp. stock in Sue's estate is reduced; and (3) Sue's estate is eligible for the Section 2031(c) exclusion. If, for example, the right to carry on commercial recreational activities is eliminated but the reserved house lots are not, the valuation and calculations will get a bit more complicated. This is because in that situation, the value of the reserved house lots will be included in calculating the value of Diamond Farm (and accordingly the value of the Diamond Farm Corp. stock), but the Section 2031(c) exclusion will only apply to the value of the restricted land in the corporation, not the value of the house lots.

Example 8: Post-Mortem Easement on Land Owned By a Corporation

Diamond Farm Corp. owns Diamond Farm. Sue owns 60 percent of the stock of Diamond Farm Corp. There is no easement on Diamond Farm. Sue dies. Can a conservation easement donation still qualify for the Section 2031(c) estate tax benefits?

Analysis: The only way Section 2031(c) makes sense is if Section 2031(c)(9) (the *post-mortem* easement donation rule) and Section 2031(c)(10) (the look-through rule) work together. In effect, the look-through rule means that the estate tax results under Section 2031(c) should be the same whether the decedent owned the land directly or through a partnership, corporation, or trust.

First, Diamond Farm Corp. donates a conservation easement (essentially a *post-mortem* easement). Note that there is no Section 2055(f) estate tax charitable contribution deduction because neither the decedent (Sue) nor her estate made the donation, but the effect on Sue's estate should be the same (as in Example 1). The easement reduces the value of the land, the value of the stock in Sue's estate is reduced for estate tax purposes, and Sue's estate is also eligible for the Section 2031(c) exclusion.

Note also that no income tax deduction will be available to Diamond Farm Corp. Under the rule of Section 2031(c)(9), the estate is entitled to a Section 2055(f) deduction only if no income tax charitable deduction is taken by anyone in connection with the easement donation.

Example 9: A Conservation Easement By Will on Co-Owned Land

Bob and Sue are co-owners of Diamond Farm. Bob and Sue each own an undivided 50 percent interest in Diamond Farm as tenants in common. Bob dies in 1999. Bob has included in his will a conservation easement on Diamond Farm.

Analysis: The easement in Bob's will is ineffective. A co-owner cannot restrict his or her undivided interest in this manner. Even if Sue agrees to the conservation easement, the easement is ineffective because Sue's agreement was not certain as of the date of Bob's death.

There is no estate tax deduction for the donation under Bob's will. Nevertheless, Bob's heirs and Sue might still have the opportunity to take advantage of the 2031(c) benefits. [See Example 10.]

Example 10: A Post-Mortem Conservation Easement on Co-Owned Land

Now, assume the same facts as in Example 9, except that Bob dies this year and does not include an easement in his will.

Analysis: Bob's estate and/or heirs can join with Sue in the donation of a *post-mortem* conservation easement on Diamond Farm. Such a *post-mortem* easement would qualify under Section 2031(c)(9).

As it turns out, the ability under Section 2031(c)(9) to donate a *post-mortem* easement could have the happy effect of saving Bob's (and Sue's) heirs considerable estate tax, whereas in the prior scenario [Example 9] all of Bob's good intentions, memorialized in the form of a conservation easement in his will on his 50 percent undivided interest, would have gone for naught. ☹

Stephen J. Small has his own firm, the Law Office of Stephen J. Small, Esq., P.C., in Boston, MA. He has written extensively on land conservation and tax law. His books include *The Federal Tax Law of Conservation Easements*, *Preserving Family Lands: Book I* and *Preserving Family Lands: Book II*.

APPENDIX H

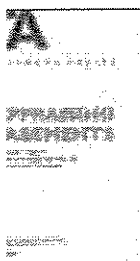
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Conservation Easement Handbook

Coming soon: The revised and updated **Conservation Easement Handbook**, the definitive resource on how to develop a conservation easement program. It will include a companion CD-ROM with sample documents and policies.



