

Topic: Open Space Preservation
Resource Type: Regulations
State: N/A
Jurisdiction Type: U.S. Federal
Municipality: N/A
Year (adopted, written, etc.): Unknown
Community Type – applicable to: Urban; Suburban; Rural
Title: Model Active Use Conservation Easement for Western United States
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Abstract

This conservation easement is a model that demonstrates the necessary elements of a conservation easement, specifically the easement address provisions that may be relevant for properties that intend to stay as working farms or ranches. The source of this sample is the Red Lodge Clearinghouse, which seeks to resolve resource conflicts in the western U.S.

Resource

DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT is made this ___ day of _____, 200_ by and between _____, whose address is _____ (the "Grantor") and _____, whose principal address _____ (the "Grantee").

Exhibits to this Deed of Conservation Easement include the following:

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

WITNESSETH THAT:

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

B. The Property currently remains in a relatively natural state and has significant ecological and open-space values as defined in Section 76-6-104, et seq., Montana Code

Annotated (MCA), and provides significant relatively natural habitat for native plants and wildlife;

C. Protection of the Property will contribute to the ecological integrity of _____ and conserve significant relatively natural habitat for wildlife and plants, presently including but not limited to _____;

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

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

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

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

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

TERMS AND CONDITIONS

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

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

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

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

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

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

B. To enter upon the Property to enforce the rights herein granted, to study and make scientific observations of its ecosystems, and to determine that Grantor's activities are in compliance with the terms of the Easement, all upon prior notice to Grantor and in a manner that does not unreasonably disturb the use of the Property by Grantor consistent with the Easement.

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

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

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

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

ii. In the event that the Grantee determines that range conditions have declined from those documented in the Report and that livestock grazing has caused

such significant deterioration, the Grantee shall so inform Grantor. In response, Grantor shall develop a Grazing and Riparian Management Plan for review and approval by the Grantee and Grantor shall then implement the approved plan.

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

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

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

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

F. Use of agricultural chemicals, including fertilizers, pesticides, herbicides, insecticides and rodenticides. The use of such agents shall be conducted in such a manner as to minimize adverse effects upon the natural values of the Property and the natural ecosystem. Aerial spraying of chemical agents requires advance approval by the Grantee.

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

H. Introduction of biological weed and pest control agents.

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

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

K. Maintenance, repair, and reconstruction of existing agricultural and residential water facilities and the development of new water resources and facilities, including the diversion, withdrawal and use of water, consistent with valid water rights, for wildlife habitat

enhancement and other uses provided for herein; provided that any maintenance, repair, reconstruction, construction or development activities do not cause significant or long-term impairment of water quality or riparian values.

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

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

ii. On other timbered areas of the Property:

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

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

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

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

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

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

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

Notwithstanding anything in this Easement to the contrary, this prohibition does not make the Grantee an owner of the Property, nor does it permit the Grantee to control any use

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

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

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

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

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

F. Intentional introduction of non-native animal species.

G. Establishment or maintenance of a commercial feed lot. For purposes of this Easement, "commercial feed lot" is defined as a permanently constructed confined area or facility within which the property is not grazed or cropped annually, and which is used and maintained for purposes of engaging in the business of the reception and feeding of livestock for hire. Nothing in this section or Section 5. D. shall prevent Grantor from seasonally confining Grantor's livestock into an area for feeding and nothing in this section shall prevent Grantor from leasing pasture for the grazing of livestock owned by others.

H. The partition, division, subdivision, or de facto subdivision of the Property. The sale, exchange, devise or gift ("Transfer") of a portion of the Property for boundary adjustment, agricultural, or timber management purposes shall be allowed, provided that no more than _____ parcels may be created from the Property covered by this Easement, and provided further that any such Transfer(s) must be effected with an express provision reflecting that said land is subject to the terms and conditions of the Easement, without modification or expansion of such terms. In the event of any such Transfer(s), no additional structures shall be allowed upon any portion of the Property beyond those structures already authorized in this Easement, and all other terms of this Easement shall continue to apply. With the exception of such authorized Transfers, no subdivision or de facto subdivision of the Property shall be allowed. Transfer of any portion of the Property for

residential use shall be expressly prohibited. Furthermore, if the Property is so divided, the Grantor must comply with all applicable federal, state, and local laws, ordinances, and regulations concerning subdivision, including, if required, the surveying of the parcels to be conveyed and the submission of the proposed separate tract(s) to state and/or local review authority for approval. The Grantee shall be furnished with a copy of the pertinent portion of any document or conveyance utilized to effect such a transfer at least thirty (30) days prior to the execution of the same.

