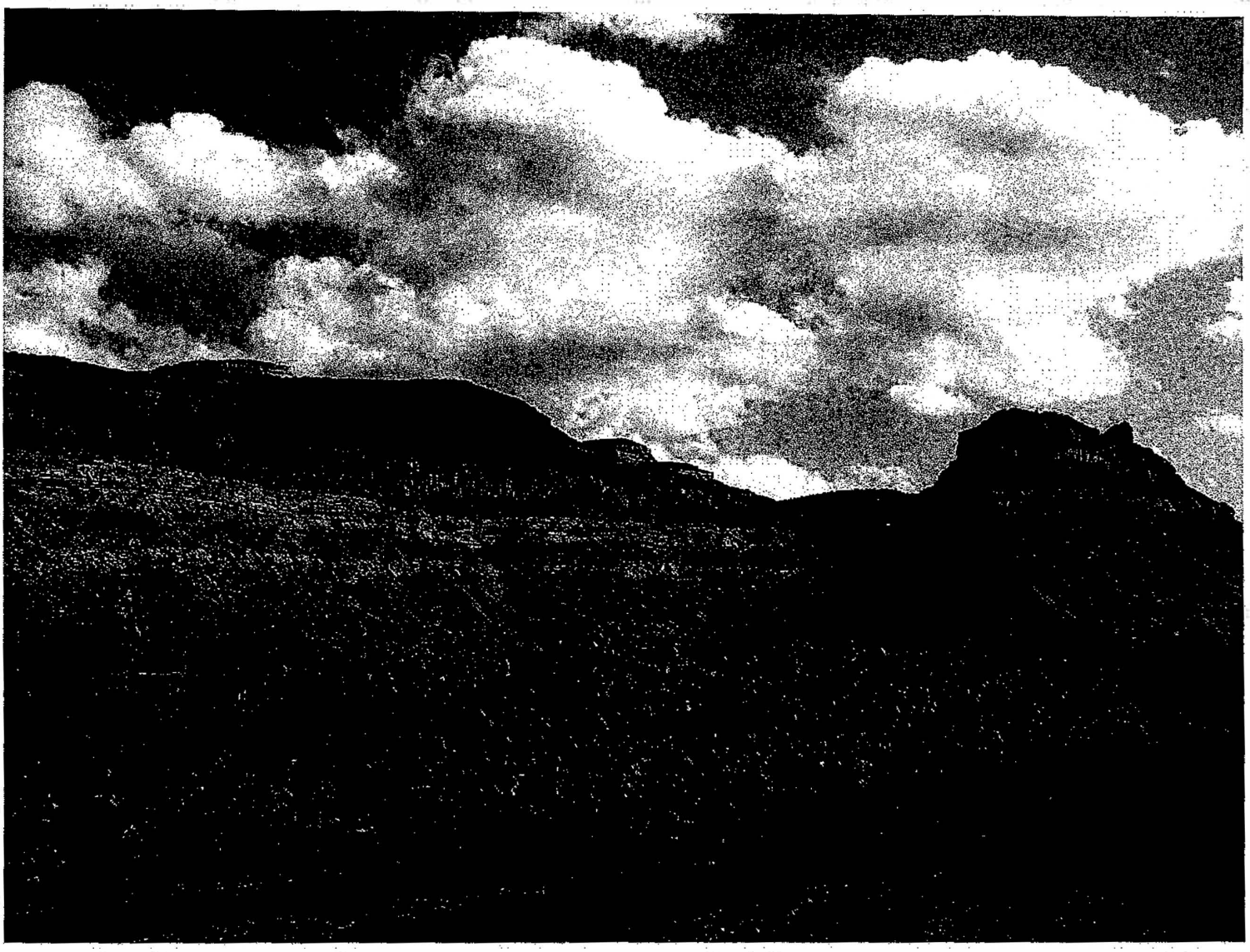
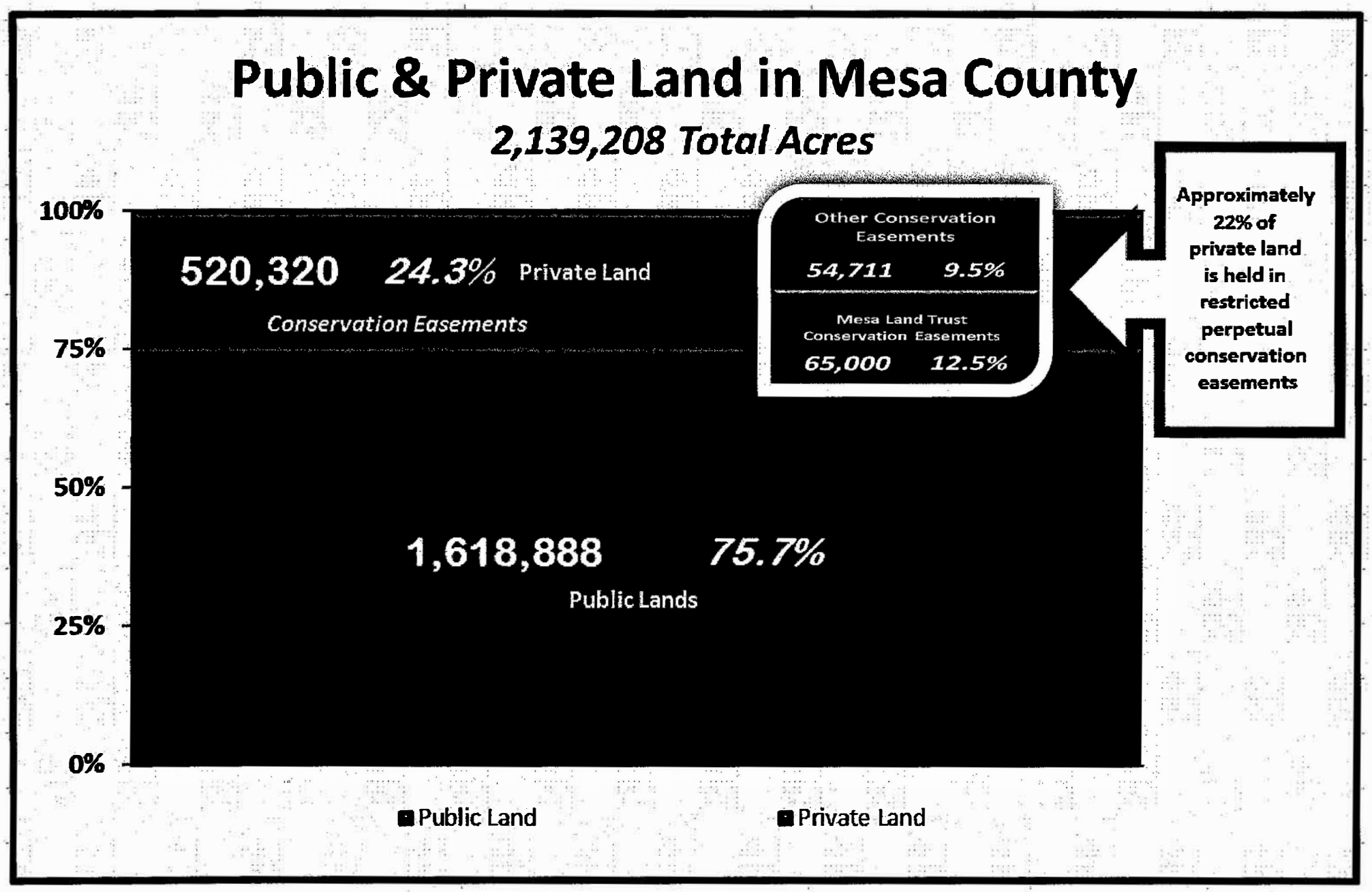
Conservation Easements



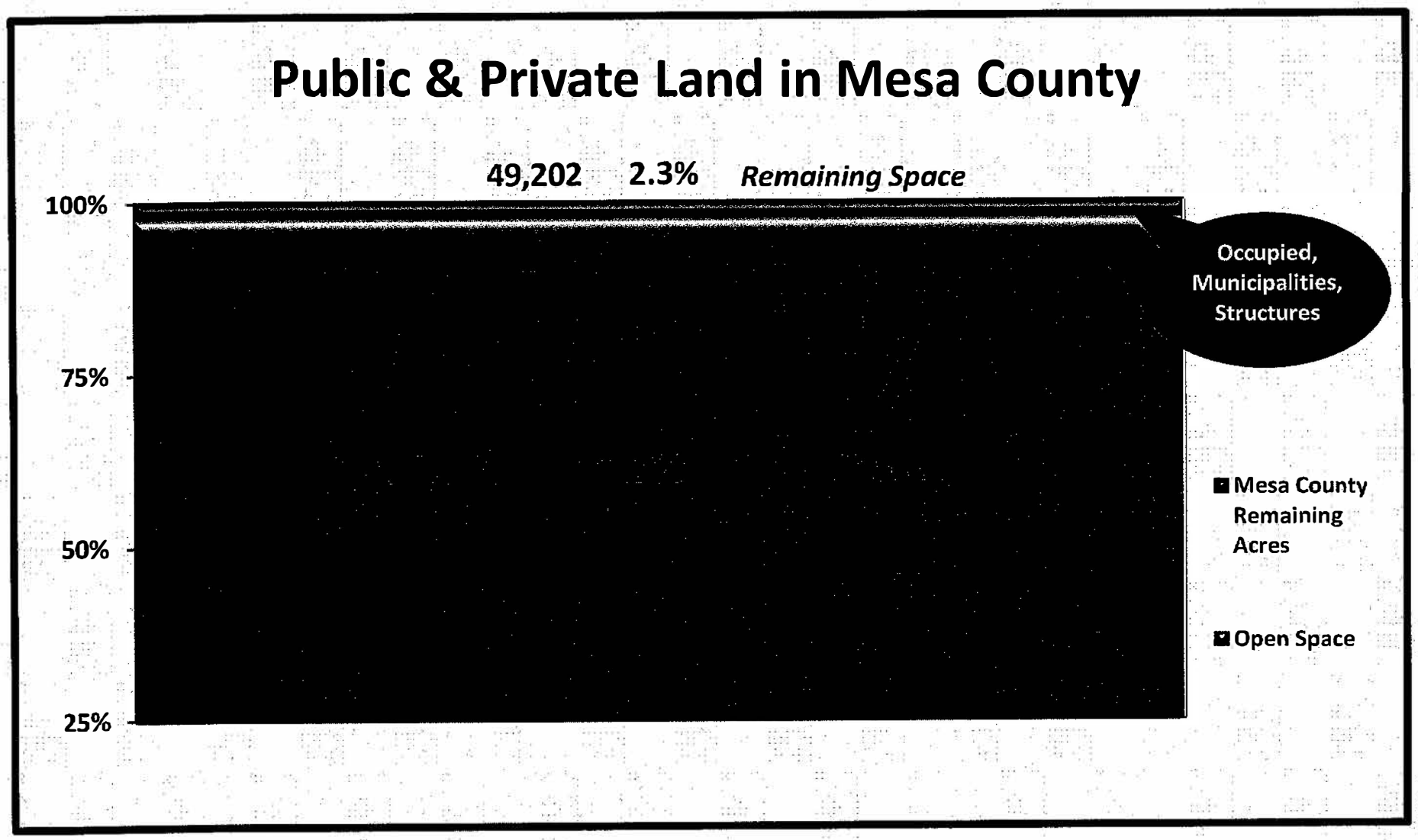
Scott McInnis

MESA COUNTY
COMMISSIONER

SCOTT.MCINNIS@MESACOUNTY.US | (970) 244-1604


Public & Private Land in Mesa County
2,139,208 Total Acres
100%
75%
50%
25%
0%
520,320 24.3% Private Land
Conservation Easements
Other Conservation Easements
54,711 9.5%
Mesa Land Trust Conservation Easements
65,000 12.5%
Approximately 22% of private land is held in restricted perpetual conservation easements
1,618,888 75.7%
Public Lands
Public Land
Private Land

Public & Private Land in Mesa County



Mesa County
Google

Scott McInnis <scott.mcinnis@mesacounty.us>

Conservation Easements

Scott McInnis <scott.mcinnis@mesacounty.us> Fri, Jul 24, 2015 at 3:05 PM
To: jerry@electsonnenberg.com
Cc: Ray Scott <ray.scott.senate@state.co.us>, Yeulin Willett <Yeulinwillett@gmail.com>, Jon And Emma Keyser <Jon@jonkeyser.com>, Dan Thurlow <dan.thurlow.house@state.co.us>
Bcc: Gina Schlagel <gina.schlagel@mesacounty.us>

I hope I find you and yours well. Your solid leadership for the State and your strong representation of rural Colorado is appreciated.

I am writing to provide some input regarding the conservation easements hearing I understand you will be conducting. While I support limited conservation easements with reasonable time periods (NOT in perpetuity), I am deeply concerned that the program has grown beyond reasonable expectations and its impact needs to be closely reviewed despite the 'holy grail' status it has obtained.

As you are keenly aware, eastern Colorado and western Colorado have significant differences in federal government holdings of land. In Mesa County, for example, approximately 76% of our land is owned by the Federal Government. While multiple use is allowed, it is heavily regulated. There is no reason to expect this percentage of government ownership will drop in the long term future.

Mesa County has seen heavy activity with conservation easements over the last several years. Remember, 76% of the County is held by the government and of the remaining land, we estimate approximately 20% (~112,000 acres) is held under conservation easements in perpetuity. Almost all of these easements involve taxpayer dollars and almost all deny public access, despite these public dollars. One notable exception would be the Division of Wildlife easements acquired for the purpose of access.

While conservation easements are popular in perception, little attention is being paid to the fact that their lands are restricted in perpetuity and because they almost all have 3rd party restrictions (mostly Federal Government), they have removed local control (for example; local planning, local government needs, etc.).

Reserved 'in perpetuity' (vs. say 30-year easements) also dramatically lowers the availability of private land for other use. This means, over time, land ownership ends up in the hands of the well-off, pushing out critical elements of a community such as middle and lower economic classes.

One must also ask if we should allow control of land by the hand coming up from the grave. Should people of this generation be able to lock out uses 50 or 100 years from now? Many uses of land today were never even thought of 100 years ago and where would we be if these local needs were locked out by decisions of people long ago? For example; what if, during the prohibition, the growing of grapes were restricted in perpetuity? We would not have the wine vineyards of communities such as Palisade, Colorado.

These easements usurp local control and transfer it to 3rd parties, primarily the federal government. They are being placed in large quantities throughout the nation and restrict said properties in perpetuity. It will create a massive transfer of land use restrictions to all future generations, without of course, their input or thought of needs.

I've attached a link to a few documents that may be of interest to you. One is a recorded deed received from the Mesa Land Trust, clearly outlining the 3rd party involvement (Department of Agriculture, Natural Resources Conservation Service, Commodity Credit Corp.) in this private land-to conservation easement deed. Please pay special note to the multiple pages of restrictions that the Federal Government places on these private lands.

I've also included copies of the letter sent to the Executive Director of Mesa Land Trust after a recent request for a support letter, and a subsequent letter to Great Outdoors Colorado (required for this particular deed). One article in this folder would be of particular interest to you, such that, although this article was written over seven years ago, the concern of conservation easements was clearly on the rise, and of growing concern. If you are

not able to read all of the included documents, please read the GOCO letter and have your staff read the article from the National Policy Analysis publication.

All use of public funds should come with oversight, and local governments given land use control without being encumbered by perpetual easements.

