

January 1981

## Attorney's Guide to Montana Conservation Easements

Robert M. Knight

*Member of Colorado and Montana Bar Associations*

Nancy K. Moe Dye

*University of Montana School of Law*

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

---

### Recommended Citation

Robert M. Knight and Nancy K. Moe Dye, *Attorney's Guide to Montana Conservation Easements*, 42 Mont. L. Rev. (1981).

Available at: <https://scholarworks.umt.edu/mlr/vol42/iss1/2>

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

Knight and Moe Dye: Conservation Easements  
**ATTORNEYS' GUIDE TO MONTANA  
CONSERVATION EASEMENTS**

**Robert M. Knight\* and Nancy K. Moe Dye\*\***

I.	Introduction .....	22
A.	Desirability of Land Preservation .....	22
B.	Property Law Techniques Available for Preser- vation of Ecologically-Significant Lands .....	23
II.	Montana's Open-Space Land and Voluntary Conser- vation Easement Act .....	24
A.	Legislative History .....	24
1.	House Bill 795—1974 Legislature .....	24
2.	House Bill 341—1975 Legislature .....	25
B.	Legislation .....	26
1.	Policies .....	26
2.	Qualifying Organizations .....	27
3.	Features .....	28
a.	Effect of Other Laws .....	28
b.	Term .....	28
c.	Conversion or Diversion .....	28
d.	Assignability .....	28
e.	Enforcement .....	28
f.	Permissible Easements .....	28
C.	Thoughts on Montana's Conservation Easement Legislation .....	29
1.	Statutory Construction .....	29
2.	Completeness .....	29
D.	Use of Conservation Easements in Montana .....	30
III.	Tax Consequences of a Gift or Sale of a Conservation Easement .....	31
A.	Income, Gift and Estate Tax .....	32
B.	Montana Property Tax .....	36
C.	Estate Planning .....	36
IV.	Advising a Client About the Gift or Sale of a Conser- vation Easement .....	36
V.	Typical Problems in Granting a Conservation Ease- ment .....	39
A.	Condition of Title .....	39

---

\* B.A., Colorado College, 1967; J.D., University of Michigan Law School, 1970; member of Colorado and Montana Bar Associations.

\*\* B.S., University of Montana, 1975; J.D., University of Montana School of Law, 1981.

B. Selecting a Qualified Recipient — Public Body or Private Organization . . . . . 42

VI. Drafting the Conservation Easement . . . . . 43

VII. Conclusion . . . . . 47

I. INTRODUCTION

A. *Desirability of Land Preservation*

Montana’s ecologically-fragile lands can be preserved by their private landowners by use of conservation easements. The document creating this easement grants, through gift or sale, certain ownership rights in property to a qualified party. The landowner retains use of the land. The ownership rights granted are those peculiar to maintaining ecologically desirable features of the land. Conservation easements came to the northwestern United States after principal use on the coasts to preserve open space lands in urban areas.<sup>1</sup>

Discussion of conservation easements is necessarily limited to locale because state statutes lack uniformity and case law is nonexistent.<sup>2</sup> The development of this land preservation device has been diverse primarily because of the various uses for which these easements are permitted and the different requirements for giving and holding the easement. Montana’s own legislation recognizing conservation easements, the Open-Space Land and Voluntary Conservation Easement Act,<sup>3</sup> is adapted to this state’s particular needs and priorities.

Conservation easements are one land preservation technique available to private landowners who realize that the world of the future depends upon the land use decisions of today.

We have been the most prodigal of people with land, and for years we wasted it with impunity. There was so much of it, and no matter how much we fouled it, there was always more over the next hill, or so it seemed.

For all our romantic veneration of the frontier tradition,

---

1. W. WHYTE, *THE LAST LANDSCAPE* 95-98 (1968) [hereinafter cited as *WHYTE*]; R. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* 87-92 (1967) [hereinafter cited as *PRIVATE APPROACHES*].

2. For comparison of state statutes, see Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land Use Agreements*, 14 *REAL PROP., PROB. & TR. J.* 540, 567-80 (Fall 1979) [hereinafter cited as *Netherton*]. See also Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 *CONN. L. REV.* 231 (1976) [hereinafter cited as *Preservation*]; and Comment, *Conservation Restrictions: A Survey*, 8 *CONN. L. REV.* 383 (1976).

3. *MONTANA CODE ANNOTATED* [hereinafter cited as *MCA*] §§ 76-6-101 to -110 and -201 to -211 (1979).

however, we were steadily moving together . . . .

The less of our landscape there is to save, the better our chances of saving it. It is a shame we have to lose so much land to learn the lesson, but desecration does seem a prerequisite for action. People have to be outraged. Most of the new land-use legislation and the pioneering programs did not come about as the result of foresighted, thoughtful analysis. They came about because people got mad over something they could see.<sup>4</sup>

### B. *Property Law Techniques Available for Preservation of Ecologically-Significant Lands*

The Restatement of Property defines easements as:

An interest in land in the possession of another which

- (a) entitles the owner of such interest to a limited use or enjoyment of land in which the interest exists;
- (b) entitles [the owner of such interest] to protection as against third persons from interference in such use or enjoyment;
- (c) is not subject to the will of the possessor of the land;
- (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and
- (e) is capable of creation by conveyance.<sup>5</sup>

A conservation easement in Montana<sup>6</sup> is this old familiar easement with statutory additives that make it desirable as a land preservation tool.

The Montana voluntary conservation easement legislation was drafted to integrate with Montana's codified property law. Appendix I compares Montana property law techniques available for preservation of ecologically-significant lands and shows their dissimilarities.

In contrast with other private land preservation techniques, the obvious advantage of a conservation easement is that "ownership of the fee is left in [the landowner], while defined rights are granted to, or limits placed upon, the conservation agency, be it public or private."<sup>7</sup> The conservation easement allows the land-

4. WHYTE, *supra* note 1, at 1-2.

5. RESTATEMENT OF PROPERTY § 450 (1944). See also C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND (2d ed. 1947); 3 POWELL ON REAL PROPERTY Ch. 34 (rev. ed. 1979).

6. Although Montana has codified easements, MCA §§ 70-17-101 to -111 (1979) contain no definition of "easement." Covenants running with the land are codified also at MCA §§ 70-17-201 to -206 (1979).

7. PRIVATE APPROACHES, *supra* note 1, at 21. See also Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559, 574-80 (1964) (after analysis of numerous property law techniques, the author concluded that "private covenants and gifts of land [have] been given too little consideration." *Id.* at 592. A similar technique to preserve agri-

owner continued use of the land subject to the restrictions of the easement.

Prior to enactment of the 1975 Open-Space Land and Voluntary Conservation Easement Act, Montana's statutory lists of permissible easements did not include a conservation easement.<sup>8</sup> Therefore, a common law attempt to burden land with the equivalent of a conservation easement could be met with uncertainty due to the absence of precise authorization. Statutory recognition assures the grantor of the certainty of perpetuation of environmental preservation.

Theoretical and practical considerations of giving or selling a conservation easement are discussed in this article. The emphasis is on informing and serving the client who is interested in this type of land use control and its possible tax and estate planning advantages. A checklist of important considerations for the potential grantor is provided in section IV.

## II. MONTANA'S OPEN-SPACE LAND AND VOLUNTARY CONSERVATION EASEMENT ACT

### A. *Legislative History*

#### 1. *House Bill 795—1974 Legislature*

The first attempt for legislative recognition of conservation easements in Montana was made in 1974.<sup>9</sup> The attempt was in response to a special situation. A number of problems increasingly alarmed landowners along the Blackfoot River in Missoula County: (1) rapid increase in recreational use of the river interfered with the landowner's use of private property; (2) subdivisions and cabins were appearing on nearby riverbanks; and (3) tax ramifications existed for possible land use reclassification where no change in land use had actually occurred. By 1974 the landowners along the river corridor had formulated a sophisticated management plan which respected the interests of both the recreationist and the landowner. The plan proposed shared management of the ecologically-fragile river corridor, preservation and recreation districts

---

cultural land has been proposed, i.e., sale of less-than-fee rights to a governmental body. Batie & Looney, *Preserving Agricultural Lands: Issues and Answers*, 1 Ag. L.J. 600 (1980).

8. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947] §§ 67-601 and -602 (now codified at MCA §§ 70-17-101 and -102). In the conservation easement context, the authors regard a restrictive covenant as a negative easement on land.

9. For historical background on conservation easements and discussion of its early form, see *WHYTE*, *supra* note 1, at 95-98; *PRIVATE APPROACHES*, *supra* note 1, at 20-35, and O. Plimpton, *Conservation Easements* (undated) (unpublished report to The Nature Conservancy).

and a two-tiered conservation easement approach regulating use close to the river but allowing some development farther away.<sup>10</sup> Legislative recognition of conservation easements was necessary for implementation of the plan.

An amendment recognizing conservation easements was offered to the Open-Space Land Act (to amend it to become the Open-Space Land and Voluntary Conservation Easement Act).<sup>11</sup> The legislation passed overwhelmingly in the House<sup>12</sup> but was stopped in the Senate by a powerful coalition comprised of Burlington Northern, Pacific Power and Light, the Anaconda Company, Montana Coal Council and the Montana Stockgrowers' Association.<sup>13</sup>

The sponsors concluded that education and involvement of the opposition in redrafting were necessary to pass legislation in 1975.<sup>14</sup> The redrafting effort resulted in House Bill 341.

## 2. *House Bill 341—1975 Legislature*

The redraft of House Bill 795, formulated as a result of meetings and discussions with representatives of former opponents, dramatically neutralized opposition from outside the legislature. Once again the proposal quickly passed the House,<sup>15</sup> but passage through the Senate was neither quick nor painless.

The section of the proposal covering taxation of property subject to a conservation easement generated considerable controversy in the Senate. Proponents of the legislation wanted to recognize the general rule<sup>16</sup> that "[a]ssessment made for taxation of property subject to a conservation easement . . . shall be determined on the basis of the restricted purposes for which the property may be

10. For an excellent discussion of the Blackfoot River project, see H. Goetz, *A Cooperative Approach to River Management: A Case Study of the Blackfoot Experience* (1979) (unpublished masters thesis) (bibliography included) [hereinafter cited as Goetz]. See also G. Stokes, *A Partnership Approach to Protecting and Managing a River*, 16 *TRENDS* 28 (Sp. 1979) [hereinafter cited as Stokes]. As Stokes explains, the Blackfoot River Corridor Management Plan has been studied by interested people from a number of states.

11. House Bill 795, 43rd Legislature (1974).

12. With a committee-as-the-whole do-pass recommendation of 75 to 3, the House easily passed HB 795: 70-yes, 18-no, 10-excused, 2-absent or not voting. 1974 *House J.* 466.

13. B. Bryan, Jr. and D. Tawney, *Conservation Easements: A New Concept for Montana 2* (July 23, 1974) (unpublished paper written for the Environmental Information Center).

14. *Id.* at 3.