Appraising Easements: Guidelines for Valuation of Land Conservation and Historic Preservation Easements

By the Land Trust Alliance and the National Trust for Historic Preservation

9)

This volume is essential for anyone who appraises land for conservation purposes. It contains sample appraisal reports for charitable gifts, tax rules governing the use of easements and an explanation of legal issues regarding appraisals. Also includes a checklist to provide an appraiser, what to include in an appraisal report, a sample appraisal transmittal letter and a variety of conclusions. 77 pages.

(LTA members and partners);
\$15 (others)



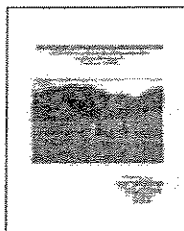
Working Forest Conservation Easements

By Brenda Lind (2001)

Written for land trusts, landowners and public agencies, this book guides practitioners in crafting conservation easements to

protect working forests. The 45-page text contains sample easement language, tools and strategies for managing forest management and a discussion of baseline documentation and easement monitoring.

(LTA members and partners);
\$15 (others)



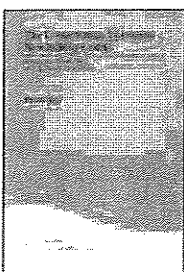
Working Ranchland Conservation Easements

By Brenda Lind and Marty Zeller (2002)

Learn from the organizations that have been most successful at

protecting open land and working ranches. This 45-page report is the culmination of extensive work by the Working Ranchland Conservation Easement Learning Circle, a group of experts assembled by LTA.

\$15 (LTA members and partners);
\$20 (others)



The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements

By Brenda Lind (1991)

Learn about baseline documentation, stewardship funds, easement enforcement,

monitoring, back-ups, condemnation, amendments and more. Sample baseline documentation form and checklist, basic rules for record keeping and sample monitoring form are included. 107 pages.

\$20 (LTA members and partners);
\$25 (others)

How Strong Are Our Defenses: The Results of the Land Trust Alliance's Northern New England Conservation Easement Quality Research Project

By Brenda Lind (2000)

This unique report will help land trusts better understand how such elements as board strength, information sharing and

networking can create stronger easement stewardship programs among the nation's land trusts. 60 pages.

\$12 (LTA members and partners);
\$15 (others)

The Federal Tax Law of Conservation Easements

Updated with Second Supplement

By Stephen J. Small (1997)

This authoritative volume interprets the IRS final regulations on gifts of conservation easements and discusses related income and estate tax considerations. It also covers historic preservation easements, donations of remainder interests for conservation purposes and reservation of qualified mineral interests. The Second Supplement, covering developments from 1988-1995, is bound into this volume for first-time buyers. 437 pages.

\$69 (LTA members and partners);
\$95 (others)

Second Supplement is also available separately: \$8 (LTA members); \$11 (others)

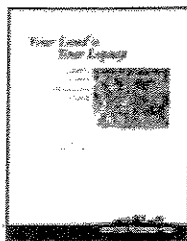
Third Supplement (2000)

This volume offers the best interpretation of the Tax Court cases and IRS Letter Rulings issued since 1996 and an in-depth interpretation of Tax Code Section 2031(c). 34 pages.

\$20 (LTA members and partners);
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LAND TRUST ALLIANCE

More Bestsellers



Your Land is Your Legacy

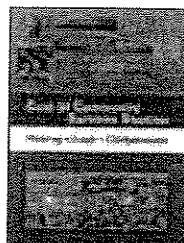
Third Edition, Revised and Updated

By Jeremiah P. Cosgrove and Julia Freedgood, American Farmland Trust (2002)

Written especially for farmers and ranchers to share with their financial advisors, this book answers all your estate planning questions about land protection and explains tax changes

from the 2001 Tax Relief Reconciliation Act. 58 pages.