Scott

Scott McInnis
Mesa County Commissioner | District 2
(970) 244-1604
scott.mcinnis@mesacounty.us
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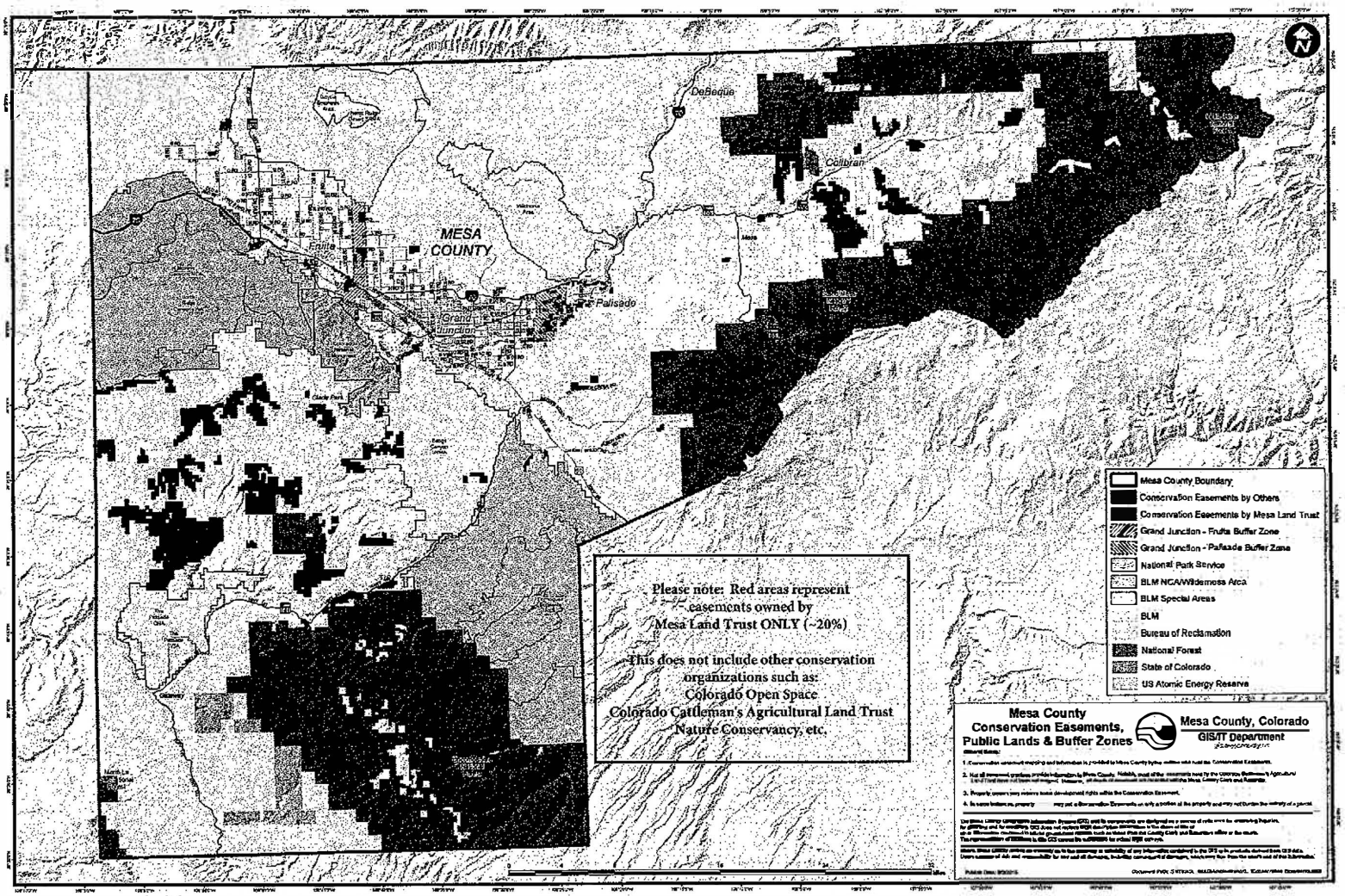
DeBeque
Collbran
MESA
COUNTY
Fruita
Grand
Junction
Palisade
Please note: Red areas represent
easements owned by
Mesa Land Trust ONLY (~20%)
This does not include other conservation
organizations such as:
Colorado Open Space
Colorado Cattleman's Agricultural Land Trust
Nature Conservancy, etc.
Mesa County Boundary
Conservation Easements by Others
Conservation Easements by Mesa Land Trust
Grand Junction - Fruita Buffer Zone
Grand Junction - Palisade Buffer Zone
National Park Service
BLM NCA/Wilderness Area
BLM Special Areas
BLM
Bureau of Reclamation
National Forest
State of Colorado
US Atomic Energy Reserve
Mesa County
Conservation Easements,
Public Lands & Buffer Zones
Mesa County, Colorado
GIS/IT Department

MESA COUNTY

COLORADO

BOARD OF COUNTY COMMISSIONERS

District 1 - John Justman 970-244-1605
District 2 - Scott McInnis 970-244-1604
District 3 - Rose Pugliese 970-244-1606

P.O. Box 20,000 544 Rood Avenue Grand Junction, Colorado 81502-5010 mcbocc@mesacounty.us Fax (970) 244-1639

April 14, 2015

Chairman of the Board
Great Outdoors Colorado
303 E. 17th Avenue, Suite 1060
Denver, CO 80203

Re: Mesa Land Trust Application

Mesa County is the local government having land use authority over the property that is subject to the Mesa Land Trust Application (located in Mesa County). Mesa County has supported conservation for years, including adopting buffer zones as part of its land use regulatory process. However, many questions have arisen considering the unfettered growth of conservation easements in perpetuity. Mesa County supports the application, but with comment, which is contained herein.

We wish to express our appreciation that GOCO has, as a part of its application process, the requirement that local governments having land use authority, as well as the county in which the property is located, sign letters of support.

Conservation easements, the majority of which encumber the property IN PERPETUITY, have long-term impact on land use which in turn impacts local governments.

As you are aware, our Board delayed a decision on this application due in part to the short time-frame provided by the applicant for our Board's consideration, combined with the fact it triggered a broader review of the easement picture in Mesa County. For your interest we will cover a few points which we feel is imperative to review.

1st - Your requirement for the local land use authority's sign-off has the result of bringing the requesting parties and the local governing authorities to the table. This was common in the early days. However, not as common now, without fault.

2nd - Mesa County, as is the case with most western rural counties, has a large percentage of government land ownership within the county. In Mesa County, government owns 75.5 % of the land, of which is almost entirely open space, with very limited development. Government ownership exists, for all practical purposes, in perpetuity.

3rd - Mesa Land Trust conservation easements control 12.5% of the remaining private land (100 square miles) and there are other land trusts involved in the county, including but not restricted to: Colorado Cattleman's Association, Nature Conservancy, and Colorado Open Lands. By one estimate approximately 20% of private land in Mesa County is encumbered by conservation easements. The effort to put even more private land under such perpetual easements continues.

4th - The Land Trust movement was originally designed to focus on shielding agricultural land from development. This has now seen mission-creep to include, but not restricted to; open space, sage grouse protection, wildlife, etc., all with limited oversight, except where requirements such as GOCO exist.

5th - Many, if not most easements in Mesa County, involve public funds. However, public access, for all practical purpose, is not allowed.

6th - Because the easements have evolved into "perpetuity" (vs. a more reasonable 30 year or term period), it has significant impact on master planning from local governments.

7th - In the early years of these easements the intent was to protect targeted agricultural lands. They were held by local trusts and provided for cooperation between local government and the trust. However, as time has passed almost all of the easements (at least in Mesa County, and we assume across the Nation) have involved third parties who in exchange for money or tax credits have been provided standing in the easement. Often it will involve federal agencies and, as you might suspect, the money comes with strings attached that result in very restrictive provisions, including limited local government involvement. It is a significant dilution in "local control." Ironically, it also serves as a heavy impediment on the flexibility of local land trusts, such as Mesa Land Trust.

8th – In earlier times in Mesa County, monies for easement purchases were raised locally and easements did not involve third parties. Now, out of town funds are used in a significant way to place, in perpetuity, easements on the remaining private land in Mesa County (75.5% of land already in government hands). Over time this has consequences.

9th - As a result of our delay in approving a support letter (and your agreement to also delay grant submission deadlines), we were able to have solid discussions regarding the current application. Mesa Land Trust met with our Chief Planner and in addition, we will be conducting a workshop with Mesa Land Trust for further discussion. Hopefully, the result will be a pull back to more local control over third party actions.

10th - We hope that the practice of "automatic signatures" on support letters and the assumption that the signatures are a "mere formality" is reconsidered, and substantive and thoughtful discussions become the norm.

Finally, we stress that all use of public funds should come with oversight. Local government should not be stripped of land use control by provisions in easements that exist in perpetuity.

After thoughtful and lengthy discussion regarding this application, including but not restricted to the above points, as well as the exact location, buffer zone issues, surrounding easements, use of land etc., Mesa County supports this application. However, it is the intent of the county that all applications will be carefully reviewed.

Thank you for your time.

Sincerely,
Mesa County Board of Commissioners

Rose Pugliese, Chair
Board of Commissioners

John Justman
Commissioner

Scott McInnis
Commissioner

cc: Mesa Land Trust

Subject: Fwd: Analysis of Federal Involvement in Conservation Easement
Date: Tuesday, November 10, 2015 8:01:35 PM MT
From: Scott McInnis
To: sl-mc@bresnan.net, Gina Schlagel

---------- Forwarded message ----------
From: "Patrick Coleman" <patrick.coleman@mesacounty.us>
Date: Nov 10, 2015 7:10 PM
Subject: Analysis of Federal Involvement in Conservation Easement
To: "Scott McInnis" <Scott.mcinnis@mesacounty.us>
Cc: "Scott McInnis" <scottmcinnis2@aol.com>

Scott:

I analyzed the Patton & Brennan Deed of Conservation Easement (the "CE") that I believe was provided to you by Mesa Land Trust ("MLT") as an example of the type of conservation easements that MLT holds. I specifically focussed on the Federal Government's involvement in the CE.

The CE is entered into by the owners (Pattons and Brennans) as Grantor, and MLT as the Grantee. However, there is a bold, all caps notice at the very top of the CE that states that the the CE is funded in part with funds administered by the NRCS or the United States. In the Premises or Granting Clause, the CE states that the United States, acting through the NRCS, has acquired a third party right of enforcement in the CE.

In Paragraph 28 on page 19 of the CE, the CE states that there are no third party beneficiaries "except as provided herein," and that the CE is "solely for the benefit of the Conservancy and the United States. . ."

I would classify the involvement of the United States in nine categories:

1. USA has a right of enforcement of the CE.

2. The use of the property is restricted by the impact from other USA lands (BLM), and USA regulated soils and water.

3. USA has control over the CE through the various IRS code sections and Treasury Regulations that regulate the MLT and the conveyance of the CE.

4. USA has control over the CE and the uses of the property through various federal environmental regulations.

5. USA's involvement in CE results in the applicability of federal law that might not otherwise be applicable to the property.

6. USA restricts use of the property through NRCS restrictions and requirements.

7. USA obtained sole discretion over any transfer, conveyance, amendment or termination of the CE.

8. Grantor has an obligation to indemnify the USA that did not exist prior to the CE.

9. USA obtained access across the CE property and "any property owned by the Grantor."

The following is a more detailed analysis of the nine categories:

1. USA has a right of enforcement of the CE. The right of enforcement is the key right obtained by the USA in the CE. The right of enforcement is clearly stated in the Premises and the Granting Clause, and is referenced many times throughout the CE, including Paragraph 7.1 (USA exempt from mediation requirement that applies to Grantor and MLT), 7.2 (MLT's discretion to determine type of enforcement action is subject to USA's right of enforcement - thus USA has ultimate authority for determining type of enforcement), and 7.3 (USA and its successors or assigns may exercise the USA's rights to enforce the CE through any and all authorities available under Federal or State law - this paragraph opens the Grantor up to the possibility that it may not be the NRCS that is enforcing the CE, but a successor or assign).

2. The use of the property is restricted by the impact from other USA lands (BLM), and USA regulated soils and water. Part of the Treasury Regulations applicable to the CE references that a purpose of a conservation easement is for the preservation of the scenic enjoyment of the general public. In Recital Paragraph D, the CE states that the property can be seen from Mesa County 33 Road and from the nearby land administered by the BLM, and in Paragraph D(1), the CE mentions that the property contains soils designated as Prime Farmland Soils of National Significance by the NRCS, that the property's agricultural values are further evidenced by its inclusion in the Grand Valley viticulture area, "as designated by the United States Congress," and that the property is irrigated by a Federal Reclamation project that requires the land and the water to be tied together. Each of these references indicate additional federal involvement that will further limit the potential uses of the property.

3. USA has control over the CE through the various IRS code sections and Treasury Regulations that regulate the MLT and the conveyance of the CE. Various Treasury Regulations determine whether or not the property qualifies as a CE (see Recital Paragraph D), and the IRS Code regulates the qualification of MLT as a holder of the CE (see Recital Paragraph F and Paragraph 36), the purpose of the CE (see Paragraph 1), and the future uses of the property (see Paragraph 2.3).

4. USA has control over the CE and the uses of the property through various federal environmental regulations. The CE contractually obligates the Grantor to comply with various federal environmental regulations, including CERCLA (see Paragraphs 3.10 and 21.3)

5. USA's involvement in CE results in the applicability of federal law that might not

otherwise be applicable to the property. By entering into the CE, the Grantor has involved itself in numerous federal laws that may not have otherwise been applicable to the use of the property, as evidenced by the numerous citations throughout the CE of federal laws that only apply to conservation easements. Specifically, Paragraph 33 requires the interpretation and performance of the CE to be governed by the laws of the State of Colorado and the laws of the United States, and places venue for any legal action possibly outside of Mesa County if the USA is involved in exercising its right of enforcement. Generally, the enforcement and interpretation of contracts involving real property between private entities or local governments apply state law and venue is where the property is located.

6. USA restricts use of the property through NRCS restrictions and requirements. Paragraph 8 of the CE discusses numerous limitations on Grantor's use of the property pursuant to various federal laws applicable to the NRCS.

7. USA obtained sole discretion over any transfer, conveyance, amendment or termination of the CE. Paragraphs 11, 12, 13, 15 and 27 provide the USA with sole discretion to approve the transfer, conveyance, amendment or termination of the CE and the property.

8. Grantor has an obligation to indemnify the USA that did not exist prior to the CE. Paragraphs 14 and 21 of the CE requires the Grantor to indemnify the USA both generally and specifically regarding the violation of any environmental laws. This indemnification clause exposes the Grantor to significant liability to the USA.

9. USA obtained access across the CE property and "any property owned by the Grantor.'' While the CE does not provide the general public access to the property (see Paragraph 9), and the CE prevents the Grantor from granting access across the property to anyone else without the MLT's permission, Paragraph 20 of the CE grants the USA access not only across the property that is encumbered by the CE, but "across any property owned by the Grantor. . ."

I hope this analysis shows how the long tentacles of the United States reach into the creation and maintenance of a conservation easement that involves federal funding. Let me know if you have other questions. Thanks.

Sincerely,

Patrick Coleman
Mesa County Attorney
544 Rood Avenue
P.O. Box 20,000, Department 5004
Grand Junction, CO 81502
(970) 244-1612
patrick.coleman@mesacounty.us

31 PAGE DOCUMENT

RECEPTION #: 2688476, BK 5594
PG 617 04/30/2014 at 09:33:49 AM, 1
OF 31, R $160.00 S $1.00 EXEMPT
Sheila Reiner, Mesa County, CO
CLERK AND RECORDER

DEED OF CONSERVATION EASEMENT

Mesa Land Trust
Patton & Brennan Property, Mesa County, CO

NOTICE: THIS CONSERVATION EASEMENT HAS BEEN ACQUIRED IN PART WITH FUNDS FROM THE COMMODITY CREDIT CORPORATION THROUGH THE FARM AND RANCH LANDS PROTECTION PROGRAM WHICH IS ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE - NATURAL RESOURCES CONSERVATION SERVICE ("NRCS" or "UNITED STATES"). THIS EASEMENT CONTAINS RESTRICTIONS ON THE USE AND DEVELOPMENT OF THE PROPERTY WHICH ARE INTENDED TO PROTECT ITS OPEN SPACE, AGRICULTURAL, AND CONSERVATION VALUES. THE UNITED STATES HAS FOUND THAT THE ADOPTION OF THESE RESTRICTIONS IS IN THE PUBLIC INTEREST.