15. The House voted 80-yes, 15-no, 3-excused, 2-not voting or absent. 1975 *House J.* 403.

16. See, e.g., *CONN. GEN. STAT. ANN.* § 7-131b (West 1979); *N.Y. GEN. MUN. LAW* § 247(3) (McKinney 1979); *WIS. STAT. ANN.* § 70.32(1) (West 1973); *MD. ANN. CODE* art. 81, § 19(1) (1974).

used."<sup>17</sup> Opponents of this section of the bill wanted a more specific tax provision. A joint conference committee resolved the conflict by providing that "minimum assessment would not be less than the actual assessed value of such land in calendar year 1973," and that land subject to a conservation easement would not be "classified [to a] lesser assessed valuation solely by reason of the creation of the easement."<sup>18</sup> With this taxation compromise, the Montana Senate approved the comprehensive legislative package<sup>19</sup> recognizing conservation easements held by public bodies and by private organizations meeting specific requirements. The Open-Space Land and Voluntary Conservation Easement Act became law April 21, 1975, the date the Governor signed the bill.<sup>20</sup>

## B. Legislation

### 1. Policies

House Bill 341 expanded the explicit policies of the Open-Space Land Act in two ways crucial to the comprehensive authorization of conservation easements.<sup>21</sup> First, the legislature decided that all "natural areas, biotic communities, and geological and geographical formations [with] scientific, educational, aesthetic, and ecological values"<sup>22</sup> worth preserving were not confined to urban and suburban areas. Passage of the bill showed legislative recognition that these values exist and may be protected in non-urban areas.<sup>23</sup> This is a departure from the historical use of conservation easements to preserve open-space in urban areas.

Secondly, the legislature decided that "enabling . . . qualifying private organizations to acquire interests and rights in real property to provide or preserve open-space land is in the public interest."<sup>24</sup> Because of these legislative conclusions, the voluntary conservation easement became the statutorily authorized means "to provide for the preservation of native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interest."<sup>25</sup>

---

17. House Bill 341, 44th Legislature (1975) pg. 9, proposed to amend R.C.M. 1947 § 62-608.

18. Joint conference committee report, 4/12/65. 1975 *House J.* 1630.

19. The Senate vote: 79-yes, 9-no, 8-excused, 4-absent. 1975 *House J.* 1653.

20. 1975 *Mont. Laws* ch. 489.

21. See, e.g., Netherton, *supra* note 2, at 567-80.

22. MCA § 76-6-102(3) (1979).

23. MCA § 76-6-201(2) (1979).

24. MCA § 76-6-102(8) (1979).

25. MCA § 76-6-103(1) (1979).

The definition of conservation easement offers freedom and structure to the landowner:

“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.<sup>26</sup>

When read with other sections of the act,<sup>27</sup> this definition removed lingering common law obstacles to the effectiveness of the easement<sup>28</sup> while recognizing the right of the landowner to specifically define the extent of the restrictions.

## 2. *Qualifying Organizations*

Non-public organizations must meet a narrow definition in order to hold conservation easements.<sup>29</sup> The act requires Internal Revenue Service (IRS) qualification as a charitable organization. This standard recognizes the gift tax deduction<sup>30</sup> and charitable contribution<sup>31</sup> deductibility of conservation easements under federal tax law. The federal review procedure necessary to maintain charitable organization classification<sup>32</sup> also protects Montana property interests held under conservation easements by private organizations.

Public bodies, i.e., “the state, counties, cities, towns, and other municipalities,”<sup>33</sup> may also hold conservation easements.

26. MCA § 76-6-104(2) (1979).

27. MCA § 76-6-105, -205, -209 (1979).

28. See Lundborg, *Restrictive Covenants & Land Use Control: Private Zoning*, 34 *MONT. L. REV.* 199 (1973).

29. MCA § 76-6-104(5) (1979) defines a qualified private organization as one

- (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 [the Open-Space Land and Voluntary Conservation Easement Act].

30. I.R.C. § 2522(a).

31. I.R.C. § 170(f)(3)(B). See text accompanying notes 59-79 *infra*.

32. I.R.C. § 501(c).

33. MCA § 76-6-104(4) (1979).



### 3. *Features*

#### a. *Effect of Other Laws*

The provisions of the Open-Space Land and Voluntary Conservation Easement Act "are controlling insofar as [they] . . . are inconsistent with the provisions of any other law."<sup>34</sup>

#### b. *Term*

Conservation easements in Montana may be granted in perpetuity or for renewable 15 year terms.<sup>35</sup> Fifteen years is a significant land use planning period particularly where there is increasing demand for land for development or for scenic or recreational uses. Only perpetual easements qualify as a charitable contribution for federal tax purposes.<sup>36</sup>

#### c. *Conversion or Diversion*

When conversion or diversion from open-space land use occurs, "[o]ther real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location [must be] substituted within a reasonable period not exceeding 1 year."<sup>37</sup>

#### d. *Assignability*

The easements are freely assignable among qualified holders, unless restricted by the conveying instrument.<sup>38</sup>

#### e. *Enforcement*

Like all easements, conservation easements may be enforced by injunction or proceedings in equity and grantee's representatives are entitled to reasonable inspection.<sup>39</sup>

#### f. *Permissible Easements*

Permissible easements and restrictions are broadly stated. The legislature concluded the listing of permissible easements and restrictions by allowing restriction on "other acts or uses detrimental to . . . retention of land or water areas in their existing

---

34. MCA § 76-6-105(1) (1979).

35. MCA § 76-6-202 (1979).

36. I.R.C. § 170(f)(3)(B)(iii).

37. MCA § 76-6-107(2) (1979).

38. MCA § 76-6-205 (1979).

39. MCA § 76-6-210(1) (1979).

conditions."<sup>40</sup>

### C. *Thoughts on Montana's Conservation Easement Legislation*

#### 1. *Statutory Construction*

A caveat is necessary for the user of the Open-Space Land and Voluntary Conservation Easement Act. The drafters intended that the original, broad language of the Open-Space Land Act also apply to conservation easements. The legislature intended the same result and the initial easement legislation was integrated into the Open-Space Land Act.<sup>41</sup> Recodification,<sup>42</sup> however, separated the conservation easement provisions from the act's general provisions.<sup>43</sup> The interpretation that the act has two distinct parts would be incorrect;<sup>44</sup> legislative intent must be ascertained by reading the act as a whole. This conclusion is supported by the recodification legislation itself:

In case of any inconsistency in meaning arising through omission or otherwise between the provisions of the Montana Code Annotated and the corresponding portion of the official enrolled bill on file with the secretary of state, effect shall be given to the official enrolled bill.<sup>45</sup>

#### 2. *Completeness*

One commentator suggests that model conservation easement legislation include certain provisions, two of which do not appear in Montana's legislation:

[1] That in the event a specified holder for any reason is or becomes incapable of taking or holding the interest it should be construed to pass to a designated organization charged with appropriate preservation or conservation responsibilities, [and]

40. MCA § 76-6-203(1)(h) (1979).

41. Compare MCA §§ 76-6-101 to -110 and -201 to -211 (1979) with R.C.M. 1947 §§ 62-601 to -609.

42. The Revised Codes of Montana (1947) were recodified into the Montana Code Annotated in 1978. 1979 Mont. Laws ch. 1, § 4.

43. *E.g.*, the provisions on conversion or diversion of open-space land, MCA § 76-6-107 (1979), now immediately follow provisions for acquisition and designation of real property by public bodies (originally at R.C.M. 1947 § 62-604, now partly recodified at MCA § 76-6-106 (1979)). However, the recodified section does not include amendatory language which referred to conservation easements in the old R.C.M. 1947 § 62-604 (recodified as MCA §§ 76-6-201 and -211(a) (1979)). Cursory reading of the recodified statutes may raise doubts as to the applicability of the conversion and diversion replacement requirements to conservation easements.

44. MCA § 1-2-106 (1979).

45. MCA § 1-11-103(6) (1979).

[2] That no court should be authorized to declare such an interest to be extinguished on the ground of changed conditions or frustration of purpose.<sup>46</sup>

The first recommendation is unnecessary. In Montana, upon dissolution or liquidation of a corporation, assets held for charitable or similar purposes must be transferred or conveyed by the organization or a court of equity to another organization "engaged in activities substantially similar to those of the dissolving [or liquidating] corporation."<sup>47</sup> Also, treasury regulations of exempt organizations (applicable to qualifying organizations in Montana) require that interests held, such as conservation easements, be "dedicated to an exempt purpose."<sup>48</sup> This requirement is satisfied by the above-mentioned statutes.

The second recommendation that no court be authorized to declare an interest extinguished on the ground of changed condition is either unnecessary or negated by the effective trustee standard imposed on the qualified private organization, i.e., to act as a fiduciary.<sup>49</sup> Such a provision possibly would be unconstitutional as a restraint of judicial powers.<sup>50</sup>

#### D. *Use of Conservation Easements in Montana*

Conservation easements do not occur frequently or without extensive negotiation. Numerous organizations and agencies are capable and willing to hold these easements.<sup>51</sup> Present grantees in

46. *Preservation*, *supra* note 2, at 246 citing MD. REAL PROP. CODE ANN. § 2-118(d) for the second provision.

47. MCA §§ 35-2-702(3) and -712(3)(c) (1979).

48. Treas. Reg. § 1.501(c)(3)-1(b)(4) (1959).

An organization's assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed for one or more exempt purposes, or to the Federal government, or to a State or local government, for a public purpose, or would be distributed by a court to another organization to be used in such manner as in the judgment of the court will best accomplish the general purposes for which the dissolved organization was organized.

*Id.*

49. MCA § 72-21-203 (1979).

50. MONT. CONST. art. VII, § 1.

51. Montana and regional offices:

Montana Department of Fish, Wildlife and Parks, Recreation and Parks Division, Helena, MT 59601

Montana Land Reliance, 107 West Lawrence, P.O. Box 355, Helena, MT 59601

National Audubon Society, c/o Jim Phelps, 2110 Bradbrook Court, Billings, MT 59101

National Wildlife Federation, 1412-16th St., N.W., Washington, DC 20036

The Nature Conservancy, P.O. Box 258, Helena, MT 59601

Trout Unlimited, c/o Robert J. Foukal, 2020A-1 S. Rouse, Bozeman, MT 59715

United States Bureau of Outdoor Recreation, Mid-Continent Region, P.O. Box 25387, Den-

Montana include:

- 1) Montana Land Reliance. This private organization has a goal of preserving ecologically significant agricultural land and an active educational policy regarding conservation easements.<sup>52</sup> The Reliance holds three easements totaling approximately 1,860 acres.
- 2) Trout Unlimited will accept conservation easements to protect significant cold water streams and has a six acre easement on the Yellowstone River in Paradise Valley.
- 3) The Nature Conservancy, a national conservation and land preservation organization protects approximately 8,790 acres.

The Montana Department of Fish, Wildlife and Parks is presently negotiating with private landowners for three easements. The City of Missoula recently passed a \$500,000 bond issue to acquire open space land and is negotiating with at least one landowner for the gift of an easement.

### III. TAX CONSEQUENCES OF A GIFT OR SALE OF A CONSERVATION EASEMENT

Considering the certainty of death and taxes, no private technique directed toward the preservation of open land should be approached without considering its tax aspects. Each conservation easement, whether given or sold, will be unique to the property preserved; likewise the tax consequences. Detailed tax analysis is not possible here but a summary can be made.

Government often shows its approval and encouragement of conveyances for charitable purposes through favorable tax legislation. This practice has been criticized as a "devious, never-count-the-cost method of chiseling away at our property tax base, in true devil-take-the-hindmost fashion . . . ."<sup>53</sup>

Lost tax revenue, however, is not the necessary result of favorable tax recognition of charitable conveyances. Exemption of conservation easements from unrealistic property tax reclassification and from income, gift and estate tax does not necessarily shift the tax burden to other taxpayers.

Actually, the value of the donation to the public may be greater than the tax benefit the landowner realizes. For example,

ver Federal Center, Denver, CO 80225.