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

J. Construction of any new roads or vehicle trails.

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

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

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

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

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

Prior to the commencement of any such activity, Grantor shall send the Grantee written notice of his/her intention to undertake or permit such activity. The notice shall inform the Grantee of all aspects of the proposed activity, including location, design, materials or equipment to be used, dates and duration, and any other relevant information, and shall be sent by registered or certified mail, return receipt requested, to Grantee at _____, or such other addresses as Grantor may from time to time be informed of in writing by the Grantee.

The Grantee shall have forty five (45) days from receipt of the notice, as indicated by the date of the return receipt, to review the proposed activity and to notify Grantor of any objections thereto; provided that the 45-day period shall not begin until such time as the

Grantee has received adequate information from Grantor to evaluate the proposed activity. In the event that the Grantee requires additional information to evaluate the proposed activity, the Grantee shall request the information from Grantor as soon as practicable and in any case not later than 30 days after the receipt of the notice of the proposed activity.

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

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

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

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

In the event that Grantor undertakes any activity requiring approval of the Grantee without or in advance of securing such approval, or undertakes any activity in violation of the terms of the Easement, the Grantee shall have the right to force, by appropriate legal or equitable action, including an action for injunction or specific performance, the restoration of that portion of the Property affected by the activity to the condition that existed prior to the undertaking of the unauthorized activity. In such case, the costs of restoration and the Grantee's costs of suit, including reasonable attorneys' fees, shall be borne by Grantor or those of his/her heirs, personal representatives, or assigns against whom a judgment is entered, or, in the event that the Grantee secures redress without a completed judicial proceeding, by

Grantor or those of his/her heirs, personal representatives, or assigns who are otherwise determined to be responsible for the unauthorized activity.

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

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

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

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

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

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

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

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

pursuant to this paragraph. In addition, the inability to carry on any or all of the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment pursuant to this paragraph.

14. Condemnation and Other Extinguishment of the Easement. Whenever all or part of the Property is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate the restrictions imposed by this Easement, or if the Easement is extinguished pursuant to Paragraph 16 herein, the Grantor and the Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking and all incidental or direct damages resulting from the taking. The net proceeds shall be divided between the Grantor and the Grantee in proportion to the fair market value of their interests in the Property on the date of execution of the Easement (as provided in Treas. Reg. Section 1.170A-14(g)(6)(I)). The Grantee shall use its share of the proceeds in a manner consistent with the purposes and intent set forth herein, or for the protection of a "relatively natural habitat of fish, wildlife, or plants or similar ecosystem," as that phrase is used in Internal Revenue Code Section 170(h)(4)(a)(ii), as amended, and in regulations promulgated thereunder.

15. Amendment. If circumstances arise under which an amendment to or modification of the Easement would be appropriate, Grantor and the Grantee may jointly amend the Easement; provided that no amendment shall be allowed that affects the qualification of the Easement under the IRS Code Section 76-6-201, et seq., MCA. Any such amendment shall be consistent with the purposes of the Easement, shall not affect its perpetual duration, shall not permit additional development or improvements to be undertaken on the Property other than development or improvements currently permitted by the Easement, and shall not impair any of the significant Conservation Values of the Property. Any such amendment shall be recorded in the official records of _____ County, _____.

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

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

18. Miscellaneous.

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

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

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

D. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with paragraph 15 above.

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

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

GRANTOR:

Accepted this _day of _____, 200__, by Grantee.

STATE OF)

) ss.

COUNTY OF)

On this ___ day of _____, 200__, before me, the undersigned, a Notary Public in and for said State, personally appeared _____ and _____, known to me to be the persons whose name 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.

Notary Public

My commission expires: _____.

STATE OF _____)

) ss.

COUNTY OF _____)

On this ___ day of _____, 200___, before me, the undersigned, a Notary Public in and for said State, personally appeared _____ the _____ of _____ (Grantee), known to me to be the person whose name is 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.

Notary Public

My commission expires: _____.

Exhibit A

Property Description

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

Exhibit B

Map of the Property

Exhibit C

Acknowledgement of Easement Documentation Report

Grantor and the Grantee acknowledge that each has read the " _____ Easement Documentation Report", dated _____, 200___, and that the report

accurately reflects the condition of the Property subject to the Easement as of the date of conveyance of the Easement.

Grantor:

Date

Grantee:

Date