THIS DEED OF CONSERVATION EASEMENT is granted this 29 day of April, 2014, by **Philip W. Patton and Susan B. Patton**, as joint tenants as to an undivided ½ interest, and **Patrick L. Brennan and Susan W. Brennan**, as joint tenants as to an undivided ½ interest, the collective address of which is 281 33 Road, Palisade, Colorado 81526 (collectively the "**Grantor**") to and for the benefit of the **MESA COUNTY LAND CONSERVANCY**, a Colorado nonprofit corporation, doing business as **MESA LAND TRUST**, 1006 Main Street, Grand Junction, Colorado 81501 (the "**Conservancy**") as grantee, for the purpose of forever conserving the agricultural productivity, open space character, wildlife habitat, and scenic qualities of the subject property. The United States of America (the "**United States**") acting by and through the United States Department of Agriculture, Natural Resources Conservation Service ("**NRCS**") acting on behalf of the Commodity Credit Corporation, as its interest appears herein, by virtue of its funding of the Conservancy's acquisition of this Deed, has acquired a third party right of enforcement in this conservation easement, including certain rights and assurances specifically set forth herein, for the purpose of forever conserving the agricultural productivity of the Protected Property and its value for resource preservation and as open space and by virtue of its funding of the Conservancy's acquisition of this Deed, has acquired a right of enforcement and those certain other rights and assurances specifically set forth in this Deed. The Grantor and the Conservancy are individually referred to as a "**Party**" and are collectively referred to as "**Parties**", herein.

The following Exhibits are attached hereto and made a part of this Conservation Easement:

Exhibit A	- Description of Property
Exhibit A-1	- Description of Additional Building Area and Agricultural Operations Building Area
Exhibit B	- Map of Property
Exhibit C	- Water Rights
Exhibit D	- Exceptions to Title

RECITALS:

A) Grantor is the sole owner in fee simple of certain real property located in Mesa County, Colorado, consisting of approximately 32.32 acres of land, more or less, together with

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agricultural improvements more particularly described in **Exhibit A** and depicted in **Exhibit B**, attached hereto and incorporated herein by this reference, and the water rights described in **Exhibit C** (together, the "**Property**").

B) The agricultural and other characteristics of the Property, its current use and state of improvement, are described in a *Baseline Documentation Report* (also referred to as a Present Conditions Report) dated April, 25 2014, and has been acknowledged in writing by the Parties to be complete and accurate as of the date of this Easement. Both the Grantor and the Conservancy shall keep signed copies of this report. It will be used by the Conservancy to assure that any future changes in the use of the Property will be consistent with the terms of this Easement. However, this report is not intended to preclude the use of other evidence to establish the present condition of the Property if there is a controversy over its use. The Baseline Documentation Report is incorporated into this Conservation Easement by reference.

C) The conservation purposes described in these Recitals are part of the Conservation Values of the Property. The Property possesses agricultural, including soils classified by NRCS as being Prime Farmland Soils of National Significance, natural, scenic, open space, and wildlife habitat values (collectively, the "**Conservation Values**") of great importance to the Conservancy, the people of Mesa County, the people of the State of Colorado, and the people of the United States of America, which are worthy of protection. The conservation purposes described in these Recitals are part of the Conservation Values of the Property.

D) The following conservation purpose, in accordance with Treasury Regulations §1.170A-14(d)(4) is furthered by this Easement, "The preservation of certain open space (including farmland and forest land) for the scenic enjoyment of the general public and will yield a significant public benefit." The Property can be seen from Mesa County 33 Road and from the nearby land administered by the United States Department of the Interior, Bureau of Land Management (BLM). Among the Conservation Values, which are more fully described in the Baseline Documentation Report, are the following:

1) The Property contains soils designated as Prime Farmland Soils of National Significance by the Natural Resource Conservation Service. The Property's agricultural values are further evidenced by its inclusion in the Grand Valley viticulture area, as designated by the United States Congress. The Property is irrigated by a Federal Reclamation project that requires that the water and the land be tied together.

2) The Property is an important orchard and viticulture property and is part of the significant orchard and viticulture areas of Mesa County, which provide fruits, wine and food products to consumers throughout the United States.

3) The Property is situated proximate to major growth corridors, and increasing development pressures in the area have resulted in a rapid recent influx of new homes situated on small lots, and a concomitant disruption and diminishment of existing farming practices and irrigation patterns, coupled with the division of "prime and unique" irrigated farmland into non-productive, non-agricultural uses such as subdivisions.

E) The conservation purposes of this Easement are recognized by, and the grant of this Easement will serve, the clearly delineated governmental conservation policies:

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1) The Farm and Ranch Lands Protection Program (16 U.S.C. 3838h and 3838i) under which the Secretary of Agriculture, acting through the Natural Resources Conservation Service, provides funding for the purchase of conservation easements for the purpose of protecting agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land.

2) The Colorado Department of Agriculture statutes, Colorado Revised Statutes Sec. 35-1-101, *et seq.*, which provide in part that "it is the declared policy of the State of Colorado to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products."

3) Colorado Revised Statutes Sec. 38-30.5-101, *et seq.*, providing for the establishment of conservation easements to maintain land "in a natural, scenic or open condition, or for wildlife habitat, or for agricultural ... or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity."

4) The Colorado Wildlife and Parks and Outdoor Recreation statutes, Colorado Revised Statutes Sec. 33-1-101, *et seq.*, which provide that "it is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit and enjoyment of the people of this state and its visitors," and that it is the policy of the state of Colorado that the natural, scenic, scientific, and outdoor recreation areas, of this state are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and visitors of this state."

5) The Colorado Department of Transportation statutes, Colorado Revised Statutes §43-1-401, et seq., provide that the preservation and enhancement of the natural and scenic beauty of this state is a matter of substantial state interest.

6) The Western Governors' Association Policy Resolution 08-21 supports "voluntary incentive-based methods for preserving open space, maintaining land and water for agricultural and timber production, wildlife, and other values."

7) Mesa Countywide Land Use Plan - Land Use Goal: "to protect ... the agricultural economy of Mesa County."

8) Mesa Countywide Land Use Plan - Agricultural Goal: "to encourage the conservation of agricultural and range lands capable of productive use."

9) Mesa Countywide Land Use Plan - Conservation Goal: "to encourage preservation of sustainable ecosystems."

10) Mesa Countywide Land Use Plan - Open Lands and Trails Goals: "to protect important open lands", "new development should accommodate and protect wildlife habitats", and "to assure that open land is recognized as a limited and valuable resource which must be conserved whenever possible."

F) The Mesa County Land Conservancy is a charitable organization as described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "**Code**") and is a "qualified organization" as defined in Section 170(h)(3) of the Code, and a charitable organization as defined and authorized in C.R.S. Section 38-30.5-104(2) to acquire and

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hold conservation easements.

G) The Grantor desires to protect the Conservation Values of the Property in perpetuity by creation of a conservation easement in gross under Article 30.5 of Title 38, Colorado Revised Statutes.

H) The Board of Directors of the Mesa County Land Conservancy accepts the responsibility of enforcing the terms of this Easement and upholding its conservation purpose forever.

NOW, THEREFORE, for reasons given, and in consideration of payment of $164,900.00, and in consideration of the above and mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of the State of Colorado, and in particular C.R.S. Sec. 38-30.5-101, *et seq.*, Grantor hereby voluntarily grants and conveys to the Conservancy, its successors and assigns a Conservation Easement in perpetuity, together with a third party right of enforcement to the United States, consisting of the rights and restrictions enumerated herein, over and across the Property (the "**Easement**" or the "**Deed**"), exclusively for the purpose of conserving and forever maintaining the open space character, agricultural productivity, wildlife habitat, and scenic qualities of the Property.

1. Purpose. The purpose of this Easement is to protect agricultural use and ensure that the Conservation Values are preserved and protected in perpetuity ("**Purpose**"). This Purpose is in accordance with §170(h) of the Internal Revenue Code of 1986, as amended, and the Treasury Regulations adopted pursuant thereto. To effectuate the Purpose of this Easement, Grantor and Conservancy intend to permit only uses of the Property that do not substantially diminish or impair the Conservation Values and to prevent any use of the Property that will substantially diminish or impair the Conservation Values by limiting non- agricultural uses of the protected Property. Notwithstanding the foregoing, nothing in this Easement is intended to compel a specific use of the Property, such as agriculture, other than the preservation and protection of the Conservation Values. The provisions and restrictions contained in this Easement are intended to insure that the Property remain available for agricultural and/or livestock production in accordance with Section 170(b)(1)(E)(iv) of the Internal Revenue Code.

2. Permitted Uses of Property. The following uses and practices by Grantor, though not an exhaustive recital, are consistent with this Easement. Certain of these consistent uses and practices are identified as being subject to specified conditions or to the requirement of and procedures for prior approval by the Conservancy. Procedures for prior approval are listed below. The remainder of these consistent uses shall not be precluded, prevented, or limited by this Easement. Notwithstanding any terms to the contrary in this Deed of Conservation Easement, there is a 4% limit on the percentage of the total area covered by this Property that may be devoted to impervious surfaces, which includes areas that are paved, covered by concrete, areas occupied by buildings (with or without walls or floors), including all improvements permitted under this Paragraph 2. Conservation practices listed in the NRCS Field Office Technical Guide ("**FOTG**") are exempt from this provision. The 4% limitation on impervious surfaces on the Property is 56,314 square feet.

   2.1. Additional Building Area. The Grantor has identified a one-half (0.5) acre, more or less, building area (the "**Additional Building Area**") in the southerly portion of the Property, which is described on the attached **Exhibit A-1** and depicted on the attached **Exhibit B**. The Grantor may construct a single residence, garage and

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accessory structures in the Additional Building Area, or alternatively, the Grantor may construct one or more structures for commercial activities related to agricultural operations (including without limitation the activities described in subparagraph 2.3.3 below) (**"Commercial Agricultural Structures"**) in the Additional Building Area. At no time shall there be both Commercial Agricultural Structures and a residence located in the Additional Building Area. There are currently no structures in the Additional Building Area. Once constructed, the Grantor may maintain, repair, remodel, enlarge, replace, remove or relocate the structures within the Additional Building Area and may construct additional accessory and agricultural structures within the Additional Building Area. Prior to any permitted construction within the Additional Building Area, the Grantor shall (1) provide written notice to the Conservancy designating whether the Additional Building Area will be used for Commercial Agricultural Structures or a single residence, together with a surveyed description of the Additional Building Area; (2) pin the corners of the Additional Building Area; and (3) at the request of the Conservancy, record a notice executed by the Parties in the real property records which describes and depicts the designated Additional Building Area, and provide a recorded copy of the notice to the NRCS. Thereafter, the Grantor shall maintain monuments or pins at the corners of the designated Additional Building Area. With the prior approval of the Conservancy as provided in Paragraph 18 below, and after compliance with items (1), (2) and (3) of this Paragraph 2.1, Grantor may expand the Additional Building Area to not more than one (1) acre in size upon execution of amendment of the Easement as provided in Paragraph 13 below.

2.2. Agricultural Operations Building Area. The Grantor has identified one agricultural building area which is approximately one (1) acre in size (the **"Agricultural Operations Building Area"**), on the Property, which is described and depicted on the attached **Exhibit B.** The Agricultural Operations Building Area includes the existing shop, agricultural help house, trailer, barn and storage shed (the **"Existing Agricultural Structures"**). The Grantor may maintain, repair, remodel, enlarge, replace, remove or relocate the Existing Agricultural Structures within the Agricultural Operations Building Area and construct, maintain, repair, remodel, enlarge, replace, remove or relocate additional accessory and agricultural structures within the Agricultural Operations Building Area. Prior to any permitted construction within the Agricultural Operations Building Area, the Grantor shall (1) provide written notice to the Conservancy together with a surveyed description of the Agricultural Operations Building Area; (2) pin the corners of the Agricultural Operations Building Area; and (3) at the request of the Conservancy, record a notice executed by the Parties in the real property records which describes and depicts the designated Agricultural Operations Building Area and provide a recorded copy of the notice to the NRCS. Thereafter, the Grantor shall maintain monuments or pins at the corners of the designated Agricultural Operations Building Area. With the prior approval of the Conservancy as provided in Paragraph 18 below, and after compliance with items (1), (2) and (3) of this Paragraph 2.2, Grantor may expand the Agricultural Operations Building Area to not more than one and one-half (1.5) acres in size upon execution of amendment of the Easement as provided in Paragraph 13 below.

2.3. Agriculture and Other Activities. It is the intention of the Parties to preserve the open space character and scenic qualities of the Property, and the ability of the

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Property to be agriculturally productive and to permit all agricultural uses (including the "**Agricultural Uses**" described in subparagraphs 2.3.1 through 2.3.4), unless otherwise prohibited herein. In addition, certain commercial uses are allowed as described below, as long as they are conducted in a manner that is consistent with § 170(h) of the United States Internal Revenue Code of 1986, as amended, and the Treasury Regulations adopted pursuant thereto, in a manner that is consistent with the Purpose of this Easement, and in a manner that is not inconsistent with the preservation and protection of the Conservation Values and as long as they remain subordinate to the agricultural uses of the Property. The following uses are allowed:

2.3.1. Producing, processing or selling plants, animals, or other farm or ranch products that are grown or raised outdoors predominately on the Property or on adjoining or nearby properties owned, managed or leased by Grantor, including forages, grains, feed crops, field crops, berries, herbs, flowers, seeds, grasses, nursery stock, tree farms, fruits, vegetables, aquaculture, trees, orchard and vineyard activities, and other similar uses and activities, with the choice of crops being in the discretion of the Grantor. Notwithstanding the foregoing, any use that removes soil with the harvested material (e.g. grass sod for lawns, ball-&-burlap nursery stock) is prohibited.

2.3.2. Breeding and grazing livestock, such as cattle, horses, sheep, swine, goats, llamas, poultry, elk and similar animals, including seasonally confining livestock into a corral or other small area for feeding, and/or leasing pasture to third parties for grazing livestock.

2.3.3. Small scale commercial activities compatible with agricultural operations and the Purpose of this Easement, including, but not limited to, operation and maintenance of a commercial winery, fruit stand, packing and processing facilities for agricultural products produced predominately on the Property or on adjoining or nearby properties owned, managed or leased by Grantor, provided structures for such activities shall be limited to buildings constructed and maintained for agricultural use as an integral part of agricultural operations on the Property and shall be constructed only within the Additional Building Area or the Agricultural Operations Building Area (collectively referred to as the "**Building Areas**").

2.3.4. Home occupations or similar customary rural enterprises conducted by and in the home of a person residing on the Property.

2.4. Minor Agricultural Structures. Outside of the Building Areas minor agricultural structures less than 500 square feet (such as corrals, small sheds, and similar structures for agricultural use), may be constructed as long as they are temporary (covering the soil for less than 6 months); if such structures are not temporary, they must be approved in writing by the Conservancy, located so as to minimize impacts on protected soils, consistent with the preservation and protection of the Conservation Values of the Property, and clustered together on the periphery of the Property insofar as possible. The new structures, improvements and buildings must be constructed solely for agricultural purposes that are not inconsistent with the preservation and protection of the Conservation Values. The square footage of the aforementioned structures that are deemed to be

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permanent by the Conservancy will be allocated against the permissible impervious surface limit of four percent (4%). The total cumulative impervious surface of such permanent structures located outside of the Building Areas may not exceed 2000 square feet. . Grantor shall notify the Conservancy for approval in advance of any construction or reconstruction of such permanent structures and so that the Conservancy may update its records if approval is granted. Grantor may maintain, repair and replace the existing agricultural fencing on the Property. Grantor may install and relocate fencing provided that the fencing is not inconsistent with the preservation and protection of the Conservation Values of the Property.

2.5. Grazing. Grantor may graze livestock on the Property provided that at all times Grantor shall utilize good grazing and range management practices that prevent pasture deterioration and over-grazing and which protect the Conservation Values of the Property. In the event the Conservancy determines that the range is deteriorating, that overgrazing is occurring, or that the Conservation Values of the Property are not being protected, the Grantor and the Conservancy shall promptly enter into an Agricultural Management Plan for the Property with the NRCS or other resource management agency or consultant mutually agreed upon by Grantor and Conservancy. Thereafter, grazing and other agricultural activities on the Property shall be conducted only in accordance with the Management Plan until Grantor and Conservancy mutually agree to modify or terminate the plan.