52. A publication titled *Tools for Land Preservation: Conservation Easements* and a general brochure are available free from the Montana Land Reliance. Other publications are available for a fee.

53. Walker, *Loopholes in State and Local Taxes*, 30 TAX POLICY 4 (Feb.-March 1963).

the Bureau of Outdoor Recreation analyzed the Blackfoot River corridor project mentioned earlier and concluded that "[t]he value of the present agreement administered by the Montana Department of [Fish, Wildlife and Parks] is estimated to be about \$250,000."<sup>54</sup> The perpetual conservation easements cover 1,572 acres and are estimated to have a fair market value of "approximately \$400,000."<sup>55</sup> Landowner donations in the initial stages of the management plan, therefore, conservatively total \$650,000. The property is dedicated to public recreation. By one estimate, the conservation easements included in the river corridor plan "would cost over 15 million dollars to purchase."<sup>56</sup>

The landowner's benefit for relinquishment of development and other property rights varies. The Blackfoot River corridor

[l]andowners are now receiving public assistance with public use of their lands; their property taxes on lands under easement are based only on uses allowed by the easement (for example, taxes may be frozen at agricultural or forestry rates); and they may realize income and estate tax benefits.<sup>57</sup>

#### A. *Income, Gift and Estate Tax*

Montana parallels the federal Internal Revenue Code (I.R.C.) for administration of income and inheritance taxes. State income<sup>58</sup> and allowable deductions<sup>59</sup> therefrom are defined by incorporation of I.R.C. sections and amendments. The language of the Montana inheritance tax provisions differs from that of federal estate tax legislation but the state tax is administered as the federal tax is.<sup>60</sup> Montana has no gift tax.

State recognition of conservation easements is vital for the client who claims a charitable contribution by granting an easement. The IRS determination of whether a conservation easement is a charitable contribution is based partly on recognition under state law that "a restrictive easement constitutes a valuable property

---

54. Stokes, *supra* note 10, at 31. The estimate is "based on the value of public access to the private lands within the 32-mile (51.2 km) recreation corridor for a five year period. The landowners charge nothing for the public's privilege to use private lands." *Id.* More conservation easements in the corridor are expected.

55. *Id.* "[The] figure [is] derived by appraising the fair market value of the properties without the easement and then under easement." *Id.* See text accompanying notes 71-75 *infra*.

56. Goetz, *supra* note 10, at 65-66.

57. Stokes, *supra* note 10, at 31.

58. MCA § 15-30-111 (1979).

59. MCA § 15-30-121 (1979).

60. Telephone conversation with Tom Stoll, Director, Inheritance Tax Division, Montana Department of Revenue, 10/30/80.

right or interest in favor of the party for whose benefit the easement is created and is enforceable by that party."<sup>61</sup> Historic and scenic easements are recognized in federal tax legislation as contributions of a property right even where the owner retains valuable personal rights in the property such as the right of access.<sup>62</sup> Once qualified as a charitable contribution, Congress allows a deduction "for the fair market value of [the] restrictive easement."<sup>63</sup>

Initial federal legislation recognizing a conservation easement as a charitable contribution for income, gift and estate tax purposes was set to expire June 13, 1981.<sup>64</sup> The Miscellaneous Revenue Act of 1980,<sup>65</sup> signed by President Carter on December 17, 1980, eliminated this deadline. In passing the act, Congress recognized the continued importance of preserving land values. The act specifically defines significant terms:

- 1) Real property interest:
  - (A) the entire interest of the donor other than a qualified mineral interest,
  - (B) a remainder interest, and
  - (C) a restriction (granted in perpetuity) on the use which may be made of the real property.<sup>66</sup>
- 2) Conservation purpose:
  - (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
  - (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems,
  - (iii) the preservation of open space (including farmland and forest land) where such preservation is—
    - (I) for the scenic enjoyment of the general public, or

61. Rev. Rul. 64-205, 1964-2 C.B. 62. See also Rev. Rul. 75-373, 1975-2 C.B. 77; Rev. Rul. 75-358, 1975-2 C.B. 76.

62. See Rev. Rul. 75-373, 1975-2 C.B. 77, Rev. Rul. 75-358, 1975-2 C.B. 76 (examples of IRS rulings regarding conservation easements).

63. I.R.C. §§ 170, 2522. For thorough discussions of taxation of partial interests under the I.R.C. see Subcommittee Report of Committee on Charitable Gifts, Trusts and Foundations, Probate and Trust Division, *Tax Incentives for Sensible Land Use Through Gifts of Conservation Easements*, 15 REAL PROP., PROB. & TR. J. 1 (1980); Browne, *Federal Tax Incentives for Private Environmental Planning*, 10 NAT. RESOURCES J. 753 (1978); Browne, Jr. & VanDorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69 (1975); Thomas, *Transfers of Land to the State for Conservation Purposes: Methods, Guarantees, and Tax Analysis for Prospective Donors*, 36 OHIO ST. L. J. 545 (1975).

64. See Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL ESTATE L. J. 304 (1979) (explanation of the deadline in the I.R.C.).

65. H.R. Rep. No. 96-1278, 96th Cong., 2d Sess. (1980).

66. *Id.* at 7.

- (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (iv) the preservation of an historically important land area or a certified historic structure.<sup>67</sup>

As before, the conservation easement must be given in perpetuity to qualify for favorable tax treatment. Any tax benefit derived by granting a conservation easement depends on the appraised fair market value<sup>68</sup> of the restrictive easement on the land. Determining this value is the donor's responsibility.<sup>69</sup> The appraisal of a conservation easement, however, is a difficult and sophisticated undertaking and should only be accomplished by a well-qualified professional appraiser.

In appraising a conservation easement, it may be necessary to integrate appraisal techniques developed by the IRS. The so-called "market data or comparable sales approach"<sup>70</sup> provides a method for appraising unimproved real property<sup>71</sup> that has not been subject to a recent arm's length transaction. This appraisal technique provides values for the "before and after approach"<sup>72</sup> which is most frequently used in determining the value of the gift of a conservation easement.

The factors considered during appraisal for the market data or comparable sales approach are:

- (a) Location, including proximity to roads, schools, shopping, transportation, and other amenities;
- (b) Configuration, topographic features, and total area;
- (c) Restrictions as to land use or zoning;
- (d) Road frontage and accessibility;
- (e) Available utilities and water rights;

67. *Id.* at 8-9. Qualified organizations are also defined. *Id.* at 7. The act clarifies the treatment of gifts of property with retained mineral interests. Mineral interests are "(A) subsurface oil, gas, or other minerals, and (B) the right of access to such minerals." *Id.* at 10. No surface mining is permitted.

68. Treas. Reg. §§ 1.170A-1(c)(2) (1972); 20.2031-1(b), T.D. 6826, 1965-2 C.B. 367; 25.2512-1, T.D. 6826, 1965-2 C.B. 367, define fair market value as "the price at which the property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts." The Wild & Scenic Rivers Act has its own provisions at 16 U.S.C. § 1285 (1968). See also Rev. Rul. 73-339, 1973-2 C.B. 68, 69.

69. Treas. Reg. § 1.170A-1(a)(2) (1972); IRS PUB. NO. 526, CHARITABLE CONTRIBUTIONS 8 (rev. 11/79). See generally IRS PUB. NO. 561, VALUATION OF DONATED PROPERTY (rev. 11/79).

70. Rev. Proc. 79-24, 1979-1 C.B. 565.

71. *Id.* "Unimproved real property is defined as land without significant buildings, structures, or any other improvements that contribute to its value." *Id.*

72. Rev. Rul. 76-331, 1976-2 C.B. 52; Rev. Rul. 73-339, 1973-2 C.B. 68.

- (f) Existing easements, rights of way, leases, etc.;
- (g) Soil characteristics;
- (h) Vegetative cover, such as grass, brush, trees or timber;
- (i) Status of mineral rights;
- (j) Riparian rights;
- (k) Other factors affecting value.<sup>73</sup>

Final valuation of the conservation easement is determined by establishing

the difference between the fair market value of the total property before the granting of the easement and the fair market value of the property after the grant as the fair market value of the easement given up.<sup>74</sup>

The determination of the value of the property allows adjustment of the taxpayer's basis in the property by eliminating that part of the total basis which is properly allocable to the restrictive easement granted.<sup>75</sup>

Where a conservation easement is a gift or partly a gift, the landowner generally may deduct up to 50 percent of the "contribution base."<sup>76</sup> The deduction for long-term capital gain property, however, is limited to 30 percent of the taxpayer's contribution base.<sup>77</sup> If the value of the easement exceeds either of these percent limits, the excess amount may be carried over for deduction in future years.<sup>78</sup>

Federal capital gains tax may be avoided when the conservation easement is given rather than sold. For a gift, the landowner may deduct up to 50 percent of the contribution base if the value of the contribution is first reduced by 40 percent of the amount that would have been long-term capital gain if the property had been sold.<sup>79</sup>

Regardless of whether the conservation easement is by gift or sale, determination of the value of the conservation easement has no effect on state taxation of the land.

73. Rev. Proc. 79-24, 1979-1 C.B. 565.

74. Rev. Rul. 73-339, 1973-2 C.B. 68, 69. For an example of application of the before and after method which utilizes elements of the later developed market data or comparable sales method see *Thayer v. Commissioner*, T.C.M. 1977-370 (CCH Dec. 34, 708[M]).

75. Rev. Rul. 64-305, 1964-2 C.B. 62, 63.

76. I.R.C. § 170(b)(1)(A). Contribution base equals adjusted gross income without regard to net loss carryback. I.R.C. § 170(b)(1)(E).

77. I.R.C. § 170(b)(1)(C)(i).

78. I.R.C. §§ 170(d)(1)(A), 170(b)(1)(C)(ii).

79. I.R.C. § 170(e)(1); Treas. Reg. § 1.170A-8(d)(2) (1972).



### B. Montana Property Tax

The immediate property tax benefit to a landowner granting a conservation easement may be inconsequential. For example, the landowner who retains agricultural or timber rights but gives up development rights will be assessed "on the basis of the restricted purposes for which the property may be used."<sup>80</sup> Property still used for agriculture or timber harvest will be so assessed.<sup>81</sup>

By contrast, where urban populations have sprawled into farmlands, conservation of ecologically-fragile lands may be the choice of landowners under pressure to develop. The legislature's exemption of farm properties from assessment at their speculative values<sup>82</sup> is some relief to the landowner resisting subdivision. Use of a conservation easement can perpetually protect the values the landowner and the recipient find important. Note, however, that land subject to an easement "may not be classified into a class affording a lesser assessed valuation solely by reason of the creation of the easement."<sup>83</sup>

### C. Estate Planning

A conservation easement can limit the value of the property to the use allowed under the easement. This restriction could amount to a substantial reduction in the value of the total estate. Where given by will, the value of a conservation easement will be included in the estate to give effect to the testamentary disposition, but is subject to exclusion for determining the amount upon which federal estate and Montana inheritance taxes are assessed.<sup>84</sup>

## IV. ADVISING A CLIENT ABOUT THE GIFT OR SALE OF A CONSERVATION EASEMENT

Advising a client about the gift or sale of a conservation ease-

80. MCA § 76-6-208 (1979).

81. See generally MCA §§ 15-6-107, -112 (1979).

82. MCA § 15-7-201 (1979). There is divergence of opinion as to whether the so-called "Green Belt Law" was properly recodified. See note 42 *supra*. The proponents of the legislation argued that a vehicle ought to be available to assure agricultural classification subject to roll back penalties for those individuals who affirmatively sought the benefits of the law. Forms were published for this purpose. The recodification suggests that the Green Belt Law applies to all agricultural land. Questions have been raised with respect to the propriety of legislation which penalizes the owner of property for conversion of agricultural land by imposing a retrospective penalty while permitting the change of use of all other classes of property subject only to prospective taxation.