\$11.95 (LTA members and partners); \$13.95 (others)



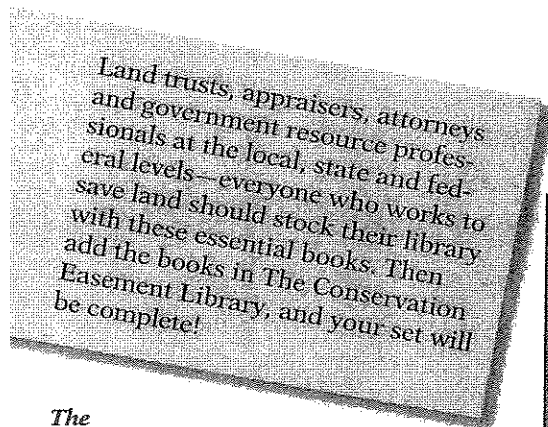
Making the Case for Land Conservation: Fifteen Years of Cost of Community Services Studies

By Julia Freedgood, American Farmland Trust (2002)

More than 80 Cost of Community Services studies conducted by American Farmland Trust show that privately owned farms, forest and ranch lands generate more in local revenues

than they require in services. Perhaps a similar study would be useful to your community. This book tells you how. 78 pages.

\$14.50 (LTA members and partners); \$16.95 (others)



The Standards and Practices Guidebook

See front page for description.



Starting a Land Trust

By the Land Trust Alliance (2000)

This practical handbook goes beyond the basics to give you valuable information about how to build and sustain an effective land trust.

Includes sample documents and loads of information and straightforward advice about fundraising, grants, government assistance and IRS forms. 184 pages.

\$35 (LTA members and partners);

\$45 (others)

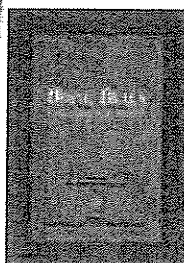
Statement of Land Trusts Standards and Practices

This booklet outlines practices the Land Trust Alliance believes are essential for responsible operation of a land trust.

\$5 (LTA members and partners);

\$10 (others)

The Fundamental Library



Doing Deals: A Guide to Buying Land for Conservation

By the Trust for Public Land (1995)

Know what developers know after you read this insightful book about buying real estate for conservation. Written

by the Trust for Public Land and published by LTA, it includes information on working with landowners, surveys, appraisals, working with government agencies and negotiating. 175 pages.

\$25 (LTA members and partners);

\$32 (others)

Preserving Family Lands I

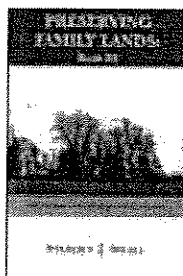
\$18 (LTA members and partners);

\$23 (others)

Preserving Family Lands II

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Preserving Family Lands III

\$20 (LTA members and partners); \$25 (others)

All by Stephen J. Small

Written by one of the nation's leading tax attorneys who authored the federal income tax regulations on

conservation easements, the *Preserving Family Lands* series provides basic information about protecting the family's land. Essential tax strategies and estate planning for the landowner are explained

in clear, understandable language. Case studies describing conservation options and their tax impacts are great for prospective conservation easement donors. Each book presents unique information. To read more in-depth descriptions about each, go to www.stevesmall.com/bks/about.html.



Exchange

Keep land trust board members, volunteers and staff up-to-date on the latest issues, innovations and trends in land conservation with *Exchange*, *The National Journal of Land*

Conservation. Land Trust Alliance member receive a subscription to LTA's quarterly journal but can order additional yearly subscriptions for board members and staff at \$16 each.



Fundraising for the Long Haul

By Kim Klein (2002)

Who doesn't need advice on fundraising? This book offers practical, in-depth advice on how nonprofi

organizations can create healthy fundraising programs. Probes the importance of prospect research, how to keep fundraising strategies fresh, common obstacles to a healthy fundraising program, and how boards can most effectively help raise funds. 161 pages.

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\$20 (others)

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All members and partners receive a discount on book orders. Go to www.lta.org/join.htm to join LTA.)

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Please allow approximately two weeks for delivery. "Rush orders" carry a \$50 fee above the normal shipping and handling charge. If your organization is tax exempt, please attach or fax a copy of your state tax-exempt certificate.

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www.lta.org

They're Coming!