2.6. Agricultural Practices. The Grantor may utilize normal or acceptable practices required for agricultural production in the area, including the use of pesticides, herbicides and agricultural sprays and fertilizers considered appropriate for raising quality crops, provided such use is in accordance with applicable laws and regulations and the manufacturers specifications and limitations for such use.

2.7. Utilities and Roads. Upon fifteen (15) days prior notice to the Conservancy, Grantor may install, construct and maintain utilities (including above-ground utilities) to serve the permitted structures and uses (including agricultural uses) on the Property so long as the proposed utility does not adversely impact the Purpose of the Easement. Grantor may also construct unpaved roads as needed for agricultural operations on the Property.

2.8. Hunting. Hunting, hunting leases, guiding, outfitting, trapping and wildlife viewing are permitted on the Property in accordance with applicable laws and regulations. All such activities must not require impervious surfaces and shall be undeveloped, passive and consistent with the Purpose of this Easement.

2.9. Rights held by Third Parties Unaffected. The pre-existing rights held by third parties pursuant to the recorded documents listed in the attached **Exhibit D**, are not affected by the Easement and are permitted uses of the Property.

3. Prohibited or Restricted Uses. Any activity on or use of the Property inconsistent with the Purpose of this Easement is prohibited. In addition to the above statement, the following uses and activities are restricted or expressly prohibited.

3.1. Development Rights. To fulfill the Purpose of this Easement, Grantor hereby conveys to Conservancy all development rights deriving from, based upon or attributable to the Property in any way (**"Conservancy's Development Rights"**), except those expressly reserved by Grantor herein, and the Parties agree that Conservancy's Development Rights shall be held by Conservancy in perpetuity

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in order to fulfill the Purpose of this Easement, and to ensure that such rights are forever released, terminated and extinguished as to Grantor, and may not be used on or transferred off of the Property to any other property or used for the purpose of calculating permissible lot yield of or density credits for the Property or any other property.

3.2. Subdivision. The Property may be comprised of more than one Assessor's parcel; nonetheless, for purposes of this Easement the entire Property (including all legally described Assessor's parcels) is a single parcel that shall at all times remain in the same ownership. The partition, division or subdivision of the Property, by physical or legal process is prohibited. At all times the Property shall remain as a single parcel which is subject to the terms of this Easement. This does not preclude sale of undivided interests in the Property; however, all co-owners are subject to the prohibition of subdivision in this Easement. The right to have the Property or any portion of it, partitioned in kind is waived; the only relief available in a partition action shall be the sale of the co-owned Property, subject to the terms of this Easement, and division of the proceeds.

3.3. Commercial and Industrial Activities. The Property may not be used for industrial activities, or for commercial activities other than the Agriculture Uses, but may be used for other activities which are consistent with preservation of the Property, including agri-tourism and special events, which do not diminish or impair the Conservation Values of the Property, and which are not prohibited by the terms of this Deed.

3.4. Boundary Line Adjustments. No boundary line adjustment shall be allowed which results in any increased density of development on or off the Property, nor shall this Property be used for calculating density of development or permitted uses on any other property or for the purpose of increasing the density of development or uses that might be permitted on any other property. Boundary line adjustments are only permitted in the case of technical errors made in the legal description attached hereto. In such cases, the adjustment of the boundary cannot exceed 2 acres for the entire Property.

3.5. Buildings or Other Structures. No buildings or other similar structures shall be erected or placed on the Property, except as provided in the Permitted Uses of Property Paragraph, above.

3.6. Paving. No portion of the Property, other than within the Building Areas, shall be paved or otherwise covered with concrete, asphalt, or other impervious paving materials.

3.7. Signs and Billboards. With the exception of the Conservancy's right to place a sign on the perimeter of the Property as described in Paragraph 4.4 below, no commercial signs, billboards, awnings, or advertisements shall be displayed or placed on the Property, except for an appropriate and customary identification sign, signs for the business uses permitted on the Property, including product promotional signs, "for sale" or "for lease" signs alerting the public to the availability of the Property for purchase or for lease, "no trespassing" signs, political signs and signs regarding the private leasing of the Property for recreational use. No signs shall diminish, impair or interfere with the Conservation Values of the Property.

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3.8. No Mining. The drilling, exploration by geophysical and other methods, mining, extraction and operating for and producing from the Property, including the construction of any and all roads, pipelines, structures, equipment, tanks, storage facilities, ponds, evaporation pools or pits, utility lines, of any kind or description, and including all activities described as "oil and gas operations" in C.R.S. Sec. 34-60-103, as amended (collectively referred to as **"mining"**), of soil, sand, gravel, rock, stone, decorative stone, oil, natural gas, coalbed methane (including any and all substances produced in association therewith from coalbearing formations), hydrocarbon, fuel, or any other mineral substance, of any kind or description (collectively referred to as **"minerals"**), is prohibited on the Property. Notwithstanding the foregoing, Grantor may conduct or allow subsurface mining underlying the surface of the Property provided that such subsurface mining is conducted in a manner that does not occur on, disturb, remove support for or otherwise impact the surface of the Property or the Water Rights or the Conservation Values (collectively, **"Non-Subsurface Disturbance"**).

3.9. Trash. The dumping or uncontained accumulation of trash or refuse on the Property is prohibited.

3.10. Hazardous Materials. The storage, dumping or other disposal of "**Hazardous or Toxic Materials**" or of non-compostable refuse on the Property is prohibited. For the purpose of this Easement "Hazardous or Toxic Materials" shall be taken in its broadest legal context and shall include any petroleum products as defined in ASTM Standard E 1527-05 and any hazardous or toxic substance, material or waste that is regulated under any federal, state or local law. Notwithstanding anything in this Easement to the contrary, the prohibitions in this Easement do not make or allow the Conservancy or the United States to become an owner or operator of the Property, nor does it permit the Conservancy or the United States to exercise physical or managerial control over the day-to-day operations of the Grantor or control any use of the Property by the Grantor which may result in the storage, dumping or disposal of hazardous or toxic materials; provided, however, that the Conservancy may bring an action to protect the Conservation Values of the Property, as described in this Easement. (The prohibitions in this Easement do not impose liability on the Conservancy for Hazardous or Toxic Materials, nor shall the Conservancy be construed as having liability as a "responsible party" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") as amended, or similar federal or state statutes.) Nothing in this paragraph shall prohibit the use of chemicals and products in accordance with applicable laws and manufacturer's instructions.

3.11. Fences. Grantor may maintain, repair and replace the existing agricultural fencing, build new fences for purposes of reasonable and customary management of livestock and wildlife, or build new fences for separation of ownership and uses on the Property. Grantor may install and relocate fencing provided that the fencing is not inconsistent with the preservation and protection of the Conservation Values of the Property.

3.12. Motorized Vehicles. Use of snowmobiles, all-terrain vehicles, motorcycles, or other motorized vehicles outside of the Building Areas, or off of roads or travelways, except for agricultural or property-maintenance purposes, is prohibited.

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3.13. Water. The Property includes any and all water and water rights appurtenant to, associated with or beneficially used on the land that are owned by the Grantor, and all ditches, headgates, springs, reservoirs, water allotments, water shares and stock certificates, contracts, units, wells, easements and rights of way associated therewith (collectively, the "**Water Rights**"). Specifically, the Grantor owns water right acres through the Orchard Mesa Irrigation District for the Property. These Water Rights are tied to the land through the Orchard Mesa Irrigation District. The Water Rights include surface water rights and groundwater rights, whether tributary, nontributary or not-nontributary, decreed or undecreed, including, but not limited to, those water rights or interests specifically described as follows or in the attached **Exhibit C**. Grantor may maintain, repair or improve the existing water delivery systems to carry out the purposes permitted under this Easement. Grantor shall retain and reserve ownership and the right to use all Water Rights on the Property for agricultural production, irrigation and other decreed uses. The Grantor shall not transfer, sell or otherwise separate the Water Rights, as defined above, from the Property and shall maintain sufficient Water Rights on the Property to ensure that the Conservation Values of the Property are preserved. The Parties intend and desire that obligations and restrictions set forth in this Section be enforceable pursuant to Colo. Rev. Stat. §38-30.5-101, et. seq. Alternatively, the Parties intend and desire that the obligations and restrictions set forth in this Section be enforceable as a restrictive covenant, or that such obligations and restrictions be enforceable as an equitable servitude.

3.14. Excavation; Topographical Changes. No excavating, grading, cutting and filling, berming or other similar topographical changes shall occur on the Property, except as reasonably necessary in connection with the (1) construction, maintenance and repair of those structures permitted in the Building Areas as provided in Paragraphs 2.1 and 2.2; (2) the Agricultural Uses allowed on the Property as described in Paragraph 2.3; and (3) the minor agricultural structures permitted on the Property in Paragraph 2.4.

4. Rights to the Conservancy. To accomplish the Purpose of this Easement in addition to the rights described in C.R.S. Sec. 38-30.5-101, *et seq.*, as amended from time to time, the following rights are granted to the Conservancy:

4.1. To preserve and protect the Conservation Values of the Property;

4.2. To enter upon the Property ordinarily not more than two inspection periods annually, at reasonable times and upon 48 hours' notice to Grantor, in order to monitor compliance with and otherwise enforce the terms of this Easement. The Conservancy may utilize vehicles and other reasonable modes of transportation for access purposes. The access routes to the Property shall be designated by the Grantor so as to minimize damage to farm operations;

4.3. To prevent any activity on or use of the Property that is inconsistent with the Purpose of this Easement, or which may be reasonably expected to have material adverse impact on the Conservation Values of the Property, and to require the restoration of such areas or features of the Property that are materially damaged by any inconsistent activity or use; and

4.4. To place and maintain on the perimeter of the Property a sign or signs indicating that a conservation easement is held by the Conservancy on the Property. The size of the sign and the location, design and content of such signs shall be determined through mutual agreement of the Grantor and the Conservancy.

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5. Rights Retained by Grantor. Grantor reserves to Grantor and to Grantor's personal representatives, heirs, successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are consistent with the Purpose of this Easement as determined by the Conservancy in its discretion.

6. Responsibilities of the Grantor and the Conservancy Not Affected. Other than as specified herein, this Easement is not intended to impose any legal or other responsibility on the Conservancy, or in any way to affect any existing obligation of the Grantor as owner of the Property. Among other things, this shall apply to:

6.1. Taxes. The Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the Property, including any taxes imposed upon, or incurred as a result of, this Easement. If the Conservancy is ever required to pay any taxes or assessments on its interest in the Property, Grantor will reimburse the Conservancy for the same.

6.2. Upkeep and Maintenance. The Grantor shall continue to be solely responsible for the upkeep and maintenance of the Property, including weed control and eradication, to the extent it may be required by law and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Property. The Conservancy shall have no obligation for the upkeep or maintenance of the Property.

6.3. Insurance; Mortgages. The Grantor shall be responsible for the maintenance of reasonable comprehensive general liability insurance coverage on the Property. Grantor shall name the Conservancy as an additional insured on such comprehensive general liability insurance coverage and shall provide a certificate of such insurance to the Conservancy upon the request of the Conservancy. Any mortgage or deed of trust which encumbers all or a portion of the Property shall be subordinate to the terms of this Easement and the foreclosure of any such mortgage or deed of trust shall not adversely affect the existence or continuing validity of this Easement.

6.4. Baseline Report. The Grantor and the Conservancy agree that the natural characteristics, ecological features, physical and man-made conditions of the Property on the date of this Easement are documented in the Baseline Documentation Report referenced in Recital B, above, which has been signed and acknowledged by the Grantor and the Conservancy as establishing the condition of the Property on the date of this Easement, which includes reports, maps, photographs, and other documentation. The Conservancy shall maintain the Baseline Documentation Report and may use the Baseline Documentation Report in enforcing provisions of this Easement, but is not limited to the use of the Baseline Documentation Report to show a change of conditions.

6.5. Responsibilities of the Conservancy. Responsibilities of the Conservancy include, but are not limited to:

6.5.1. Annually monitoring the Property in accordance with applicable policies and guidelines.

6.5.2. Ensuring active farm operations are in compliance with the Conservation Plan for the Property.

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6.5.3. Investigating potential violations of this Easement, informing NRCS or successor agency of any violations, taking appropriate enforcement action, and providing an annual monitoring report to NRCS or successor including any follow-up or actions necessary to maintain compliance with the terms of this Easement.

6.5.4. The Conservancy shall resolve violations within sixty (60) days of receipt of notice from the United States in accordance with 7 CFR § 1491.30(e). Failure to resolve the violation may result in enforcement of the terms of the Easement by the United States pursuant to its Right of Enforcement as delineated in Paragraph 7.4.

7. Enforcement.

7.1. The Conservancy shall have the right to prevent and correct violations of the terms of this Easement. If the Conservancy finds what it believes is a violation, it shall immediately notify Grantor in writing of the nature of the alleged violation and it may at its discretion take appropriate legal action. Except when an ongoing or imminent violation could irreversibly diminish or impair the open space character, agricultural productivity, wildlife habitat or scenic qualities of the Property, the Conservancy will give the Grantor sixty (60) days to correct the violation before filing any legal action and the Parties shall pursue resolution of the dispute through the mediation process ("**Mediation Process**") described in this paragraph. The United States shall in no event be required to participate in meditation. For purposes of this Easement the Mediation Process is as follows: (a) Upon notice from the Conservancy to the Grantor of a potential violation of the Easement, both Parties agree to meet as soon as possible to resolve this difference; (b) If a resolution of this difference cannot be achieved at the meeting, both Parties agree promptly to meet with a mutually acceptable mediator to attempt to resolve the dispute as early in the sixty (60) day period as possible; (c) Grantor shall discontinue any activity causing, related to, and/or resulting in the alleged violation during the mediation process; and (d) Should mediation fail to resolve the dispute, the Conservancy may, in its sole discretion, take appropriate legal action. If a court with jurisdiction determines that a violation may exist or has occurred, the Conservancy may obtain a temporary or permanent injunction to stop the violation. The Conservancy may also request a court of competent jurisdiction to issue an order requiring the Grantor to restore the Property to its condition prior to the violation. In any case where a court finds that a violation has occurred, the Grantor shall reimburse the Conservancy for all its expenses incurred in stopping and correcting the violation, including but not limited to reasonable attorney's fees. These rights are in addition to any rights as described in C.R.S. Sec. 38-30.5-101, *et seq.*, as amended from time to time. An action for injunction (including mandatory injunction) under this Easement shall be governed by the provisions of C.R.S. Section 38-30.5-108.

7.2. The Conservancy will enforce the terms of this Easement to protect the Conservation Value of the Property, provided, however, that the Conservancy shall have the right to determine in its sole discretion what enforcement action, if any, is necessary, subject to the United States Right of Enforcement. Any forbearance by the Conservancy to exercise its rights under this Easement shall not be deemed or construed to be a waiver by the Conservancy of any term of this Easement or of any of the Conservancy's rights under this Easement. No delay or omission by the Conservancy in the exercise of any right or remedy

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upon any breach by the Grantor shall impair such right or remedy or be construed as a waiver. Grantor hereby waives the defenses of laches, estoppel and prescription in any action brought by the Conservancy to enforce this Easement; notwithstanding the foregoing, the Grantor shall be entitled to rely upon any written approval from the Conservancy that is given pursuant to Paragraph 18, herein. Grantor hereby waives any defense available to Grantor pursuant to C.R.S. Section 38-41-119.

7.3. **United States Right of Enforcement**. Under this Conservation Easement, the United States is granted the right of enforcement in order to protect the public investment. The Secretary of the United States Department of Agriculture (the Secretary), on behalf of the United States, will exercise these rights under the following circumstances: In the event that the Conservancy fails to enforce any of the terms of this Conservation Easement, as determined in the sole discretion of the Secretary, the Secretary and his or her successors or assigns may exercise the United States' rights to enforce the terms of this Conservation Easement through any and all authorities available under Federal or State law.