83. MCA § 76-6-208(1) (1979).

84. I.R.C. § 2055. Montana would handle the exclusion in the same manner as the IRS. Telephone conversation with Tom Stoll, see note 60 *supra*.

ment is not materially different from advising the client about the acquisition or disposition of any other substantial interest in real property. At the outset, the attorney should assess the client's motivations in considering the use of a conservation easement. The lawyer should review with the client the most frequently advanced reasons for using conservation easements as a land preservation technique. These reasons range from a genuine desire to perpetually preserve property in its natural state to a desire to restrict the value of real property for estate planning purposes. It is not unusual for a client to express interest in using a conservation easement as a tool to limit real property taxes, to generate income through the sale of such an interest, or to shelter income using tax deductions available for a qualified gift of a conservation easement. And with the advent of federal programs for the protection of wild and scenic rivers and other private programs for the comprehensive and systematic preservation of scenic and ecologically significant properties, the client's motivation may be to share the protection and benefits with neighboring or adjoining landowners.

It is important to assess initially the client's motivation, as other options may be more appropriate to achieve the client's objectives. For example, a desire to maintain agricultural tax status for the property may be satisfied by explaining the special tax provisions relating to agricultural land<sup>85</sup> contrasted with the property tax provisions applicable to conservation easements. The authors believe that the gift of a conservation easement would not alter or modify the continued taxation of lands currently taxed for agricultural purposes at agricultural rates.<sup>86</sup> The client desiring to reduce ultimate estate taxes should also consider the special farm and ranch valuation provisions of the I.R.C.<sup>87</sup> A conservation easement is only one of many means to address the needs and desires of a client. Frequently, the attorney may find alternatives which better serve the client's objectives.

If, however, the client's priorities appear to be better served by a conservation easement, a number of practical considerations must be addressed on a case-by-case basis. While not intended to be inclusive, the following checklist is offered as a guide for discussion with the client.

(a) A conservation easement may be more appropriate for clients who have fostered land use practices and preserved a natural environment for a long time, than it would be for younger cli-

---

85. MCA §§ 15-7-201 to -216 (1979).

86. MCA § 76-6-208 (1979).

87. I.R.C. § 2032A.

ents whose affinity for the land and long-range financial goals are uncertain.

(b) What is the relationship of the land to be subjected to a conservation easement to the entire estate?

(c) What are the current and projected values of the estate? Is there any long-range objective to be accomplished by the gift or sale of a conservation easement?

(d) What is the nature, extent and source of the client's income? In the case of a gift of a conservation easement, can the client effectively use the charitable contribution within the time permitted by law?<sup>88</sup> Alternatively, in the case of a sale or partial sale/partial gift of a conservation easement, the client should consider what effect the sale proceeds will have on taxable income.

(e) Will zoning regulations or other legislation arise which will enable government at the local, state or federal level to regulate the use of the land and affect its value? If zoning regulations appear imminent, the client should consider the benefits from the gift or sale of a conservation easement, rather than permit the government to take comparable interests in the land without compensation.

(f) What is the relationship of the client's property to adjacent property? The client should be advised of the potential windfall benefits to neighboring properties which remain unrestricted and unregulated as to future use. Additionally, it may be necessary to include neighboring properties for the effective preservation of water quality, game habitat, or other conservation values.

(g) What conservation values is the client seeking to protect? Identifying these values will help to identify prospective recipients. Recent legislation<sup>89</sup> imposes more stringent standards upon gifts of qualified real property interests for the preservation of open space, including farm land and forest land, than for the protection of a relatively natural habitat of fish, wildlife, plants, or a similar ecosystem. Open space preservation would qualify only if it would yield a significant public benefit, coupled with the requirement that it be for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state or local government conservation policy.<sup>90</sup>

(h) What is the form of ownership of the property to be subject to the conservation easement? Is the client a corporation or an

---

88. I.R.C. § 170(b)(1)(D)(i) to (iii); Treas. Reg. §§ 1.170A-8(d) to -10(c) (1972).

89. See H.R. Rep. No. 96-1278, 96th Cong., 2d Sess. (1980).

90. *Id.* at 8.

entity subject to restricted income tax deductions,<sup>91</sup> or one which may be adversely affected by receiving income from the sale of a conservation easement? If others hold an interest in the property, will they participate to accomplish the gift or sale of the conservation easement? This assessment may lead to the conclusion that the entity owning the property should be reorganized before the gift or sale of a conservation easement occurs.<sup>92</sup>

## V. TYPICAL PROBLEMS IN GRANTING A CONSERVATION EASEMENT

### A. *Condition of Title*

The title of the property to be subject to sale or donation of a conservation easement must be closely examined before drafting the conveyance. As in all real property transactions, all parties having an interest in the property must be determined. This process should include an examination of all underlying contracts, deeds, and instruments creating security interests to determine if there are restrictions on the ability to convey a conservation easement. These same documents should be examined to determine if there are any restrictions which would affect the value of the interest conveyed. For example, some contracts for deed prohibit granting easements absent the express consent of the contract seller. Also, some mortgages include provisions which trigger acceleration of the unpaid balance, should any interest in the property be conveyed without consent of the mortgage lender.

The attorney should also check for restrictive covenants, zoning regulations, flood plain regulations, county comprehensive plans, sanitary restrictions, and other restrictions that may impair the use of the land. These restrictions may have a significant effect in determining the value of the property for sale or gift of a conservation easement. Many of these restrictions do not appear on the standard title policy and require independent investigation at county and state offices.

The attorney should determine whether the property proposed for conveyance is the quid pro quo for some concession by local or state regulatory authorities. If the client has agreed to dedicate land for perpetual open space in return for a zoning change on other lands, a material question exists whether any gift can be

---

91. If a corporation makes the donation, it is subject to a limitation of five percent of its taxable income each year. The balance of the value over the five percent limitation may be carried forward as a deduction in the succeeding five years. I.R.C. §§ 170(b)(2), 170(d)(2).

92. Liquidation of a corporate entity after a sale has been negotiated can result in a determination that the corporation made the sale. See *Court Holding Co. v. United States*, 324 U.S. 331 (1945).

made. If the land is a remainder parcel in a subdivision or proposed subdivision, the county commissioners' minutes, minutes of the planning board meetings, or other appropriate documents should be examined to determine if the property is already subject to restrictions on use.

When examining the title, the attorney should determine whether access to the property would permit development which could be restricted by the gift or sale of a conservation easement. For example, if current access is by permit across public lands, the public agency may restrict or refuse to grant additional access permits. Prescriptive or recorded easements of limited duration or which prescribe the nature of the use of the access way, either historically or by limitations imposed in the grant of access easement, can significantly restrict the development potential of the property. In both instances, restrictions on access would undoubtedly have an effect on the value of the conservation easement.

In Montana, the use of contracts for deed for the sale of property is popular. A client may contemplate purchasing property pursuant to a contract for deed and may want to convey a conservation easement at a later date. If so, it is advisable that the contract include the consent of contract sellers. The following clause is a sample which might be used in a contract for deed or preliminary purchase and sale agreement to establish the buyer's right to donate a conservation easement:

**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, 1979, 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 buyer 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, and to receive the full and exclusive benefit of any tax deduction or other benefit derived from the grant of such easement. Buyers agree that any such conservation easement shall be substantially in accord with the purposes, terms, limits and re-

strictions 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.

It is also recommended that the default clause in the contract for deed be modified; for example:

In the event the buyer has, at the time of default, made a grant or grants of a conservation easement pursuant to paragraph \_ of this agreement, seller acknowledges that said conservation easements, and the purposes, terms, limits and restrictions contained therein, 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.

The attorney might want to alter the above clauses depending upon whether the buyer or seller is represented. When certain uses of the property are perpetually restricted and result in a devaluation of the property, the seller may desire to place further restrictions upon the grant of a conservation easement for security protection. For example, the seller may desire to prohibit granting a conservation easement until the purchaser can establish, by qualified appraisal, that the value of the property after the grant of the deed of conservation easement will be at least equivalent to the unpaid balance due seller pursuant to the contract for deed. The seller may also desire to require advance written approval for modification of the limitations and restrictions set forth in the proposed conservation easement.

The sample clause contemplates that the parties will attach a sample form of the conservation easement and that any grant of conservation easement will be substantially in accord with the purposes, terms, limits and restrictions as set forth in the sample form. A contract seller will normally desire to review the terms and conditions of a proposed deed of conservation easement prior to agreeing that it may be granted by the buyer. Attaching a conservation easement form can alleviate the uncertainties about the types of restrictions to be placed upon the property. Note, however, that there is no standard conservation easement, and most qualified recipients desire that any conservation easement be tailored to particular qualities of the property. Consequently, the

preparation of a conservation easement form which will be sufficiently precise to advise the seller of the nature of future limitations and restrictions may be a difficult document to prepare in the absence of substantial participation at an early date by a potential recipient. Additionally, a buyer who is not fully familiar with the property being purchased may have difficulty making judgments about appropriate limitations and restrictions prior to closing. Nevertheless, it is recommended that some base document be formulated, if for no other reason than to assure that the parties are generally cognizant of the nature of the conveyance and the purposes, terms, limits and restrictions encompassed therein. It is also recommended that the parties execute a separate, recordable document evidencing consent to the grant of a conservation easement on the terms provided in the unrecorded contract for deed.

### B. *Selecting a Qualified Recipient— Public Body or Private Organization*

Those entities qualified to receive a conservation easement are described in general terms by statute. The public bodies qualified to receive a conservation easement pursuant to the Montana statute include governmental entities at all levels except agencies of the federal government.<sup>93</sup> Federal agencies, however, may receive conservation easements under various federal statutory provisions.<sup>94</sup>

A number of factors should be considered when selecting the recipient of a conservation easement. The main consideration is the willingness of the qualified recipient to work with the client. No qualified recipient is obligated to accept a conservation easement and no presumption should be made that the recipient will necessarily accept the conservation easement in the form initially proposed by the client. The qualified recipient will probably desire to inspect the land and make its own determination of the presence of worthwhile conservation values. The organizations receiving conservation easements have been willing to assess their interest in a prospective acquisition, and to outline their organization's capabilities, including the organization's ability to monitor and manage the property.

Consideration should also be given to the organization's past

---

93. MCA § 76-6-104(4) (1979).

94. See, e.g., 7 U.S.C. § 2269 (1978), which authorizes the Secretary of Agriculture to accept and administer on behalf of the United States, gifts or devises of real property made for the benefit of the United States Department of Agriculture or for the carrying out of any of its functions.

involvement as a recipient of conservation easements. Of concern to many individuals who contemplate granting a conservation easement is the recipient's potential to act over a long period of time. Consequently, it may be important to assess the potential longevity of the organization to determine whether assignment of the interest conveyed to another qualified entity is probable.