Two highly anticipated books from the Land Trust Alliance Conservation Easement Series are in the works. Watch for

the revised and updated ***Conservation Easement Handbook***, the definitive resource on how to develop a conservation easement program. It will include a companion CD-ROM with sample easements and policies. This edition reflects the important lessons learned in the 15 years since the first book was released.

Also coming is ***Protecting Surface Water Quality with Conservation Easements***. Because water moves over and through a landscape, it cannot be restricted with easement provisions in the same way that land-based resources can be. Learn more about the differences in this new book.

Watch for more information at www.lta.org/publications.

LAND TRUST ALLIANCE

The Land Trust Alliance promotes voluntary land conservation and strengthens the land trust movement by providing the leadership, information, skills and resources land trusts need to conserve land for the benefit of communities and natural systems. Go to www.lta.org to read about LTA's many programs, trainings and resources.

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STATEMENT REGARDING PRO BONO PARTICIPATION

The State Bar's "Access to Justice Committee" asks you to remember that all members of the Bar have an ethical obligation to do civil pro bono work for low income people. Providing free legal assistance to those who cannot pay is critical to achieving the American ideal of "justice for all".

Over 187,000 Montanans, 22% of our population, qualify as low income under federal poverty guidelines. Montana Legal Services, the publicly funded provider of civil legal services to the poor, has lost nearly one-half its attorney staff. There is now only one Legal Services attorney for every 12,000 low income Montanans.

Since Montana Legal Services cannot possibly serve all the needs of low income people, the need for pro bono work by all attorneys is ongoing and increasing.

We urge each member of the Bar to take this responsibility personally. If each lawyer does his/her share, we can assure all Montanans have access to justice.

A WORD OF THANKS

Those who plan and teach State Bar of Montana CLE seminars are volunteers in service to the profession -- reimbursed only for their travel expenses to attend the CLE. Their generous contributions of time, talent, and energy make this and every CLE seminar a success. We appreciate their work.

UPCOMING CLE INSTITUTE SEMINARS

Feb. 23	Insurance Law Update (2 hrs.)	Several
Feb. 25	Bench/Bar Conference	Bozeman
March 4	Employment Law	Great Falls
March 15	Criminal Law Update (2 hrs.)	Several
March 18	Trial Practice	Butte
April 6	Issues in Evidence Law (2 hrs)	Several
April 8	Chapter 13 Bankruptcy Issues	Kalispell
April 14	New Lawyers 1 st Annual CLE	Missoula
April 22	Elder Law Issues	Helena
June 10	Legislative Update	Bozeman
June 17	Equal Justice Conference	Billings
Sept. 14-16	Annual Meeting CLEs	Helena

HOW TO REGISTER FOR ANY OF THE ABOVE CLES: CLE fliers are usually mailed to every active attorney in Montana at least two months in advance of the seminar. Fill out the registration form and mail to the State Bar.

OR:

CHECK OUT OUR WEBSITE FOR REGISTRATION INFORMATION:
www.montanabar.org

Please contact Gino Dunfee at the State Bar office - 406-447-2206, if you have questions about upcoming State Bar seminars. For questions concerning accreditation of programs sponsored by other entities, contact Kathy Powers, MCLE Administrator, at 406-447-2207. Thank you.

CALL FOR SPEAKERS

The CLE Institute is looking for knowledgeable speakers on a variety of legal topics. We cannot pay an honorarium, but we do reimburse one-night's lodging, round trip in state travel (mileage) at current state rate, no reimbursement for travel outside of Montana, and up to \$30 for meals. The benefits of speaking at a State Bar CLE Institute seminar are many, including free CLE credits for your preparation and participation in the seminar, plus a coupon good for free admission to a future State Bar CLE Institute seminar, a chance to promote yourself as a possible expert in a certain field and meet people interested in your line of work or specialty.

If you think you have something to contribute and would like to be placed on the list of possible speakers, please complete the form and return it to the State Bar, and include a biography or a brief history regarding your expertise or specialty.

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