8. Agricultural Practices. The following language applies to properties with cropland that is designated as being 'Highly Erodible Land' ("**HEL**"). By definition, HEL is limited to fields devoted to cultivated crops and composed of soils that NRCS has determined to be inherently vulnerable to excessive erosion by wind or water. This provision does not currently apply to the Property and no Conservation Plan is required. The language is included, however, to address unforeseeable changes in land use or changes NRCS may make as a result of an act of Congress.

8.1. As required by section 12381 of the Food Security Act of 1985, as amended, the Grantor, its heirs, successors, or assigns, shall conduct agricultural operations on highly erodible land on the Property in a manner consistent with a Conservation Plan prepared in consultation with NRCS and the Conservation District. This conservation plan shall be developed using the standards and specifications of the NRCS Field Office Technical Guide and 7 CFR Part 12 that are in effect on the date of this Deed. However, the Grantor may develop and implement a conservation plan that proposes a higher level of conservation and is consistent with the NRCS Field Office Technical Guide standards and specifications. NRCS shall have the right to enter upon the Property, with advance notice to the Grantor, in order to monitor compliance with the conservation plan.

8.2. In the event of noncompliance with the conservation plan, NRCS shall work with the Grantor to explore methods of compliance and give the Grantor a reasonable amount of time, not to exceed twelve months, to take corrective action. If the Grantor does not comply with the conservation plan, NRCS will inform the Conservancy of the Grantor's noncompliance. The Conservancy shall take all reasonable steps (including efforts at securing voluntary compliance and, if necessary, appropriate legal action) to secure compliance with the conservation plan following written notification from NRCS that (a) there is a substantial, ongoing event or circumstance of non-compliance with the conservation plan, (b) NRCS has worked with the Grantor to correct such noncompliance, and (c) Grantor has exhausted its appeal rights under applicable NRCS regulations.

8.3. If the NRCS standards and specifications for highly erodible land are revised after the date of this Conservation Easement Deed based on an Act of Congress, NRCS will work cooperatively with the Grantor to develop and implement a

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revised conservation plan. The provisions of this section apply to the highly erodible land conservation requirements of the Farm and Ranch Lands Protection Program and are not intended to affect any other natural resources conservation requirements to which the Grantor may be or become subject.

9. Public Access. No right of access by the general public to any portion of the Property is conveyed by this Easement.

10. Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle the Conservancy to bring any action against the Grantor for any injury or change to the Property resulting from causes beyond Grantor's control, including, but not limited to, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such natural events. For purposes of this Easement, "natural event" shall not include acts of third parties. The Grantor shall take reasonable efforts to prevent third parties from performing, and shall not knowingly allow third parties to perform, any act on or affecting the Property that is inconsistent with the Purpose of this Easement. Grantor understands that nothing in this Easement relieves the Grantor of any obligation or restriction on the use of the Property imposed by law.

11. Transfer of Easement. This Easement is transferable by the Conservancy, but the Conservancy may assign its rights and obligations under this Easement only to an organization that (a) is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code of 1986, as amended (or any successor provision then applicable), and the applicable regulation promulgated thereunder; (b) is authorized to acquire and hold conservation easements under Colorado law; (c) agrees in writing to assume the responsibility imposed on the Conservancy by this Easement; and (d) is approved in writing as a transferee by the United States in its sole discretion. As a condition of such transfer, the Conservancy shall require that the conservation Purpose that this grant is intended to advance continues to be carried out.

12. Transfer of Property. Any time the Property itself, or any interest in it, is transferred by the Grantor to any third party, the Grantor shall notify the Conservancy in writing at least twenty-one (21) days prior to the transfer of the Property. The document of conveyance shall expressly refer to this Easement. Upon any transfer of the Property, or any portion thereof, Grantor shall have no further liability or obligations under this Easement with respect to the portion of the Property which is transferred, except to the extent such liability arises from acts or omissions occurring prior to the date of transfer.

13. Amendment of Easement. If circumstances arise under which an amendment to or modification of this Easement or any of its exhibits would be appropriate, the Grantor, the Conservancy and The United States may jointly amend this Easement so long as the amendment (a) is consistent with the Conservation Values and Purpose of this Easement, (b) does not affect the perpetual duration of the restrictions contained in this Easement, (c) does not affect the qualifications of this Easement under any applicable laws, (d) complies with the Conservancy's procedures and standards for amendments (as such procedures and standards may be amended from time to time) and (e) receives prior written approval from the United States, in its sole discretion. Any amendment must be in writing, signed by the Grantor and the Conservancy, and recorded in the records of the Clerk and Recorder of Mesa County. Nothing in this paragraph shall be construed as requiring the Conservancy or the United States to agree to any particular proposed amendment.

14. Hold Harmless.

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14.1. Grantor shall hold harmless, indemnify, and defend the Conservancy and the members, directors, officers, employees, agents, and contractors and their heirs, personal representatives, successor and assigns of each of them (collectively, "**Indemnified Parties**") 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 (1) injury or death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, unless due to the negligence (in which case liability shall be apportioned in accordance with Colorado law) or intentional acts or omissions of any of the Indemnified Parties; (2) the obligations of Grantor specified herein; and (3) the presence or release of Hazardous Materials on, under or about the Property. Without limiting the foregoing, nothing in this Easement shall be construed as giving rise to any right or ability the Conservancy or the United States, nor shall the Conservancy or the United States have any right or ability to exercise physical or managerial control over the day-to-day operations of the Property, or otherwise to become an operator with respect to the Property within the meaning of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended.

14.2. Grantor shall indemnify and hold harmless the United States, its employees, agents, and assigns for any and all liabilities, claims, demands, losses, expenses, damages, fines, fees, penalties, suits, proceedings, actions, and costs of actions, sanctions asserted by or on behalf of any person or governmental authority, and other liabilities (whether legal or equitable in nature and including, without limitation, court costs, and reasonable attorneys' fees and attorneys' fees on appeal) to which the United States may be subject or incur that both relate to the Property and arise from Grantor's negligent acts or omissions, Grantor's breach of any representation, warranty, covenant, or agreements contained in this Easement, or Grantor's violations of any Federal, State, or local laws, including all Environmental Laws.

15. Termination of Easement.

15.1. This Easement constitutes a real property interest immediately vested in the Conservancy. This Easement may only be extinguished with the joint approval of the Conservancy and the United States, and only if a court with competent jurisdiction determines that conditions on or around the Property have changed so much that none of the conservation purposes of the easement created by this Deed can continue to be fulfilled. The Grantor, the Conservancy and United States stipulate that the Easement has a fair market value which is 44% of the fair market value of the Property unencumbered by this Easement (the "**Proportionate Share**"). The Proportionate Share has been determined at the time of conveyance of this Easement by dividing the fair market value of this Easement by the fair market value of the Property unencumbered by this Easement. The Proportionate Share will remain constant over time

15.2. In the event the Easement is extinguished, condemned or terminated and the Property is sold or taken for public or permitted use in whole or in part, then, Grantor and the Conservancy shall act jointly to recover the fair market value of the affected portion of the Property valued as unencumbered by this Easement and all damages resulting from the extinguishment, condemnation or termination and as required by Treasury Regulation Sec. 1.170A-14(g)(6), the Conservancy

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shall, be entitled to receive the Proportionate Share of the gross sale proceeds or condemnation award (the "**Conservancy's Proceeds**"). In the event of extinguishment, condemnation or termination, the United States shall be entitled to receive its share based on the appraised fair market value of the conservation easement at the time the easement is extinguished or terminated in proportion to its percentage of original investment. The Conservancy shall use its portion of the Conservancy's Proceeds consistently with the conservation Purpose of this Deed. All expenses reasonably incurred by the Grantor and the Conservancy in connection with condemnation shall be paid out of the total amount recovered prior to the allocation of such damages award between Grantor and the Conservancy, as described in this Paragraph. Notwithstanding the foregoing, because the United States has a vested property interest in this Easement, the United States must consent to any termination, extinguishment, eminent domain and/or condemnation action involving the Property.

15.3. Grantor, upon receipt of notification of any pending condemnation action brought by any government entity affecting and/or relating to the Protected Property shall notify the Conservancy and the United States of America, in writing, within fifteen (15) days of receipt of said notification.

15.4. In making this Grant the Grantor has considered the possibility that uses prohibited by the terms of this Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. It is the intent of both the Grantor and the Conservancy that any such changes shall not be deemed to be circumstances justifying the termination or extinguishment of this Easement in whole or in part. In addition, the inability of the Grantor, or Grantor's heirs, successors, or assigns, to conduct or implement any or all of the uses permitted under the terms of this Easement, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for termination of this Easement in whole or in part.

16. Interpretation. This Easement must be interpreted under the laws of the State of Colorado, and of the United States, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation Purpose and protection of the Conservation Values. Grantor intends the bargain sale of the Conservation Easement to qualify for a deduction under Section 170(h) of the Code and for the credit under Section 39-22-522, C.R.S.; all provisions of this Easement shall be interpreted to effectuate that intent, and a court may reform this Easement with the prior approval of NRCS as necessary to effectuate such intent so long as such reformation is consistent with the Purpose of this Easement and the protection of the Conservation Values of the Property.

17. Perpetual Duration. The easement created by this Easement shall be a servitude running with the land in perpetuity. Every provision of this Easement that applies to the Grantor or the Conservancy shall also apply to their respective agents, heirs, executors, administrators, assigns, and all other successors as their interests may appear. A Party's rights and obligations under this Easement terminate upon transfer of the Party's interest in this Easement or the Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

18. Approvals. Certain activities herein are allowed only if the permission of the Conservancy is first obtained. When approval of the Conservancy is required, the Grantor

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must give notice to the Conservancy of the intention to undertake any activity which requires approval but is otherwise permitted herein. The notice shall inform the Conservancy 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 must be deemed sufficient by the Conservancy in its discretion for review of the proposed activity to constitute proper notice. The Conservancy shall have forty-five (45) days from the receipt of the notice to review the proposed activity and to notify the Grantor of any objections thereto. Except as provided herein where the Conservancy's approval may be withheld in its discretion, the approval may be withheld only upon a reasonable determination by the Conservancy that the action as proposed would be inconsistent with the Purpose of this Easement and materially adversely impact the Conservation Values of the Property; the reason(s) for such determination shall be set forth with specificity by the Conservancy in such written notice to Grantor. Where the Conservancy's approval is required, Grantor shall not undertake the requested activity until Grantor has received the Conservancy's approval in writing. The Grantor shall be responsible for all costs of the Conservancy associated with the approval, including the Conservancy's attorney fees, unless the Parties agree otherwise.

19. Notices. Any notices required by this Easement shall be in writing and shall be personally delivered or sent by Federal Express or other similar courier service specifying the earliest available delivery, or by certified mail, return receipt requested, to the Parties and the United States at the following addresses, or to a new address if the Parties and the United States are notified as provided in this Paragraph 19, of a changed address of another addressee:

To the Grantor:

at the address shown above:

To the Conservancy:

The Mesa County Land Conservancy
1006 Main Street
Grand Junction, Colorado 81501

To the United States:

State Conservationist
USDA Natural Resources Conservation Service
Denver Federal Center
DFC Building 56, Room 2604
P.O. Box 25426
Denver, CO 80225-0426

20. Grantor's Title Warranty; Access. The Grantor warrants that it has good and sufficient title and legal and physical access to the Property subject to and except those matters described in the attached **Exhibit D**, that the Conservancy and the United States has access to the Property for the Purposes described in this Easement, that any mortgages, deeds of trust or monetary liens encumbering the Property are subordinate to all of the terms of this Easement, and hereby promises to defend the same against all claims from

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any persons except those listed in **Exhibit D** and their successors and assigns. Grantor hereby grants to the Conservancy and the United States the right to access the Property for the Purpose described herein, across any property owned by the Grantor, including this Property, or across any easements, rights of way or routes of access of any kind or description, now owned or later acquired by the Grantor, and to ensure that at all times the Conservancy and the United States has full right of access to the Property for the Purpose described in this Easement. The Parties intend that this Easement encumber the Property, including any and all soil, sand, gravel, fuel, rock, stone or any other minerals of any type or character on or thereunder that is necessary for Non-Surface Disturbance of the Property, and the Water Rights described herein, whether any such interest is now owned or is later acquired by the Grantor. Nothing herein shall encumber nor give the Conservancy any right, title or interest in any oil, gas, coalbed methane or other minerals that are mined from underneath the surface of the Property using Non-Surface Disturbance methods, as provided in Paragraph 3.8.

21. Grantor's Environmental Warranty.

21.1. Grantor warrants that it is in compliance with, and shall remain in compliance with, all applicable Environmental Laws. Grantor warrants that there are no notices by any governmental authority of any violation or alleged violation of, non-compliance or alleged non-compliance with or any liability under any Environmental Law relating to the operations or conditions of the Property. Grantor further warrants that it has no actual knowledge of a release or threatened release of Hazardous Materials, as such substances and wastes are defined by applicable federal and state law.

21.2. Moreover, Grantor hereby promises to hold harmless and indemnify the Conservancy and the United States against all litigation, claims, demands, penalties and damages, including reasonable attorneys' fees, arising from or connected with the release or threatened release of any Hazardous Materials on, at, beneath or from the Property, or arising from or connected with a violation of any Environmental Laws by Grantor or any other prior owner of the Property. Grantor's indemnification obligation shall not be affected by any authorizations provided by the Conservancy or the United States to Grantor with respect to the Property or any restoration activities carried out by the Conservancy at the Property; provided, however, that the Conservancy shall be responsible for any Hazardous Materials contributed after this date to the Property by the Conservancy.

21.3. "**Environmental Law**" or "**Environmental Laws**" means any and all Federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, hazardous materials, worker and community right-to-know, hazard communication, noise, radioactive material, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building and land use as may now or at any time hereafter be in effect.

21.4. "**Hazardous Materials**" means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials,

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infectious materials and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment.

22. Grantor's Other Warranties. Grantor is duly authorized to execute this Easement and this Easement is enforceable against Grantor in accordance with its terms. Grantor is in substantial compliance with the laws, orders, and regulations of each governmental department, commission, board, or agency having jurisdiction over the Property in those cases where noncompliance would have a material adverse effect on the Property or this Easement.

23. No Grant of Access Easements. Grantor shall not grant access across the Property to or for the benefit of any other Property without the prior written permission of the Conservancy which permission it may withhold in its discretion.

24. Acceptance. As attested by the signature of the Conservancy's President and NRCS affixed hereto, the Conservancy and the United States hereby accepts without reservation the rights and responsibilities conveyed by this Easement.

25. Recording. The Conservancy shall record this instrument in timely fashion in the official records of Mesa County, Colorado, and may re-record it at any time as may be required to preserve its rights in this Easement.

26. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the Purpose of this Easement and the policy and purpose of C.R.S. §38-30.5-101, *et seq*. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the Purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

27. Non-Merger. If the Conservancy wishes to acquire fee title to the Property or any additional interest in the Property (such as a leasehold), the Conservancy must first obtain the written approval of the United States. As a condition of such approval, the United States may require that the Conservancy first transfer the Easement to another qualified organization consistent with Paragraph 11 above, such that the Easement continues to encumber the Property. Notwithstanding C.R.S. §38-30.5-107, under no circumstances, including the acquisition of the fee title to the Property by the Conservancy or the United States, shall this Easement merge into the fee interest.

28. No Third-Party Beneficiary. This Easement is entered into by and between the Grantor and the Conservancy, and except as provided herein, is solely for the benefit of the Grantor, the Conservancy and the United States and their respective successors in interest and assigns and does not create rights or responsibilities in any third parties.

29. 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 of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

30. Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the Parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property.

31. Termination of Rights and Obligations of Conservancy. The Conservancy's rights and obligations under this Easement shall terminate upon transfer of the Conservancy's

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interest in the Easement or Property, except that liability for acts or omissions occurring prior to the transfer shall survive the transfer.

32. Joint Obligation. In the event the Property is owned by more than one owner, all such owners shall be jointly and severally liable for the obligations imposed by this Deed upon Grantor.

33. Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Colorado and the laws of the United States. Venue for any dispute concerning this Easement shall be Mesa County, Colorado, unless the United States has exercised its right of enforcement as described in Paragraph 7.4.

34. 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.

35. Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

36. Conservancy Acknowledgement of Donation (I.R.C. 170(f)(8)). The Conservancy acknowledges receipt and acceptance of this Easement encumbering the Property described herein, for which no goods or services were provided, except for the consideration, if any, recited above.

TO HAVE AND TO HOLD this Deed of Conservation Easement unto the Conservancy, the United States of America, their successors and assigns forever.

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IN WITNESS WHEREOF Grantor and the Conservancy have executed this Deed of Conservation Easement on this 29 day of April, 2014.

GRANTOR:

Philip W. Patton

Philip W. Patton

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 29 day of April, 2014, by Philip W. Patton, as Grantor.

WITNESS my hand and official seal.

My commission expires: _____.

(SEAL)

Notary Public

DIANE HAGEN
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 07/29/2014

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GRANTOR:

Susan B. Patton

Susan B. Patton

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 29 day of April, 2014, by Susan B. Patton, as Grantor.

WITNESS my hand and official seal.

My commission expires: _____
(SEAL)

Notary Public

DIANE HAGEN
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 07/29/2014

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GRANTOR:

Patrick L. Brennan

Patrick L. Brennan

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 29 day of April, 2014, by Patrick L. Brennan, as Grantor.

WITNESS my hand and official seal.

My commission expires: _____
(SEAL)

Notary Public

DIANE HAGEN
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 07/29/2014

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GRANTOR:

Susan W. Brennan

Susan W. Brennan

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 29 day of April, 2014, by Susan W. Brennan, as Grantor.

WITNESS my hand and official seal.

My commission expires: _____
(SEAL)

Notary Public

DIANE HAGEN
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 07/26/2014

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Accepted:

THE **MESA COUNTY LAND CONSERVANCY**, a Colorado non-profit corporation, doing business as **MESA LAND TRUST**:

by: Van K. Graham
Vice President

attest: Marcia Sublette
~~Secretary~~
TREASURER

STATE OF Colorado)
) ss.
COUNTY OF Mesa)

The foregoing instrument was acknowledged before me this 29 day of April, 2014, by Van K Graham, as Vice President and by Marcia Sublette as Treasurer, of the Mesa County Land Conservancy, a Colorado non-profit corporation, doing business as Mesa Land Trust, as Grantee.

WITNESS my hand and official seal.

My commission expires: _____.

(SEAL)

Diane Hagen
Notary Public

DIANE HAGEN
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 07/29/2014

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ACCEPTANCE OF PROPERTY INTEREST
BY THE NATURAL RESOURCES CONSERVATION SERVICE

The Natural Resources Conservation Service, United States Department of Agriculture, an agency and Department of the United States Government, hereby accepts and approves the foregoing conservation easement deed and the rights conveyed therein, on behalf of the United States of America.

PHYLLIS ANN PHILIPPS
State Conservationist

Natural Resources Conservation Service

United States Department of Agriculture

COUNTY OF DENVER

STATE OF COLORADO

On this 25th day of April, 2014 before me, the undersigned, a notary public in and for the State, personally appeared Phyllis Ann Phillips known or proved to me to be the person whose signature appears above, and who being duly sworn by me, did say that he or she is the State Conservationist of the Natural Resource Conservation Service, United States Department of Agriculture, is authorized to sign on behalf of the agency and acknowledged and accepted the rights conveyed by the deed to be his or her voluntary act and deed.

In witness whereof, I have hereunto set my hand and official seal the day and year first above written.

Amy Mund

Notary Public, State of Colorado

My Commission Expires 5/13/2018

AMY MUND
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID # 19984013319
MY COMMISSION EXPIRES MAY 13, 2018

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Exhibit A – Description of Property

Mesa County, Colorado:

Parcel 1 of CORNEY'S PLACE, as set forth in Plat recorded June 3, 1997 in Book 15 at Page 322, Reception No. 1800992

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Exhibit A-1 – Description of Additional Building Area and Agricultural Operations Building Area

Additional Building Area:

GPS coordinates for corners of Additional Building Area:

NW Corner: 108 degrees 26' 27.28" W, 39 degrees 2' 33.81" N
NE Corner: 108 degrees 26' 25.41" W, 39 degrees 2' 33.78" N
SE Corner: 108 degrees 26' 25.31" W, 39 degrees 2' 32.33" N
SW Corner: 108 degrees 26' 27.27" W, 39 degrees 2' 32.33" N

(0.5 acres, more or less):

Agricultural Operations Building Area:

Commencing at a point which is 18 feet South and 30 feet East of the NW corner of the Property (which point is the NW corner of the Agricultural Operations Building Area);

Thence East 189 Feet to the NE corner of the Agricultural Operations Building Area;
Thence South 230 feet to the SE corner of the Agricultural Operations Building Area
Thence West 189 feet to the SW corner of the Agricultural Operations Building Area
Thence North 230 feet, more or less, to point of beginning.

(1 acre, more or less)

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Exhibit B– Map of Property

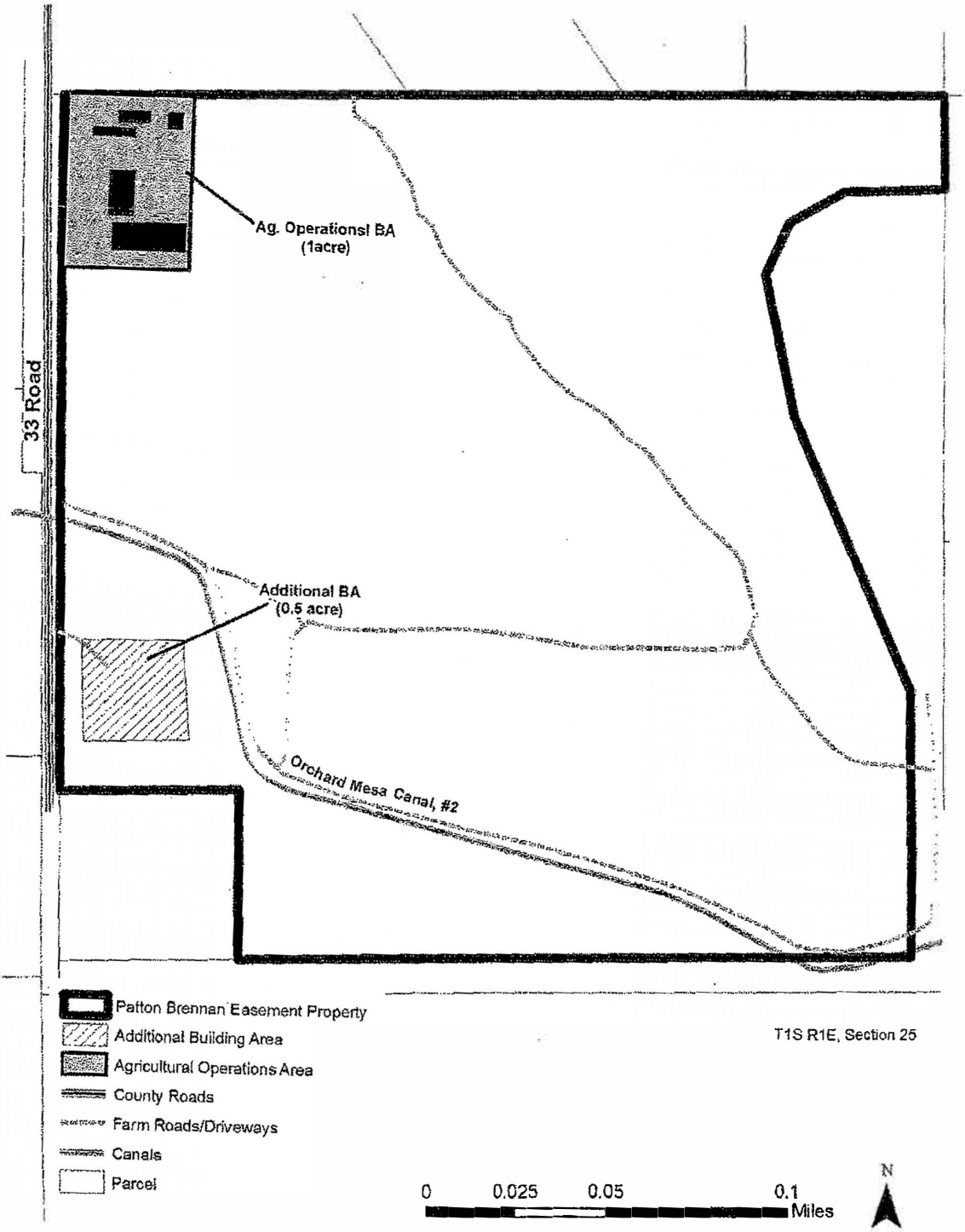

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Exhibit C – Water Rights

Water for the irrigation of 25.21 water right acres from Orchard Mesa Irrigation District

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Exhibit D – Exceptions to Title

1) Reservation of right of proprietor of any penetrating vein or lode to extract his ore, in U.S. Patent recorded March 8, 1909 in Book 70 at Page 495, Reception No. 81731.

2) Reservation of right of way for any ditches or canals constructed by the authority of United States in U.S. Patent recorded March 8, 1909 in Book 70 at Page 495, Reception No. 81731.

3) Right of way, whether in fee or easement only, as granted to The Orchard Mesa Irrigation District by instrument recorded March 9, 1911 in Book 156 at Page 530, Reception No. 97643.

4) Right of way, whether in fee or easement only, as granted to Grand Valley Rural Power Lines, Inc., by instrument recorded August 5, 1994 in Book 2090 at Page 593, Reception No. 1691112.

5) Right of way, whether in fee or easement only, as granted to The Mountain States Telephone and Telegraph Company by instrument recorded July 30, 1979 in Book 1211 at Page 732, Reception No. 1198448, as set forth therein.

6) Right of way, whether in fee or easement only, as granted to Grand Valley Rural Power Lines, Inc. by instrument recorded July 11, 1977 in Book 1111 at Page 966, Reception No. 1136852.

7) Easement for egress and ingress granted to Parcel 2 along the existing canal road as described in Deed recorded July 7, 1997 in Book 2339 at Page 688, Reception No. 1804797 and as shown on the recorded Plat of Corney's Place, recorded June 3, 1997 in Book 15 at Page 322, Reception No. 1800992.

8) Any loss of or adverse claim to that portion of the Property described in Exhibit A hereof adjoining the Orchard Mesa Irrigation Canal based on an assertion that the channel and banks thereof have been changed or altered other than by natural causes and in imperceptible degrees.

9) Easements as shown on the recorded Plat of Corney's Place, recorded June 3, 1997 in Book 15 at Page 322, Reception No. 1800992.

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National Policy Analysis
A Publication of The National Center for Public Policy Research

569 May 2008

Conservation Easements: The Good, the Bad, and the Ugly

by Dana Joel Gattuso

Introduction

Conservation easements, as we know them today, are a fairly recent approach to land conservation. As government acquisitions and regulatory restrictions on land use have become prohibitively invasive, costly, and ineffective, governments have looked to conservation easements as a potentially effective and less expensive conservation method than government ownership and/or regulation. Use of conservation easements began to gain steam by the 1980s and by the 1990s, exploded on the scene.

Initially, conservation easements - which allow landowners to hold on to and use their property but permanently remove development rights in exchange for tax benefits - seemed to hold some promise as an unintrusive, effective means of preserving open space while upholding private stewardship, private initiative and the rights of private property owners. Land trusts, the organizations that manage the easements, tended originally to be small, nonpolitical, and independent of government involvement.

Over time, however, as numerous land trusts have grown in size and number, so have their association - and influence - with government. This has been the case particularly with the large, national organizations that obtain enormous sums from federal funding. For many of these land trusts, what used to be a close working relationship with private landowners has been replaced by a closer relationship with government agencies. Increasingly too, the mission has evolved from protecting open lands through private stewardship to aiding government agencies in acquiring private lands. In these troubling arrangements, land trusts have operated more like government agents, acquiring easements from private landowners, only to turn around and quietly sell them - sometimes for a profit - to state or federal governments. These methods certainly are not practiced by all land trusts, but nor are they isolated cases.

Given the rapid growth in land trusts and the rising use of conservation easements over the past decade, along with increasing involvement with government in the arrangements, easements could become a far-reaching means for public land acquisition. That is, easements, absent reforms, could evolve into the prevailing method for government to shift lands unobtrusively from private to public control under a pretense of private stewardship.

Other problems too have evolved. Federal tax incentives for conservation easements require landowners to encumber their land in perpetuity. While the permanency may hold appeal to those property owners who see value in shielding their land from developers forever, particularly when sweetened with a significant tax deduction, it could prove to be detrimental to the public over the long-term as economic and ecological factors change our definitions of what should be preserved and why. Because conservation easements essentially are a contract between two people - the grantor and the grantee - one of the promising aspects of easements has always been their flexibility and adaptability, compared to government ownership and regulations. Perpetuity requirements run counter to flexibility and necessary change.

The tax incentives themselves also are problematic, developing into what some critics call a "tax haven" and "tax bonanza" for the wealthy landowner. Although the tax benefits were intended to aid the land-rich, cash-poor farmer or small business, struggling because of exorbitant property and estate taxes to hold on to their land, the federal tax benefits disproportionately favor wealthy landowners.

This report examines these issues, addressing 1) conservation easements' evolution from a promising approach aimed at protecting land through private ownership to a questionable arrangement that shifts private lands to government control; 2) the costly and potentially detrimental impact of perpetual deeds; and 3) the manipulative use of the tax code.

Policy reforms can change conservation easements as we know them today, returning control of land to property owners while removing existing disincentives to land preservation. Among these are:

* Preventing government takeover of land through land trusts' acquisition of conservation easements.

* Phasing out government funding of land trusts.

* Changing the tax code to allow for fixed-term, rather than perpetual, conservation easements.

* Eliminating estate taxes, which encourage property owners to sell their land to developers.

Background on Conservation Easements

A conservation easement[1] is a legally-binding agreement between a property owner and a nonprofit organization - typically a land trust - or a government agency[2] that restricts development on the land covered by the easement, usually in exchange for tax benefits for the property owner.[3] The property owner who donates or sells the easement - called the "grantor" - retains partial ownership rights over the land but relinquishes rights to use the property for development.[4] The organization to receive or buy the easement - called the grantee - holds interest in the property and enforces the restrictions.