## VI. DRAFTING THE CONSERVATION EASEMENT

Two formats for conservation easements are reproduced in Appendices II and III. Appendix II represents a form of conservation easement currently used in Montana by most qualified, private recipients of conservation easement gifts. The easement deed reproduced as Appendix III illustrates the format used by the Forest Service in acquiring scenic easements pursuant to the Wild and Scenic Rivers Act. Virtually all scenic easements acquired pursuant to the Wild and Scenic Rivers Act are acquired by purchase or condemnation.

A reading of the two formats reveals that the Appendix II conservation easement is more detailed. The additional detail is probably attributable to at least three factors. First, the terms and conditions of the conservation easement represented in Appendix II reflect a voluntary relinquishment of enumerated rights in perpetuity versus payment, under threat of condemnation, for relinquishment of such rights. Secondly, private qualified organizations do not have the resources of the government at their disposal, hence they seek greater enumeration of rights and responsibilities to avoid confusion and conflict and to elaborate on enforcement rights to provide more certainty about the process to be followed in the event of breach of the terms and conditions of the easement. Finally, Appendix II is drafted to accommodate certain exigencies of Montana law, whereas Appendix III represents an easement acquired pursuant to federal enabling legislation.

The Appendix II conservation easement is not offered as the model Montana conservation easement. Each conservation easement of record in Montana includes variations of the sample clauses. There are general observations which can be made, however, with respect to the provisions of this particular conservation easement. (For ease of reference, numerical notations appear on Appendix II which correspond to the following subparagraphs.)

1. *Identification of parties.* As in any conveyance, it is important that the grantors be properly identified. If ownership is in question, it is advisable to obtain an ownership title report. It is equally important that the conveyance be to a qualified donee or



grantee who meets the statutory prerequisites.<sup>95</sup> A copy of the IRS 501(c) ruling should be examined to confirm that the private organization is currently qualified pursuant to I.R.C. § 501(c).

2. *Whereas clauses.* The prefatory clauses of the conservation easement frequently identify in general terms the parties' goals and objectives. The clauses may be particularly significant in identifying the "conservation purpose" contemplated in the recently approved amendments to I.R.C. § 170.<sup>96</sup> The prefatory clauses should also include an affirmative statement of the recipient's qualifications pursuant to Montana law. Care should be taken to avoid recitation of monetary consideration if the conservation easement is intended to be a gift.

3. *General provisions.* Many conservation easements include a statement of the general rights conveyed and retained, which includes the duration of the easement. Since Montana law permits the grant of a conservation easement in perpetuity or for a minimum term of fifteen years, the duration should be specified. Most conservation easements in Montana specifically address the potential for conversion of land subject to a conservation easement pursuant to MCA § 76-6-107 (1979). The sample provision provides that the land may not be converted or directed to any use other than those provided in the easement. The absence of such a provision would permit conversion or diversion if the statutory criteria are met.

4. *Consistent uses and practices.* The provisions of the sample easement recognize that there are certain activities which may be undertaken that are consistent with the conservation easement if they are undertaken in a prescribed manner, and in some instances, after having been reviewed by the recipient. The latter activities are italicized for identification in the sample easement. The sample easement also provides a process for notifying the recipient about activities subject to review, and provides a process for review and approval or disapproval.

5. *Prohibited activities.* Prohibited activities are set forth in detail in the sample easement. The nature of these prohibited activities will largely reflect those kinds of activities which might impede the preservation of recognized conservation values. Additionally, the nature and extent of the prohibited activities will largely determine the value of the rights relinquished pursuant to the conservation easement. Property which cannot be divided or subdivided

---

95. MCA §§ 76-6-194(5)(a) to (c) (1979).

96. H.R. Rep. No. 96-1278, 96th Cong., 2d Sess. at 8-9 (1980).

vided, or on which commercial activity may not be undertaken, usually will be less valuable than property subject to minimal restrictions on subdivision or on which specified commercial activity is permitted.

6. *Remedies for breach.* While Montana statutes generally provide for the enforcement of conservation easements by injunction or proceedings in equity, the parties may further enumerate the rights and remedies if the terms of the easement are violated. The sample clauses include a provision for the award of attorney's fees. As in any contract, a provision could be included with regard to notice of violation and a period for curing such violation. When representing the recipient of the easement, the enforcement provisions should include an acknowledgment that a failure to enforce in any specific instance does not preclude the right to enforce in the event of a later breach.

7. *Public access.* No Montana law mandates that the public be afforded access to property subject to a conservation easement. The gift of a conservation easement is not impaired by the absence of public access, though recent legislation suggests that the "conservation purpose" test is met if a conservation easement preserves land for outdoor recreation by (or for the education of) the general public.<sup>97</sup> If public access is not granted, the conservation easement should so provide to avoid confusion with regard to the rights of the public on land subject to conservation easements. Public access is, in most instances, inappropriate in a perpetual grant because of the probable need to adjust to the impacts of public use over time. Public access and incidental impacts of public use can be accommodated using management agreements of a more limited duration.<sup>98</sup>

8. *Assignability.* All conservation easements in Montana are assignable unless the conveying instrument expressly stipulates otherwise.<sup>99</sup> The sample clause includes a limited restriction on assignability. Most qualified entities, as a matter of policy, will not accept conservation easements with absolute restrictions on assignability. In some instances qualified entities will not accept easements with any restrictions on assignability. In the event of assignment, the assignee must be qualified to hold a conservation easement pursuant to Montana law.<sup>100</sup>

---

97. *Id.*

98. Property owners in the Blackfoot River drainage in Missoula and Powell Counties, Montana, have entered into a series of cooperative recreational use management plans with the University of Montana, the County of Missoula, and the Department of Fish, Wildlife and Parks providing enforcement and support personnel, signs and public information.

99. MCA § 76-6-205 (1979).

100. *Id.*

9. *Base-line data.* The sample easement provides for the attachment of a base-line data report to establish the condition of the property at the time the conservation easement is granted. It is recommended that a base-line data report be prepared for the benefit of the grantor and the recipient. The base-line study should be completed by an independent party competent to assess the conservation values of the property. Such a report assists in identifying conservation values to be protected, in formulating the provisions necessary to accomplish such protection, and in documenting the conservation purpose. Additionally, the base-line study gives both parties an agreed base reference should a dispute arise concerning the condition of the property at the time of the grant. It is recommended that the base-line study be incorporated in the conservation easement and recorded with it to apprise subsequent owners of the existence of base-line information.

10. *Savings clause.* The sample conservation easement includes a standard savings clause. Because most conservation easements are given in perpetuity, the possibility that a provision of the conservation easement may be found to be invalid is not remote. The savings clause assures that the invalidity of any particular provision of the conservation easement does not affect the remaining provisions.

11. *Notarial acknowledgment.* The conservation easement must be in recordable form to fulfill the requirement that all conservation easements be recorded in the county where the land lies.<sup>101</sup>

The conservation easement should be executed in triplicate to assure that copies are available to meet the separate filing requirements of the statute.<sup>102</sup>

The particular terms of any conservation easement should be formulated through negotiation between the parties or their legal representatives. The provisions should be designed to protect qualities and features of land which merit protection without unduly restricting other legitimate compatible uses. Care should be taken to avoid subjecting land which has little or no conservation value to inappropriate restrictions. For example, buffer lands in a scenic river corridor may require some restrictions to avoid interference with water quality or wildlife migration routes. Consideration should be given in such a case to incorporating less stringent provisions affecting the buffer zone. This can be accomplished by identi-

---

101. MCA § 76-6-207(1) (1979).

102. MCA § 76-6-207(2) (1979).

fying and mapping different use zones and clearly providing for appropriate restrictions and permissible use patterns. Maps used to identify zones should be incorporated in the conservation easement and recorded, since these zones normally follow contour lines or natural features, and rarely can be described using conventional legal descriptions.

The preparation of the conservation easement is not a process which can be accomplished overnight. Ample time should be allowed to complete the conservation easement to the satisfaction of all parties. If year-end gifting or other timing considerations are important, the process should be instituted sufficiently in advance of any contemplated deadline in order to permit review of the conservation easement by the local planning authority and to allow for the completion of the statutory review process<sup>103</sup> before the conservation easement is recorded.

## VII. CONCLUSION

Conservation easements are a versatile land preservation technique. Within the statutory boundaries, Montana allows the landowner great latitude in defining the easement. A client interested in preserving ecologically-fragile lands by conservation easement must understand the federal and state tax ramifications and the extent to which conservation restrictions are authorized. Not suitable for every landowner, the easement allows some to use a "new instrument of foresight and protection and nurture [that] recover[s] the relationship between man and nature and [makes] sure that the national estate [passed] on to our multiplying descendants is green and flourishing."<sup>104</sup>

---

103. MCA § 76-6-206 (1979).

104. John F. Kennedy quoted in *PRIVATE APPROACHES*, *supra* note 1, at iii.

APPENDIX I

COMPARISON OF MONTANA PROPERTY LAW TECHNIQUES AVAILABLE FOR THE PRESERVATION OF ECOLOGICALLY-SIGNIFICANT LANDS

	Duration		Created by Conveyance	Recording Required	Enforcement		Tax Benefits
	Use by Owner	Renewal Optional			Privacy Necessary	Assignable	
Purchase/Sale Servitudes	Terminated Use right given to grantee	Not applicable	Yes	Yes	Depends	Depends	Yes <sup>1</sup>
Covenants	Restricts use by contract	Yes	May be	*	Yes	May be	No
Conservation Easements	May have uninter- rupted use <sup>4</sup>	Yes <sup>5</sup>	Yes	Yes	Yes <sup>6</sup>	Yes <sup>6</sup>	Yes <sup>7</sup>

1. Tax benefits exist for outright charitable conveyances, of course. I.R.C. § 170.
2. Necessary for enforcement against third parties where notice must be actual, of record, or on inquiry.
3. See Annot., 51 A.L.R.3d 556 (1973).
4. Generally, the owner continues use but agrees not to commit acts detrimental to the existing condition of the land. MCA § 76-6-203 (1979).
5. Minimum of 15 years. MCA § 76-6-202 (1979).
6. To other government bodies or qualified private organizations. MCA § 76-6-205 (1979).
7. MCA § 76-6-208 (1979), I.R.C. § 170. Discussed in text.

**THIS GRANT DEED OF CONSERVATION EASEMENT** by \_\_\_\_\_  
and \_\_\_\_\_, husband and wife, of \_\_\_\_\_  
(hereinafter referred to as "Grantors"), and \_\_\_\_\_  
\_\_\_\_\_, non-profit corporation (or public body) (hereinafter  
referred to as the "\_\_\_\_\_").

①

**WITNESS THAT:**

**WHEREAS**, Grantors are the owners of certain real property in \_\_\_\_\_ County, Montana, said real property being more particularly described on Exhibit "A" attached hereto (hereinafter described and hereinafter referred to as the "Grantors' Land"); and

②

**WHEREAS**, portions of Grantors' Land currently remain in a substantially undisturbed, natural state and have significant ecological, scenic and aesthetic values; and

**WHEREAS**, Grantors' Land is a valuable element of the \_\_\_\_\_ Creek Drainage, which includes Grantors' Land, \_\_\_\_\_ Creek, and its wetlands, and its aesthetic and ecological values, including flora, fauna and soils; and

**WHEREAS**, Grantors' Land supports significant communities of native plants and provides important habitat for native wildlife; and

**WHEREAS**, the protection of the ecological features and elements of the Grantors' Land is essential to the integrity of the \_\_\_\_\_ Creek Drainage and the flora and fauna they support; and

**WHEREAS**, all of these natural elements and ecological and aesthetic values are of great importance to the Grantors and to the people of the State of Montana, and are worthy of preservation; and

**WHEREAS**, Grantors desire and intend that the natural elements and the ecological and aesthetic values of Grantors' Land be preserved and maintained by the continuation of patterns of land use on the Grantors' Land that will not interfere with or substantially disrupt the natural elements or the workings of the natural systems, including such uses as agriculture, ranching and guest ranching and sustained yield timber harvesting; and

**WHEREAS**, Grantors, as owners of Grantors' Land, own the affirmative rights to identify, to preserve and protect in perpetuity and by mutual agreement, to enhance by restoration, the natural ecosystems, the natural elements, and processes and the great aesthetic value of Grantors' Land; and

**WHEREAS**, Grantors desire and intend to transfer such rights to \_\_\_\_\_ (Grantee); and

**WHEREAS**, the \_\_\_\_\_ (Grantee) is organized to preserve and conserve natural areas and ecologically significant land for aesthetic, scientific, charitable and educational purposes; and

**WHEREAS**, the State of Montana has recognized the importance of private efforts toward preservation of natural systems in the state by the enactment of Montana Code Annotated [hereinafter cited as MCA] §§

76-6-201 to -211 (1979); and

WHEREAS, \_\_\_\_\_ (Grantee) is a qualified private organization under the terms of MCA § 76-6-104(5) (1979) or a public body under MCA § 76-6-104(4) (1979).

Now, THEREFORE, in consideration of the mutual covenants contained herein, based upon the Common Law, and further, pursuant to MCA § 76-6-201 to -211 (1979), Grantors, \_\_\_\_\_, and \_\_\_\_\_, do hereby convey to \_\_\_\_\_, Grantee, a non-profit corporation (or public body) with offices at \_\_\_\_\_, a Conservation Easement consisting of the rights hereinafter enumerated, over and across that real property situated in \_\_\_\_\_ County, Montana (referred to herein as the "Grantors' Land"), more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof.

The rights conveyed by the Conservation Easement granted are the following:

- ③ 1. To identify, to preserve and protect in perpetuity and to enhance by mutual agreement, the ecological and aesthetic features and the natural flora and fauna on the Grantors' Land and its water resources.
2. To enter upon the Grantors' Land to enforce the rights herein granted and to observe, study and make scientific observations of its ecosystems, upon prior written notice to Grantors, their heirs, personal representatives, successors or assigns, and in a manner that will not unreasonably interfere with the use of the Grantors' Land by Grantors, their heirs, successors or assigns at the time of such entry.
3. To enjoin any activity on, or use of, the Grantors' Land which is inconsistent with the Conservation Easement granted and with the Grantors' intentions and to enforce the restoration of such areas or features of the Grantors' Land as may be damaged by such activities.

The Conservation Easement granted shall run with and burden title to the Grantors' Land in perpetuity, and shall bind the Grantors, their heirs, personal representatives, successors and assigns.

This Conservation Easement shall confine the use of the Grantors' Land to activities such as farming, ranching, guest ranching and outfitting, sustained yield timber management, personal residence for the owner of Grantors' Land and his family, and ecological study.

Pursuant to the terms of MCA § 76-6-107 (1979), the Grantors' Land preserved hereby as open space and natural land, may not be converted or directed to any uses other than those provided herein.

- ④ The following uses and practices, though not an exhaustive recital of consistent uses and practices, are consistent with this Conservation Easement, and these practices may not be precluded, prevented or limited by this Conservation Easement as interpreted in the context of historical use as above mentioned, except for the requirement of prior approval from the \_\_\_\_\_ (Grantee) as provided herein:

A. To pasture and graze livestock, including, but not limited to, the continuation of historical modes of stock watering and stock crossings,

and to continue agricultural activity on the Grantors' Land consistent with the maintenance and enhancement by mutual agreement, of soil composition, structure and productivity and to the extent that such activities do not result in the pollution or degradation of any surface waters in such a manner as to have a demonstrable detrimental effect upon fish or wildlife, their natural habitat, or upon the natural ecosystems and their processes.

B. To institute and carry on any agricultural or ranching activity which will not result in a degradation of any of the ecological elements upon Grantors' Land in such a manner as to have a demonstrable detrimental effect upon fish or wildlife, their natural habitat or upon the natural ecosystems and their processes. Grantors specifically reserve the right to maintain a garden on Grantors' Land and to utilize the meadow on Grantors' Land for grazing and grain and/or hay production, subject to the general restrictions set forth above.

C. To develop and maintain those water resources on the Grantors' Land necessary for the grazing, agricultural, wildlife and domestic purposes conducted thereon pursuant to the terms hereof, including, but not limited to, the right to locate, construct, install and maintain a pump and irrigation system, to irrigate the pasture situated on Grantors' Land. Where possible, the aforementioned system and the means to operate the same, will be buried or otherwise camouflaged.

D. To build, maintain and repair fences, and to maintain and repair buildings, corrals and other improvements on the Grantors' Land, *and to place upon the Grantors' Land those additional buildings, corrals or roads or travelways and other improvements as may be necessary for agricultural and ranching purposes and for residential and guest ranching purposes.*

E. To use agrichemicals, including, but not limited to, fertilizers and biocides, only in those amounts and with that frequency of application constituting the minimum necessary to accomplish reasonable grazing, agricultural and residential purposes. The use of such agents shall in all cases be conducted in such a manner as to minimize any adverse effect upon the natural value of Grantors' Land and to avoid any impairment of the natural ecosystems and their processes.

F. To control predatory and problem animals by the use of selective control techniques. All measures used for such control shall be limited in their effectiveness to specific animals which have caused damage to livestock or other property, Grantors retaining no right to use poison bait, cyanide guns or other nonselective control techniques; provided, however, that in the control of coyotes only, and only during the period immediately prior to and during calving season, Grantors may use any chemical(s) approved for non-experimental use in coyote control by the Environmental Protection Agency of the United States of America. Provided further, that the aforementioned restrictions do not apply to ground rodents.

G. To maintain all the existing residential and related structures on



the Grantors' Land, and in the event of removal or destruction of any or all of said structures, to replace them with structures of similar size, function, capacity, situation and building materials.

H. To construct, maintain and repair, a barn, tack shed, residential cabins, woodshed, and storage sheds, on the Grantors' Land in the proximity of existing buildings and structures, utilizing natural material, i.e., wood, logs, stone, etc., as the principal building material, and in the event of destruction of any or all of said structures, to replace them with structures of similar size, function, capacity, situation and building materials.

I. To bury and otherwise camouflage, if possible, all utility systems or extensions of existing utility systems constructed in the future.

J. To construct additional residential or residential related structures, to expand those uses now existing and utilized for purposes permitted herein; said additional structures in aggregate shall not exceed fifty per cent (50%) of the square footage of the total of all existing structures. The square footage in each instance shall be the gross area or areas of the floor (or several floors in the case of residential structures only) of the structure, measured from the exterior faces of exterior walls, excluding therefrom the basement, cellar and attic space. Any additional structure constructed in accordance herewith shall be of similar situation, function, and building materials, and in the event of removal or destruction of any such addition, Grantors shall have the right to replace it with a structure of similar size, function, capacity, situation and building materials.

K. To take gravel for the purposes of maintaining the existing roads and travelways and for building and maintaining those additional roads and travelways as may be permitted hereunder, provided, however, that gravel may not be taken from any location in the watershed in such a manner as to cause a demonstrable decrease in water quality or stream flow or a material interference with the natural habitat values of the Grantors' Land.

L. *To harvest timber in accordance with forestry practices which are consistent with the general and specific intentions of the Grantors as expressed in this Conservation Easement and which do not interfere with the integrity of:*

- i. *water quality, including, but not limited to, its fisheries resources,*
- ii. *the wildlife habitat on the Grantors' Land, and*
- iii. *the natural aesthetic qualities of the Grantors' Land.*

*Except as provided herein, such forestry practices shall not be construed to include either clearcutting or the taking of any trees within 150 yards on either side of the centerline of any stream or creek.*

*With regard to timber harvest practices, Grantors specifically intend that timber harvest activities on the Grantors' Land shall be limited generally by this Conservation Easement in order to preserve the water quality of the fisheries resources, the wildlife habitat on the Grantors' Land, and the aesthetic and scenic qualities of the Grantors' Land.*

**M.** *To clearcut timber only in order to remove or abate disease or infestation; and*

**N.** The sale, exchange, devise or gift of a unit of land solely for ranching, guest ranching, timber management and/or harvesting or agricultural purposes, shall not be considered a subdivision or de facto subdivision, provided such transfer is effected with an express provision reflecting that said land is subject to the terms and conditions of the Conservation Easement, without modification or expansion of the terms of the easement, to the extent that said land is situated within any portion of the Grantors' Land subject to the Deed of Conservation Easement. The \_\_\_\_\_ (Grantee) shall be furnished with a copy of a pertinent portion of any document or conveyance utilized to effect such a transfer within thirty (30) days of the execution of the same.

Except with regard to the normal maintenance of improvements as provided under subparagraph D, and further, except in regard to the carrying on of existing agricultural and ranching activities under subparagraph B, Grantors, their heirs, personal representatives, successors or assigns may not undertake any activity pursuant to the italicized portions of the provisions of D, L and M without first having notified \_\_\_\_\_ (Grantee) as provided herein. Prior to the commencement or undertaking of any such activity, Grantors, their heirs, personal representatives, successors or assigns, shall send the \_\_\_\_\_ (Grantee) written notice of the intention to commence or undertake such activity. Said notice shall inform the \_\_\_\_\_ (Grantee) of all aspects of such proposed activity including, but not limited to, the nature, siting, size, capacity and number of similar and dissimilar structures, improvements, facilities or uses.

Said notice shall be sent by registered or certified mail, return receipt requested, and shall be addressed to \_\_\_\_\_, or to such other address as Grantors, their heirs, personal representatives, successors or assigns may be from time to time informed of in writing by the \_\_\_\_\_ (Grantee).

The \_\_\_\_\_ (Grantee) shall have thirty (30) days from the posting of such notice, as indicated by the registered or certified return receipt, to review the proposed activity and to notify Grantors of its objections thereto. Such objections, if any, shall be based upon the \_\_\_\_\_ (Grantee's) opinion that the proposed activity is inconsistent with this Conservation Easement. If in the opinion of the \_\_\_\_\_ (Grantee) it is possible that the proposed activity can be modified to be consistent with the Conservation Easement, said notice shall inform Grantors of the manner in which the proposed activity can be modified to be consistent with this Conservation Easement. If there is concurrence with the matters set forth in the notice, the proposed activity may thereafter be conducted in a manner that is mutually acceptable to Grantor and \_\_\_\_\_ (Grantee).

The \_\_\_\_\_ (Grantee's) response to Grantors' notice shall be sent by registered or certified mail, return receipt requested, to Grantors at \_\_\_\_\_, or to such other address as the \_\_\_\_\_

(Grantee) from time to time may be informed of in writing by Grantors, their heirs, personal representatives, successors or assigns.

Should the \_\_\_\_\_ (Grantee) fail to post its response to Grantors' notice within thirty (30) days of the posting of said notice, the proposed activity shall automatically be deemed consistent with the terms of this Conservation Easement, the \_\_\_\_\_ (Grantee) having no further right to object to the activity identified by such notice.

Grantors shall be under no liability or obligation for any failure in the giving of notice as required above with regard to any activity undertaken by Grantors necessitated by virtue of fire, flood, act of God, or other element, or any other cause beyond the control of Grantors similar to those hereinbefore specified.