Property owners typically are motivated to place their land in a conservation easement by deductions from federal and state taxes, by a desire to shield their property from development,[5] or by the threat of government land-acquisition or land-use regulations.[6] To receive tax benefits, landowners must agree to allow the land to be used for one of the following: outdoor recreation for the general public; protection of animals, plants or ecosystems; preservation of open spaces - for either farming, forestry, or ranching[7] - or for scenic enjoyment for the general public; or the preservation of historic land or structures.[8]

They also must donate the easement to a government agency or a "qualified" nonprofit organization, defined as a charitable organization "that receives a substantial portion of [its] support from the public and government entities."[9] And they must agree that the easement will be held in perpetuity, meaning all future landowners of the easement are bound by the terms of the deed. The intended purpose of the easement is to preserve the land for the benefit of the general public.[10]

Birth, Growth, and Boom of the Conservation Easement

The earliest "conservation easement" of its kind dates back to 1891. The first private land trust, the Trustees of Reservations in Massachusetts, was formed to purchase and maintain public parkways, designed by landscape architect Frederick Law Olmsted, throughout the city of Boston. Conservation easements were not used again until the 1930s and 1940s, when the National Park Service bought parcels of land for scenic use along what are now the Blue Ridge Parkway and the Natchez Trace Parkway.[11]

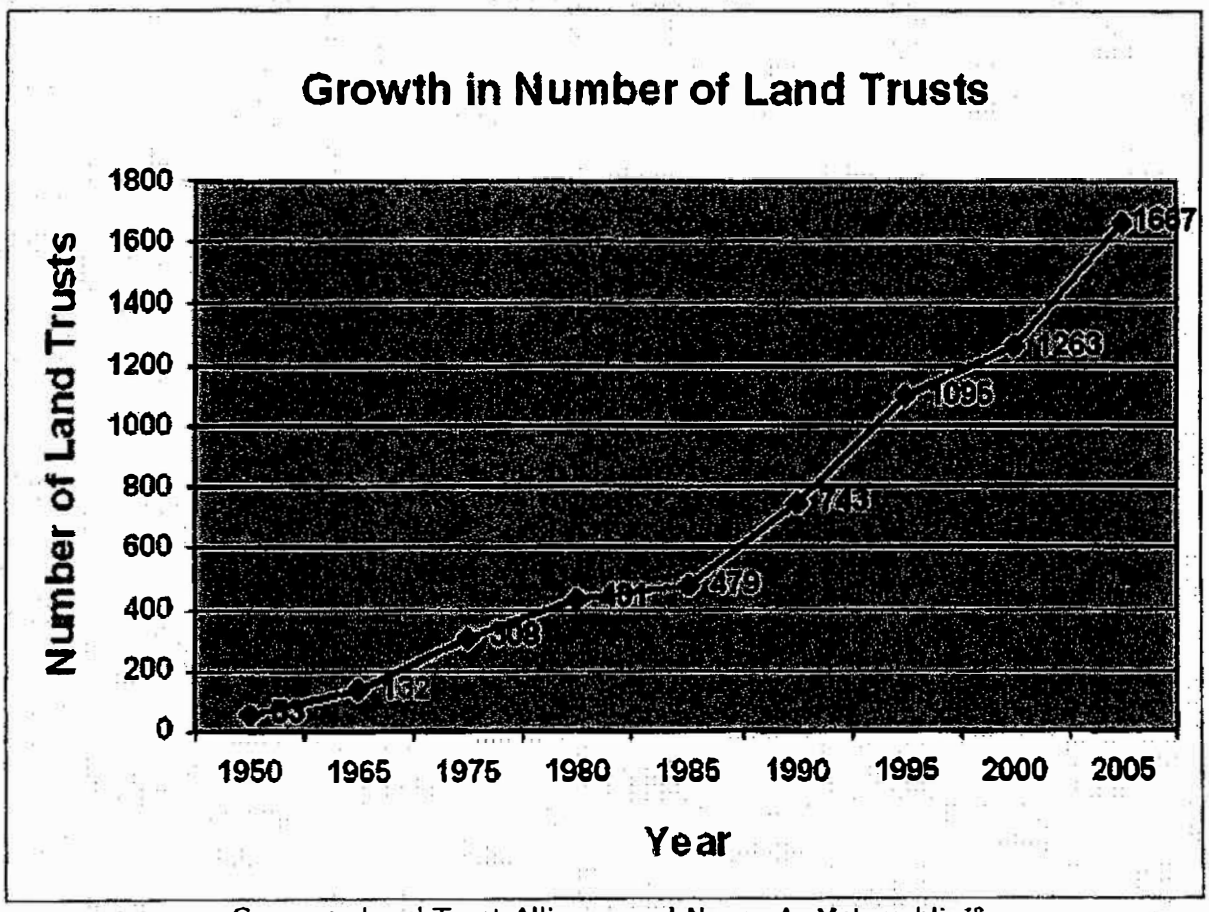
This was the first instance in which a government entity managed land that wasn't via fee simple ownership of the entire property.[12] However, these "scenic easements" differed largely from today's conservation easements in that they were primarily intended for public access and enjoyment of parks and vistas.[13] Conservation easements as we know them today - designed to curb development - did not evolve for a few more decades.

Washington and states bolster the easement "movement." In 1964, the Internal Revenue Service authorized the first rule allowing charitable income tax deductions to landowners who donated property for scenic easements adjacent to federal highways. A year later, as part of the Federal Highway Beautification Act, Congress required states to spend 3 percent of federal highway funds on landscapes and beautification along the highways as a condition of renewed federal funding.[14] The requirement spurred states to enact enabling legislation for conservation easements.[15] Today, all 50 states and the District of Columbia have enacted enabling legislation.[16]

Generally, the states followed the provisions of the Uniform Conservation Easement Act (UCEA), a non-binding, national blueprint for state legislation. The legislative template was drafted in 1981 by the National Conference of Commissioners on Uniform State Laws, a nongovernmental body that provides model legislation for states. The act recommended that states enact enabling legislation to address any existing impediments to traditional common law (discussed later in this paper). The draft also included model language stipulating conservation purposes of an easement, restrictions on which organizations are entitled to hold easements, and provisions allowing a "third party" to enforce an easement's requirements.[17] During this time, Congress provided incentives to landowners by codifying the IRS' ruling, providing a charitable tax deduction off federal income taxes to donors of conservation easements.

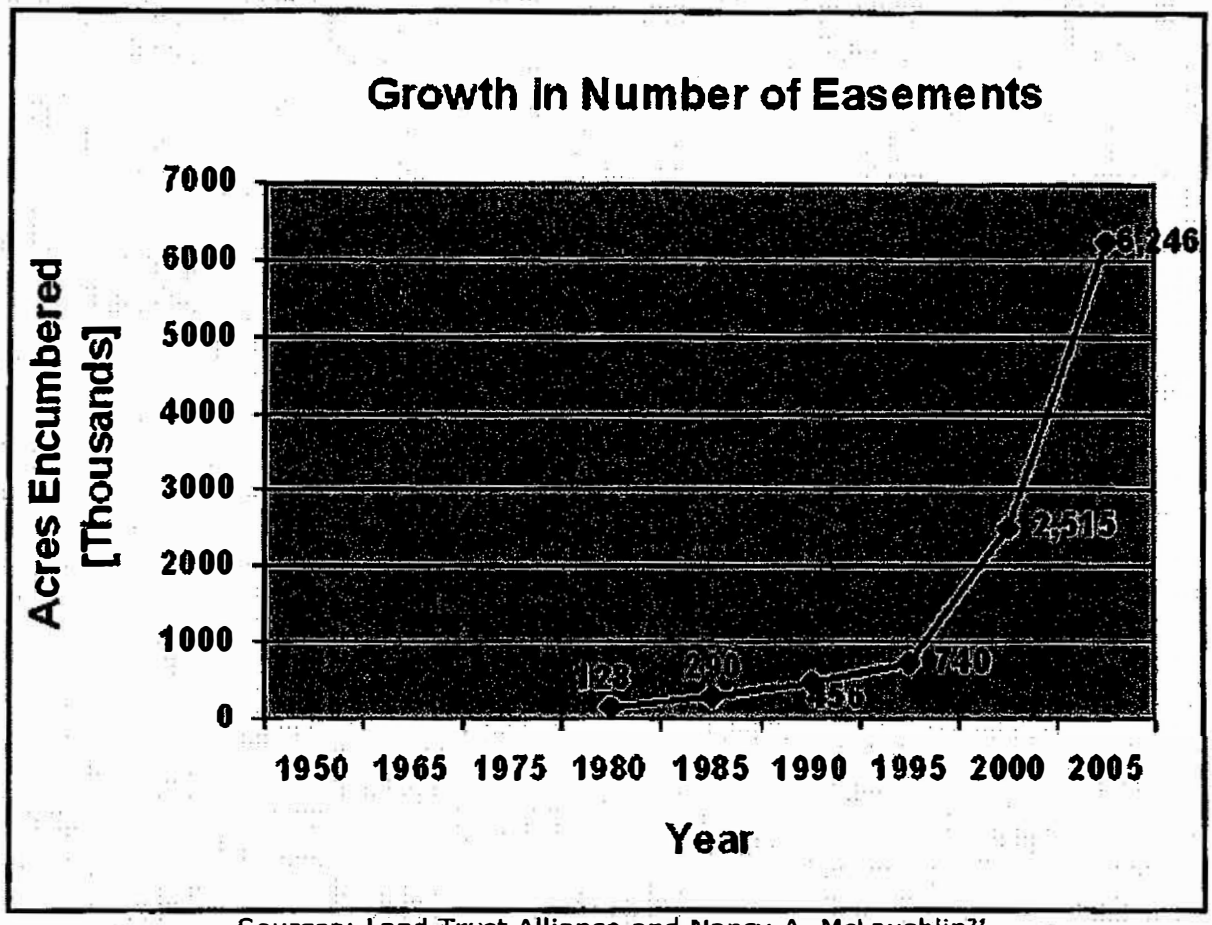
As Washington and the states took steps providing incentives and statutory authority, the use of conservation easements gradually advanced. By the 1980s, the easements were used routinely; by the 1990s, they exploded on the scene.

The surge in land trusts and conservation easements. The graph below shows the dramatic increase in the number of land trusts since 1950, particularly the last five years data is available, where the numbers rose from 1,263 in 2000 to 1,667 in 2005.



Sources: Land Trust Alliance and Nancy A. McLaughlin[18]

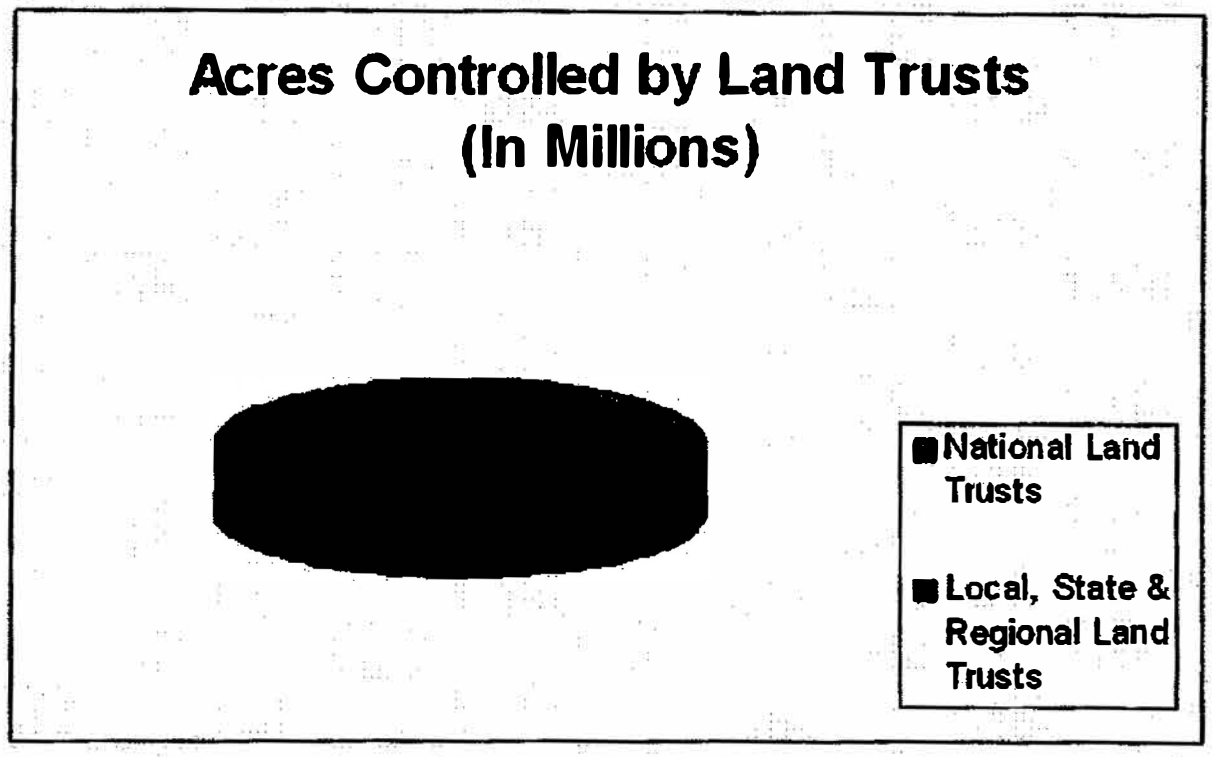
Collectively, land trusts control 37 million acres of land throughout the United States.[19] At least nine million acres of this amount is believed to be held in conservation easements, though the precise amount is not well documented.[20] As the following graph illustrates, the rise in the use of conservation easements has paralleled the growth of the land trust movement.



Sources: Land Trust Alliance and Nancy A. McLaughlin[21]

Most of the controlled land is managed by large, national environmental organizations, such as The Nature Conservancy, The Trust for Public Land, Ducks Unlimited, American Farmland Trust and The Conservation Fund. Together, they hold 25 million acres of land. The largest of these is The Nature Conservancy (TNC) which controls 15 million acres. Over three million acres is held in conservation easements by TNC, a fivefold increase since 1997, when the land trust held 645,000.[22]

The nation's 1,663 local, state and regional land trusts control 12 million acres of private lands. Approximately half that amount - 6.2 million acres - is from conservation easements, up from 2.5 million acres in 2000.[23]



Explanations for easement zeal. The rapid growth and popularity of conservation easements as a conservation tool is partly a response to exorbitant costs of government regulations on land use and zoning laws. It is also an outgrowth of gradual public disapproval over the economic burdens that government "command and control" land use policies place on landowners.[24]

Many property rights advocates also argue the threat of land use regulations and federal land-grabs can act as an incentive for conservation easements, driving landowners to sell or donate a conservation easement to avoid the burden of a threatened regulation. Faced with the choice of government seizing your land or encumbering your land with a conservation easement, most landowners would, even if grudgingly, opt for the latter.[25]

Conservation easements' growing use is also a factor of the overwhelming rise in number and influence of land trusts in the United States.[26] As the number of land trusts has risen, so has land trusts' choice for conservation easements over fee simple ownership as a conservation tool. Rising costs of purchasing land for conservation - reflecting the opportunity costs of leaving land dormant rather than developed - have made easements a more affordable and practical approach.[27]

Finally, the recent conservation easement phenomenon is due to a growing interest among property owners. Some researchers suggest landowners are driven to donate land for easements largely through their love of their land and their desire to keep it protected from development, both in the present and long after they are gone.[28] Others believe tax relief is the driving force.[29]

Tax Incentives

There are two forms of federal tax benefits available to donors:

1. Federal income tax deduction
Because donated conservation easements are considered a charitable donation under the federal tax code, property owners can deduct the value of the easement, defined as the difference between the value of the land just before the easement is granted and the value of the land immediately after

the donation. In August 2006, President Bush signed the revised Pension Protection Act, which raised the maximum federal tax deduction for conservation easements from a maximum of 30 percent of adjusted gross income to 100 percent for farmers and ranchers, and to 50 percent for non-farmers.[30] The increase expired at the end of December 2007, but a provision now pending in the Food and Energy Security Act of 2007 (the "farm bill") would extend the tax deductions for two more years.[31]

2. Federal estate tax deduction

Relief from estate taxes is the most significant tax benefit for landowners granting conservation easements, particularly those who inherit sizable estates. In 1997, Congress passed estate tax relief legislation for conservation easement grantors. The purpose was to encourage property owners to hold on to property they might otherwise want to sell to land developers to offset debilitating estate tax burdens. The tax provisions allow the grantor to deduct the value of the easement from the fair market value of the deceased's estate. The donor also may deduct up to 40 percent of the value of the estate at the time the owner passes away.[32]

Most states also provide some form of tax incentive for conservation easements:

1. State income tax credits

Twelve states provide tax credits, though most are not as substantial as the federal income tax benefit. The most significant tax incentives are provided by Colorado and Virginia, which allow grantors to sell partial or full amounts of their credit to other taxpayers in the state.[33]

2. Property tax relief

At least 17 states also provide property tax incentives, allowing donors to deduct the value of the easement from the assessed value of the property.[34]

Achievements of Conservation Easements

Many commentators argue that conservation easements' potential strength in preserving land is their approach as an alternative to government land acquisitions and land use regulations.[35]

Private land trusts, working closely with property owners to preserve the land through easements, have been known to be more effective stewards than government, and numerous studies bear this out.[36] For one reason, land trusts are more flexible than government and more in tune with the needs of the community. Land trusts "promote a level of innovation and experimentation in private land conservation efforts that typically is not found in government controlled land conservation programs."[37] Furthermore, easements - when arranged on a purely voluntary and private basis, absent government involvement - can harness "the forces of self-interest to encourage the efficient use of resources," as University of Virginia law professor Julia Mahoney writes, "rather than by using the power of the state to coerce individuals and institutions."[38]

In fact, the oldest land trust in the United States was created as a response to what even then was regarded as the failure of government's management of public lands. The Trustees of Reservations in Massachusetts was established in 1891 by landscape architect Charles Eliot, a protégé of Frederick Law Olmsted, to manage lands through private means. Eliot's goal was to preserve small, tax-free parcels of scenic and historic lands in and around Boston for public enjoyment through private stewardship and voluntary means. Among the objectives was "to act for the benefit of the whole people, and without regard to the principal cause of the ineffectiveness of present methods, namely the local jealousies felt by townships and the parts of townships towards each

other."[39]

The scenic easements managed by the National Park Service in the 1930s and 1940s ended in failure only a few decades later. State agents, given the charge from the Park Service to acquire property from private landowners for the Blue Ridge and Natchez Trace parkway easements, failed to explain to landowners what rights they were giving up. As law professor Roger Cunningham writes in 1968, they were "concerned only with getting the landowner's signature on the easement deed."[40] Nor were any appraisal standards applied. Landowners were paid drastically different sums from other donors giving similar land for scenic easements. Cunningham: "As a result, friction between the National Park Service and the... landowners increased; the number of violations steadily increased; and the cost of policing the scenic restrictions became substantial."[41] The problems and "numerous... conflicts that generated a mistrust of the use of scenic conservation easements by government agencies"[42] forced the federal government to end its purchase of easements for the parkways at this time. It was government's failure at managing scenic conservation easements, as well as its record on costly fee simple ownership, that gave birth and nurture to the private land trust.