⑤ Grantors state that the following uses and practices, though not an exhaustive recital of inconsistent uses and practices, are inconsistent with the purpose of this Conservation Easement, and shall be prohibited:

(a) The change, disturbance, alteration or impairment of the natural ecological values of those portions of any river system within and upon Grantors' Land except as provided herein.

(b) The introduction of non-native plant or animal species which will compete with and result in the decline or elimination of native species except where such introduction is intended as biological control against introduced pest species and where the introduction is subject to the prior approval of \_\_\_\_\_ (Grantee), which approval shall not be unreasonably withheld.

(c) The hunting of any non-game animals, except as heretofore provided in subparagraph F.

(d) Trapping for any purposes other than predatory and problem animal control as provided herein in subparagraph F.

(e) The exploration for or extraction of minerals, hydrocarbons, or soils or other materials on or below the surface of the Grantors' Land.

(f) The division, subdivision or de facto subdivision of the Grantors' Land, except as hereinbefore provided in subparagraph N.

(g) The construction of any structures except as otherwise provided herein.

(h) The construction of the roads except for those limited residential purposes and for the conduct of timber management and harvesting and agriculture provided for herein.

(i) The use of off-road vehicles in such a manner as will result in soil erosion or compaction or in the interference with vegetation or with the natural habits of those animal species occurring on the Grantors' Land.

(j) The establishment or maintenance of any commercial feed lots. A commercial feed lot shall be defined for purposes of this agreement as the establishment and maintenance of a permanently constructed confined area or facility within which the land is not grazed or cropped annually, for purposes of engaging in the business of the reception and feeding of livestock for hire.

the Grantors' Land.

(l) The collection of firewood other than for Grantors' personal use.

(m) The installation of utility structures or lines upon or within Grantors' Land except in connection with the construction of agricultural and residential facilities as provided herein.

(n) With regard to the raptor nesting habitat on the Grantors' Land, Grantors specifically intend that this Conservation Easement shall prohibit the cutting or disturbance of any trees or other vegetation within 660 feet of any active or inactive raptor nest, currently known or later identified, during the nesting season. Grantors further intend that this Conservation Easement shall prohibit the removal of any crown trees or other overstory vegetation including the nesting trees themselves, within 330 feet of any active or inactive raptor nest, currently known or later identified, at any time, provided, however, that during the non-nesting season, diseased trees may be cut and removed to abate infestation.

Grantors further intend that should Grantors, their heirs, successors or assigns, undertake any activity requiring approval of the \_\_\_\_\_ (Grantee) without or in advance of securing such approval, or undertake any activity in violation of the terms of this Conservation Easement, the \_\_\_\_\_ (Grantee) shall have the right to force the restoration of that portion of the Grantors' Land affected by such activity to the condition that existed prior to the undertaking of such unauthorized activity. In such case, the costs of such restoration and the \_\_\_\_\_ (Grantee's) costs of suit, including attorney's fees, shall be borne by Grantors or those of their heirs, personal representatives, successors or assigns against whom a judgment is entered, or, in the event that the \_\_\_\_\_ (Grantee) secures redress without a completed judicial proceeding, by Grantors or those of their heirs, personal representatives, successors or assigns who are otherwise determined to be responsible for the unauthorized activity. Nothing herein contained shall be construed to preclude Grantors from exhausting their legal remedies in determining whether the proposed activity to which the \_\_\_\_\_ (Grantee) has objected is inconsistent with the Conservation Easement. ⑥

Grantors agree to pay any and all real property taxes and assessments levied by competent authority on the Grantors' Land, except any tax or assessment on the easement herein granted.

Grantors agree to bear all costs of operation, upkeep and maintenance to the Grantors' Land, and do hereby indemnify the \_\_\_\_\_ (Grantee) therefrom.

Nothing herein contained shall be construed as affording the public access to any portion of the land subject to this Conservation Easement. ⑦

The parties hereto covenant and agree that the \_\_\_\_\_ (Grantee) may not assign its interest in this Conservation Easement without the prior written consent of Grantors, which consent shall not be unreasonably withheld. ⑧

The Grantors acknowledge that a collection of base-line data more particularly described in Exhibit "B" attached hereto, and by this refer- ⑨

particularly described in Exhibit "B" attached hereto, and by this reference made a part hereof, has been completed by competent naturalists familiar with the environs, and agreed upon by the \_\_\_\_\_ (Grantee) and the Grantors. The parties acknowledge that said collection of base-line data is designed to establish the condition of the property subject to this Conservation Easement at the time of this grant.

10 If any provision of this Deed of Conservation Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of the Deed of Conservation 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.

IN WITNESS WHEREOF, the Grantors have hereunto set their hands this \_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
\_\_\_\_\_

11 STATE OF \_\_\_\_\_ )

: ss.

County of \_\_\_\_\_ )

On this \_\_\_ day of \_\_\_\_\_, 19\_\_, before me, the undersigned, a Notary Public for the State of \_\_\_\_\_, personally appeared \_\_\_\_\_ and \_\_\_\_\_, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

(SEAL)

\_\_\_\_\_  
NOTARY PUBLIC for the State of \_\_\_\_\_  
Residing at \_\_\_\_\_  
My commission expires \_\_\_\_\_

Tract No. \_\_\_\_

**National Wild and Scenic Rivers System  
Easement Deed**

**THIS EASEMENT**, dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by and between \_\_\_\_\_, of \_\_\_\_\_, hereinafter called the Grantors, and the UNITED STATES OF AMERICA, hereinafter called Grantee;

**WHEREAS**, Public Law 90-542 (82 Stat. 906), as amended, provided for the establishment of a Wild and Scenic Rivers System, and designated portions of the Flathead River System in Montana as a component of the National Wild and Scenic Rivers System to be administered by the Secretary of Agriculture as part of the National Forest System, and

**WHEREAS**, the Grantors are the owners of certain land in the established boundaries of the Flathead River component of the National Wild and Scenic Rivers System, located in Flathead County, State of Montana, said land being appurtenant to other lands of the Grantee and affecting the public benefits provided by this Federal land, and

**WHEREAS**, the Grantee, by the United States Department of Agriculture through the Forest Service, or its assigns, desires to administer such land pursuant to the Wild and Scenic Rivers Act and the general statutory authorities relating to the National Forest System and to provide for and protect the natural, scenic, recreational and other values for which this river was designated, and to prevent any developments that will tend to mar or detract from these values, and to that end exercise such reasonable controls over the land within the areas described herein as may be necessary to accomplish such objectives.

**NOW THEREFORE**, the Grantors for and in consideration of the sum of \$\_\_\_\_, the receipt of which is hereby acknowledged, and in further consideration of the covenants herein contained, do hereby grant and convey unto the Grantee and its assigns a perpetual estate and easement in the following decribed lands:

The above-described property contains \_\_\_\_\_ acres, more or less.

The acquiring agency is the Forest Service, United States Department of Agriculture.

Grantors and Grantee do hereby covenant and agree for themselves, their heirs, or assigns, that they shall use and restrict the use of the easement area as set forth hereinafter, it being mutually agreed that such use, or restriction thereof, shall run with the land, and be to the benefit of the entire river area and such other lands of the Grantee which are situated within said area by fostering and enhancing the Grantee's goal of preserving the scenic, recreational, and other natural qualities of the Flathead Wild and Scenic River area in accordance with Public Law 90-542 (82 Stat. 906), as amended.

## I. PRE-EXISTING REGULAR USES:

Section 15(c) of the Wild and Scenic Rivers Act, Public Law 90-542, defines a scenic easement, the interest being acquired herein, as the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the Wild and Scenic Rivers System for the purpose of protecting the natural qualities of the river area, but such control shall not affect, without the owners' consent, any regular use exercised prior to the acquisition of the easement; accordingly, the regular uses of the above-described land exercised prior to the acquisition of this easement and not relinquished are:

## II. USE BY GRANTEE:

The Grantee, its authorized representatives and/or assigns, is hereby granted the right to go upon the land described in this easement for the following purposes:

A. To inspect for violations and to administer this easement, including the establishment and maintenance of corners delineating the easement area. It is the intent of Grantee, whenever reasonable and feasible, to notify any owner or tenant occupying the easement area of the impending inspection and to offer that occupant an opportunity to accompany the Grantee on the inspection.

B. At the expense of the Grantor, remove or eliminate any advertising displays, signs and billboards, stored or accumulated junk automobiles, and other salvage materials, junk, or debris, which is not permitted by the terms of this easement, and is placed on the above-described land after the date of this easement.

C. To mark, cut, and remove any trees and shrubs which in the judgment of the Grantee endanger public safety or detract from the aesthetics of the above-described area, and to plant and selectively cut or prune trees and shrubs to restore or maintain the scenic view and to implement disease prevention measures. The property owners shall be consulted prior to initiation of such operations. Any merchantable timber so cut shall, unless otherwise agreed, be cut into logs of standard lengths for disposal by the Grantors.

D. To perform such other scenic, aesthetic, historical, fish and wildlife, sanitation, restoration or other work as, in the opinion of the authorized representative of the Grantee, may be deemed necessary or desirable to protect and promote the natural and recreational qualities of the area. The Grantors shall be consulted prior to initiation of such projects.

E. To post regulatory notices on selected portions of the easement area for purposes of promoting the provisions of this easement and the intent of the Wild and Scenic Rivers Act, and at its discretion to utilize with respect to the public the general statutory authorities relating to the National Forests and Wild and Scenic Rivers in such a manner as it deems appropriate to carry out the purposes of said Act. Nothing in this clause is intended to abrogate the landowners' right to legally protect

their property rights under State law.

Except as noted, activities conducted by the Grantee under the above section shall be at no expense to the Grantors. Nothing herein shall be construed as creating any duty on the part of the Grantee to undertake any of the acts described above.

### III. USE BY GRANTORS:

In return for the stated consideration, the Grantors assume the following covenants and restrictions. These covenants and restrictions are imposed upon the occupancy and use of the easement area by the Grantors, all heirs or assigns, except that none of these covenants and restrictions shall be deemed or construed as controlling or eliminating any regular use of the land exercised prior to the acquisition of this easement unless such use is acquired by the Grantee. Except as otherwise provided by this easement, the costs of conformance with the terms of Part III of this easement shall be borne by the Grantors.

Where specific activities and uses are predicated upon approval or permission by the Secretary of Agriculture or his duly authorized representative, such approval or permission may be withheld or conditioned by requirements necessary to preserve the natural values of the area. Such requirements shall have the same force and effect as if stated in this instrument.

A. The easement area shall not be further subdivided, sold, leased or otherwise conveyed as smaller tracts.

A. Said existing lots in the easement area shall not be further subdivided or sold or otherwise conveyed as smaller tracts.

A. The easement area shall not be further subdivided, sold, leased, or otherwise conveyed as a unit smaller in size than exists on the date of this easement. One (1) single-family residence and associated structures is the maximum number authorized for the easement area.

A. The easement area shall not be further subdivided, sold, leased, or otherwise conveyed as smaller tracts unless approved in writing by the Secretary of Agriculture or his duly authorized representative.

A. The Grantors, all heirs and assigns, retain the right to develop the easement area for residential or light commercial purposes consistent with applicable State and local regulations. Commercial enterprises shall be limited to those which offer necessary services or goods to visitors, through-travelers, or local residents. Examples of such enterprises are automobile service stations, stores, souvenir and gift shops, cafes, lodge or motel type accommodations, multifamily or single-family condominiums and guide and packer services. Excluded are such businesses as amusement parks, used car lots, trailer rental lots, outdoor "zoos", and industrial and manufacturing operations.

A. The Grantors, all heirs and assigns, retain the right to develop the easement area for residential or light commercial purposes associated with a commercial campground and associated uses. Associated uses, in addition to the basic camping units, would be centralized showers and



sanitary facilities, store and laundry. Any other uses require the advance written approval of the Secretary of Agriculture or his duly authorized representative.

A. The Grantors, all heirs and assigns, specifically reserve the right to subdivide the easement area into no more than \_\_\_\_ smaller parcels subject to:

(1) No part of land within the easement area shall be subdivided, sold, or leased, or otherwise conveyed in parcels or lots smaller than \_\_\_\_ acres, or which will leave a remaining parcel of less than \_\_\_\_ acres. If subdivided, each parcel shall be subject to the provisions of this easement.

(2) For riverfront lots, each subdivided portion of the easement area shall be limited to a minimum width of 300 feet fronting the river.

(3) For nonriverfront lots, each subdivided portion of the easement area shall be limited to a minimum width of 200 feet facing the river, unless authorized in writing by the Secretary of Agriculture or his duly authorized representative.

B. Use of the easement area is limited to single-family residential and recreational uses. One (1) single-family residence or recreational residence and appropriate accessory structures is the maximum number authorized for the easement area or each authorized subdivision thereof.

B. The lands within the easement area shall be exclusively for general crop, livestock and tree growing purposes. Such right shall be subject to conditions and approval in writing by the Secretary of Agriculture or his duly authorized representative.

B. The lands within the easement area shall not be used for any professional, residential, recreational, commercial, industrial, or mining purposes except such use that does not disturb the natural environment. It is the intent of this provision to let the easement area revert to a near natural condition.

B. The Grantors, all heirs and assigns, retain the right to use the easement area for general crop and livestock farming. Such right shall be subject to the following limitations:

B. The Grantors, all heirs and assigns, retain the right to use the easement area for general crop and livestock farming and limited residential development consistent with applicable State and local regulations. Such right shall be subject to the following limitations:

(1) Livestock grazing within \_\_\_\_ feet of the existing riverbank is prohibited.

(1) The Forest Service has the authority to preclude all domestic livestock grazing within \_\_\_\_ feet of the Flathead River by locating, erecting and maintaining fences.

(2) Spraying of herbicides, insecticides or other pesticides within 200 feet of the river is prohibited without the written consent of the Secretary of Agriculture or his duly authorized representative.

(3) Additional land clearing is generally prohibited in order to maintain the present balance of open and timbered areas. Additional land

clearing within 200 feet of the river is prohibited. Written consent is required prior to any land clearing except that no permission is needed to remove brush and trees from existing fields and open pastures in accordance with good farm practices.

C. The lands within the easement area shall not be used for any professional, industrial or commercial activities except such as can be and are in fact conducted from a residential dwelling without exterior alteration of the dwelling.

D. No commercial buildings, multifamily residential buildings, or other industrial or commercial structures shall be placed on the easement area.

E. There is specifically retained by the Grantors, all heirs and assigns, the right to perform ordinary maintenance on all existing or permitted roads and structures, together with the right to replace, rebuild, or substitute any road or structure now existing with similar roads or structures in substantially the same location.

F. Adequate provisions for disposal of waste and sewage shall be made to fully comply with applicable State and local regulations for sanitation and water pollution control. The water and sewage disposal facilities shall be approved in writing by the Secretary of Agriculture or his duly authorized representative prior to the construction, erection, or moving of new or additional buildings and structures onto said lands. In no case shall untreated waste or sewage be discharged into any water or waterway.

G. Above-ground structures shall not exceed a height greater than \_\_\_\_\_ feet measured from the natural grade to the highest point of the structure measured on the riverside.

G. Structural heights greater than thirty (30) feet on the riverside may be permitted if screened from view from the river and if they can be harmoniously blended with the landscape and general surroundings.

H. Above-ground structures shall not be placed within \_\_\_\_\_ feet of any abutting public road and \_\_\_\_\_ feet of any exterior property boundary common with another abutting landowner.

I. Above-ground structures shall not be placed within \_\_\_\_\_ feet of the riverbank, except as authorized in writing by the Secretary of Agriculture or his duly authorized representative.

J. All new roofs, exterior siding, plumbing vent pipes, chimneys, drain gutters, downspouts and other exterior material and fixtures, except windows, shall be constructed of nonreflective material and painted or maintained with earth-tone colors found in the surrounding environment. Use of the native materials such as wood and stone is encouraged.

K. The location and architectural design of new structures and facilities and the location and design of new roads shall be harmonious with the landscape and general surroundings. Architectural and site plans including landscaping plans must be approved in writing by the Secretary of Agriculture or his duly authorized representative prior to construction, erection, or placement of new or additional structures.

L. Except as expressly provided herein, no portable structures or any other low quality, unattractive structures will be constructed or moved into the easement area. Mobile homes are permitted for permanent or recreational residences provided their color, structure, profile, design, and positioning on the property, including landscaping, are harmonious with the rural environment. Written permission shall be obtained from the Secretary of Agriculture or his duly authorized representative prior to the placing of mobile homes on said lands.

M. No tents, travel trailers or camping facilities of any kind except for those owned by the Grantors shall be placed or erected upon the easement area except as approved in writing by the Secretary of Agriculture or his duly authorized representative.

N. No dumping of trash, ashes, garbage, sewage, sawdust, or any similar unsightly or offensive material is permitted within the easement area.

O. No trees or shrubs shall be pruned, removed or destroyed within the easement area except those authorized in writing by the Secretary of Agriculture or his duly authorized representative, except as otherwise noted herein.

Permission need not be obtained in the following circumstances:

(1) To cut dead trees or to remove hazardous trees for reasons of safety or to protect existing or authorized improvements.

(2) Cultivated crops, including orchard fruit, nut trees, nursery stock or Christmas trees may be pruned, cut, sprayed, harvested and otherwise managed and maintained in accordance with good farm practice.

(3) Likewise, seedling trees or seedling shrubbery may be grubbed up, cut, pruned or sprayed in accordance with good farm practice on lands presently being cultivated or pastured.

(4) Maintenance of trees and shrubbery within the immediate vicinity of residential and recreational improvements.

Permission to cut trees and shrubs or otherwise alter natural vegetation will generally be granted if the proposed activity will leave the easement area in an aesthetically pleasing condition that blends with the surrounding environment or is necessary to prevent deterioration of Wild and Scenic River values.

OR:

Permission to cut trees and shrubs, unless otherwise noted above, will not be granted except: (1) in connection with construction of appropriate developments, (2) to reduce a safety hazard, (3) when determined necessary to prevent deterioration of river values, and (4) to improve wildlife habitat. Cutting shall be done in a manner that maintains the natural and primitive appearance of the river area.

O. The Grantors, all heirs and assigns, may harvest timber from the easement area subject to the following conditions:

(1) Within a \_\_\_\_-foot-wide strip along the main stem of the Flat-head River, only salvage harvesting of dead or down trees will be permit-

ted. This will be accomplished without new road construction.

(2) Prior approval of a written logging plan must be obtained in writing from the Secretary of Agriculture or his duly authorized representative. Logging plans will be developed in accordance with sound timber harvesting practices and will be reviewed or modified and approved during annual easement area inspections.

Permission to cut and remove trees is not needed in the following circumstances:

(1) To cut dead trees or to remove hazardous trees for reasons of safety or to protect existing or authorized improvements.

(2) Likewise, seedling trees or seedling shrubbery may be grubbed up, cut, pruned or sprayed in accordance with good farm practice on lands cultivated or pastured.

(3) Cultivated crops, including orchard fruit, nut trees, nursery stock or Christmas trees may be pruned, cut, sprayed, harvested and otherwise managed and maintained in accordance with good farm practice.

P. Additional land clearing for any purpose within 200 feet of the river is prohibited without the written consent of the Secretary of Agriculture or his duly authorized representative.

Q. No trees or shrubs and other natural vegetation within the easement area shall be pruned, removed or destroyed except those authorized in writing by the Secretary of Agriculture or his duly authorized representative.

R. Ingress and egress between the easement area and abutting public roads shall be limited to not more than one (1) access point per lot or tract. The location of any new access point shall fully comply with applicable State and local safety regulations and prior to development shall be approved in writing by the Secretary of Agriculture or his duly authorized representative.

S. Subject to valid existing appropriated water rights, the Grantors may not pump or remove water from the river. Diversion works and ditches will be constructed and maintained in a manner compatible with the preservation of the scenic values of the river. The Grantors may obtain water from wells and ponds in the easement area, consistent with other provisions of this easement.

T. Archeological or paleontological explorations may be conducted only by the Grantee or as authorized by a permit from the Secretary of Agriculture or his duly authorized representative. All specimens or materials of archaeological or paleontological interest shall be the property of the United States.

U. No permanent changes in the general topography of the landscape or land surface including the riverbed shall be permitted except for those caused by the forces of nature. The Grantors may drill wells or lay, operate, maintain, repair, or remove water and sewer pipelines, conduits, or drains below the surface of the easement area insofar as such activities do not permanently impair or ruin the natural beauty of said easement area and provided that the disturbed area is restored to its former natural

condition.

V. Except as otherwise provided, no signs, billboards, outdoor advertising structures, or advertisement of any kind shall hereafter be erected or maintained within the easement area. One (1) on-premise sign not greater in size than 16 inches by 24 inches may be erected and maintained to advertise the sale, hire, or lease of the property, or to advertise the sale or availability of any goods, products, or services on the land; one additional sign of the same size may be erected and maintained to designate the owners or name of the property. In addition, the Grantors may erect and maintain appropriate signs as necessary to indicate that portion of the easement area which is not open to public entry. All signs restricting public entry shall not exceed 5 inches by 7 inches in size, shall be of earth-tone colors and shall be placed so they are not readily noticeable from the river or arterial roads.

V. Advertising signs and billboards will be limited to one (1) on-premise sign per lot. Sign design must be harmonious with the general surroundings. Neon lights and exterior flashing lights of any nature are prohibited. Two additional signs, not to exceed 16 inches by 24 inches each, may be erected and maintained to advertise the sale of the property and the name of the owners or property name.

W. No oil, gas or mineral exploration, extraction or other related activity will be permitted on the easement area. Subsurface activity is permitted if there is no surface and vegetation disturbance, surface subsidence or adverse impact on water quality.

X. The introduction of non-native fish species in public or private waters within the easement area is strictly prohibited.

With respect to the provisions in this easement which require approval in writing by the Secretary of Agriculture or his duly authorized representative, the Grantee agrees to respond to all Grantors' requests in a prompt manner.

#### IV. PUBLIC ENTRY:

The granting of this easement is not intended to permit or in any way give the public the right to enter upon said land for any purpose. Where needed, the Grantee may erect appropriate signs indicating the easement area is not open to public entry.

OR:

The Grantee is hereby granted the right to permit public use of the riverbank for fishing and traversing the river. The public shall be excluded from entry for any other purpose. The public use area is generally meant to be a 10-foot-wide strip of land running parallel to and inland from the \_\_\_\_\_. When needed, the Grantee may erect appropriate signs indicating that portion of the easement area which is not open to public entry.

TO HAVE AND TO HOLD the herein described scenic easement and rights unto the Grantee and its assigns, forever. The said Grantors hereby