While the voluntary arrangements of the Trustees of Reservations differed considerably from today's conservation easements, it nonetheless set the stage for preserving parcels of land through private rather than public means. Today, the Trustees of Reservations manages 25,000 acres of land throughout Massachusetts, 14,000 of which is held in conservation easements.[43] The organization has served for decades as a model to other private land trusts on how to preserve lands through private incentives, voluntary private property interests, and private stewardship.[44]

One such example is the Sand County Foundation, located in Wisconsin. The foundation dates back to 1965 and was established to preserve 120 acres of land located on the Wisconsin River floodplain, acquired by the 20th century ecologist and writer Aldo Leopold. The foundation's founders wanted to utilize the approach espoused by Leopold, namely to protect property through "a conviction of individual responsibility to the land."[45] The founders sought the commitment from neighboring landowners to preserve the land and adjacent properties to commemorate Leopold and his "land ethic" on individual responsibility. Today, the foundation works with surrounding property owners to manage and conduct scientific research on 1,800 acres of private lands.[46]

Another example is the Montana Land Reliance in Bitterroot Valley, which protects land for agriculture use, fish and wildlife habitat, and open space. Holding more than 515 easements on 500,000 acres, the organization is the largest state-based land trust in the nation. Among its accomplishments are protecting elk, deer, and bears along the Madison River Valley adjacent to Yellowstone National Park. The land trust ensures easements remain in private control, maintaining that "private landowners make the best decisions for their land, given the right incentives."[47]

Unfortunately, however, over time the focus of many land trusts has changed, and many of them - particularly the large national organizations - have developed suspect relationships with the government. In some cases, land trusts are aiding government agencies in obtaining private lands via conservation easements.

Problems with Conservation Easements

Stewards of Land or Stewards of Government?

Any chance conservation easements have in being effective stewards of land is lost when land trusts cease to work as independent, private organizations obtaining easements through purely voluntary means and become agents of government aiding in public land acquisitions. Yet land trusts, particularly the larger organizations, are

changing their focus from independent and private approaches to working in tandem with government agencies in an effort to assist government in obtaining private lands.

In fact, many leaders in the land trust movement are articulating a new mission to pick up where government has failed at public ownership. As former president Jean Hocker of the Land Trust Alliance (the membership organization representing land trusts throughout the nation) observed, land trusts have a niche as a result of a "reluctance to regulate private lands or even to add land in public ownership." And the "lack of a bureaucratic constraint makes land trusts exceedingly good at complementing, supplementing, and implementing public open-space agendas."[48]

Prearranged "flip." In increasing practice, land trusts do not hold on to the easement but turn around and sell it to federal or state government agencies, known as a "prearranged flip" or "preacquisition." Because most easements are purchased by land trusts at below market value, land trusts can then sell the property to the government at market value, profiting off the difference. In one example, the Nature Conservancy bought an easement for $1.26 million, then directly sold it to the Bureau of Land Management for $1.4 million.[49]

Land trusts benefit because they can earn a profit off the taxpayer-funded arrangement. Government agencies like the arrangements because, unlike seizing private lands through land use regulations, zoning laws, or even eminent domain, they can obtain private property via methods shielded from public scrutiny. Preacquisitions also enable government to obtain private land when public funds are not yet readily available.[50] As a report on easements by the Department of Agriculture notes, "voluntary acquisitions" provide "opportunities for public agencies to influence resource use without incurring the political costs of regulation or the full financial costs of outright land acquisition."[51]

Preacquisitions change the whole nature, intent, and potential benefits of conservation easements to protect lands through private stewardship. As referenced earlier in this report, studies show that unequivocally easements work better when managed by land trusts than by government entities. Easements become not a means of protecting lands through a private sector partnership between landowner and land trust, but a non-transparent tool for government to obtain private property without public knowledge or approval. As Clemson University economics professor Bruce Yandle writes:

> Such programs encourage land trusts to serve as government land agents, often quite profitably. If land trusts continue to respond to this temptation, land conservation will become ever more political...History teaches us that market incentives for conservation are strongest when individuals pay market prices and receive market rewards. They are weakest when government agents spend someone else's money and get no reward for good management.[52]

While documentation is limited showing precisely how much land under conservation easement is transferred to government, anecdotal information indicates the practice is prevalent. An article published by the American Enterprise reports that more than two-thirds of the Nature Conservancy's operating budget goes to purchasing private lands that are then sold to the government.[53] Similarly, the national American Farmland Trust has worked closely with federal and state government agencies for years, leveraging tax dollars to turn private property into public land via the conservation easement. A book on land conservation "public-private partnerships," published in 1993, describes such an arrangement with the state of Massachusetts:

> Massachusetts has a strong tradition of private land conservation... Thus, it did not take much to convince the state agriculture department that a partnership with land trusts could enable it to save more Pioneer Valley farms than could the government acting alone. The department encouraged

> AFT [the American Farmland Trust] and other land trusts to acquire conservation easements over key parcels of valley farmland for subsequent resale to the state.[54]

The practice is also common among some state land trusts. The Maine Coast Heritage Trust, the state's largest land trust along the coast, has sold more than 700 of its 850 easements and acquisitions to federal and state agencies. As described in the Gulf of Maine Times:

> One of [the land trust's] partners, the U.S. Fish and Wildlife Service (USFWS), identifies important habitats for migratory and endangered fish and wildlife. The trust works with the owners of these areas to determine if there is an opportunity to protect that habitat. If there is, the trust takes a lead role in acquiring the land on behalf of either USFWS or the Maine Department of Inland Fisheries and Wildlife.[55]

In some cases, the federal government uses partnerships with conservation groups to skirt existing state laws that limit the terms of an easement. A report released last September by the Government Accountability Office describes how the U.S. Fish and Wildlife Service has partnered with Ducks Unlimited to obtain thousands of acres of easements from private landowners in North Dakota.

The state forbids the term of an easement acquired by a conservation group to exceed 99 years.[56] But according to officials from the Service, they are "not bound by state law regarding the easement terms." If the agency "receives a monetary donation from Ducks Unlimited to purchase easements, the eased land is protected in perpetuity," a direct violation of the state's intent.[57]

Federal funding. Also indicative of the close "partnerships" many land trusts have with government is the amount of public funding land trusts receive, with The Nature Conservancy (TNC) collecting by far the largest amount of federal funds. The American Farmland Trust and The Conservation Fund take in a million and three million dollars annually in federal grants, respectively, while TNC receives an alarming sum exceeding one hundred million dollars. Moreover, revenues earned by TNC from sales of conservation easements to governments "and others" amounts to another $262 million annually, 20 percent of TNC's support and revenues.[58]

Federal financing of conservation easements comes from numerous sources and programs, and it is difficult to find documentation showing the actual sum. However, it is clear that support has skyrocketed over the past decade. The two largest programs funding easements are the Forest Legacy Program and the Farm and Ranch Lands Protection Program, both operating under the U.S. Department of Agriculture. Funding for the Forest Legacy Program has ballooned from $2.6 million in fiscal year 1997 to over $80 million in fiscal 2007.[59] The increase in the Farm and Ranch Lands Protection Program is even more dramatic, rising almost tenfold, from $62 million for 1996-2001 to $597 million for 2002-2007.[60]

Given the vast sums of federal dollars handed to many land trusts, along with the prearranged transfers of land from private hands to government acquisition, it is hard to imagine not only how land trusts can operate effectively as stewards of land, but also how they can operate independent of political pressures and influence.

Perpetual Conservation Easements: Forever Is a Long Time

Another problematic aspect of conservation easements is the requirement that the easement be held in perpetuity in order for the grantor to receive federal tax benefits.[61] Such restrictions have ecological and economic implications to the public interest - the intended beneficiary of conservation easements - that extend far into the future.

Furthermore, it is not fully clear how future courts will rule on the "dead-hand" control over private property.

Changes in science and nature could deem perpetual easements useless or harmful. As numerous legal scholars and policy experts have argued, conservation easements that bind landowners and their descendants in perpetuity ultimately become antiquated and, therefore, useless or even harmful. The rule fails to recognize that conservation needs - as well as definitions of scenic, aesthetic and cultural[62] - change over time, and that the easement may eventually lose any ecological benefit or even become a detriment.

Gains in scientific knowledge can change our definition of what is ecologically beneficial. For example, we know from scientific advances in forest management that thinning techniques are essential to protecting healthy forests and their habitat and preventing forest fires.[63] Yet conservation easement requirements with the specific purpose of perpetually protecting habitat in a forest may not allow for necessary logging and thinning projects.

In addition to gains in scientific knowledge, nature constantly affects changes that aren't predictable. The very notion that easements in perpetuity are ecologically beneficial contradicts modern views in ecology which hold that the environment is "in a process of constant change rather than in search of a stable end-state."[64] For example, a conservation easement intended to protect the habitat of salmon would likely designate an area along a river for spawning and limit development. But rivers change their course over time. If the area under easement is defined geographically, it will be deemed useless when, inevitably, the river shifts.[65] Another example would be a situation where a conservation easement covering a wetland to protect habitat dries up, deeming the wetland useless for conservation purposes. In still another situation, an easement created and written to protect an endangered species could become useless if the species becomes plentiful or extinct.

Some environmental lawyers respond that inevitable changes can be broadly addressed by writing "dynamic" - rather than the more traditional "static" - conservation easements. They recommend that perpetual easements be written specifically allowing for changes in science, nature, and public policy.[66] But, as some of these same attorneys point out, drafting these easements can be prohibitively expensive and difficult to write, particularly for the smaller land trusts with limited staff and resources.[67] And without possibly knowing or being able to predict what changes would occur, how could even the most experienced attorneys write an easement comprehensive enough to cover all possible changes to what's considered ecologically beneficial, far into the future?

Another unintended consequence of perpetual conservation easements is the long-term impact they inevitably will have on housing costs. The rapid rate land trusts are acquiring properties, preventing construction of homes far into the future, will in time limit housing availability and push prices up.[68] This already is a critical issue in California, where 427,000 acres of land are encumbered by conservation easements[69] and where the state contains some of the most expensive real estate in the nation. For decades there has been a constant struggle pitting farming and grazing needs and the desire for open spaces against housing needs.[70] With the rapid pace that land throughout the state is being taken out of production by conservation easements, housing costs can only be expected to rise further.

Does perpetual have to mean forever? Does a perpetual conservation easement allow either party to terminate the agreement once it has lost its ecological benefit? How difficult is it for heirs to terminate a time-worn agreement? And how costly?

The answers are not obvious, mainly because conservation easements do not conform to the traditional rules of common law (see next section).[71] Outcomes could differ

depending on the specific language of the easement, state law, and interpretations of the residing courts. Laws generally favor honoring perpetuity, primarily because grantors receive federal tax benefits for donating or selling conservation easements only if they are perpetual.

Land trusts particularly are motivated to ensure perpetuity, not only by a desire to maintain interest in the property far into the future, but also to assure prospective grantors that the property under easement will be protected forever.[72] Furthermore, as some experts argue, land trusts are acutely aware of the inevitable future challenges to easements by descendants and are writing agreements they believe will survive the test of time.

The issue becomes less clear, however, in cases where the land trust, as well as the landowner, are in agreement over the need and desire to end a conservation easement. In these instances, the ease or difficulty generally depends on the state's law governing easements. Most state laws either contain the same language in the non-binding Uniform Conservation Easement Act, stating the conservation easements may be modified or terminated "in the same manner as other easements," and that courts may "modify or terminate a conservation easement in accordance with the principles of law and equity" - or they do not address the issue.[73]

But most experts agree state requirements and procedures for termination are not uniform, adding to the confusion over if, when, and how a perpetual conservation easement can be ended or modified.[74] Some states require a public approval procedure.[75] Other states stipulate the decision-making falls on the state attorney general, who enforces the general interests of the public.[76]

Legal scholars generally believe it is not likely that the courts will readily allow termination unless they determine the purpose for the conservation easement has changed or become obsolete, and the agreement no longer provides intended benefits. Specifically, courts can apply the Restatement (Third) of Property which reads, "[i]t is inevitable that, over time, changes will take place that will make it impracticable or impossible for some conservation servitudes to accomplish the purpose they were designed to serve. If no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the power to terminate the servitude so that some other productive use may be made of the land."[77]

Regardless of the outcome, attempts to change perpetual conservation easements will be costly. If changes are sought by future descendants, legal and transaction fees are likely to be hefty. The law was written recognizing that the donor received tax benefits for agreeing to perpetuity. However, as the law now stands, in cases where termination is desired by both parties and the state or court allow it, the landowner would not be required to compensate the land trust. But if the property eventually is sold by the property owner, he would be required to pay the land trust a portion of the proceeds, assuming the owner initially received a charitable deduction.[78]

In conclusion, considering the rapid growth in the use of conservation easements, the question of perpetuity enforcement will be with us for decades to come and eventually must be dealt with by the courts in one way or another. And it will be costly. As law professor Julia Mahoney observes, perpetual conservation easements inevitably will burden future generations with economic, "ecological, legal and institutional messes for later generations to deal with."[79]

Are perpetual conservation easements inconsistent with common law? Most legal experts agree that conservation easements, perpetual or time-limited, are not recognized under common law. Conservation easements are called "negative servitudes" in legal terminology, referring to the fact the easement holder is preventing the landowner from taking action on his own property - i.e., building or developing. By

contrast, an "affirmative servitude," or non-conservation easement, enables the landowner to make active use of his land. Common law, which favors use of one's land rather than restrictions, traditionally recognizes only three types of negative servitudes, none of which include those for conservation purposes.[80]

In addition, conservation easements are easements "in gross," meaning they benefit one or more individuals who do not own land adjacent to the easement. In a standard non-conservation easement, such as an agreement that allows the holder to use the grantor's property to build an access road, the individual benefiting from the easement is the holder who owns land adjacent to the land under easement. In a conservation easement, however, the easement is assumed to benefit the general public, and does not entail ownership of adjacent land. Generally, common law has disfavored easements in gross and, specifically, has rejected long-lasting easements in gross. It has also rejected both covenants (contracts) and servitudes that bind holders of land via dead-hand control.[81]

Over the years, however, all 50 states and the District of Columbia have enacted laws allowing for perpetual "negative servitudes in gross."[82] While the laws vary from state to state, most include: 1) a legislative declaration of policy; 2) an authorization to utilize conservation easements as "property interest," more apt to be recognized under common law, rather than as "covenants" or "contracts;" and 3) an attempt to shield conservation easements from common law doctrines.[83] While some legal experts are of the view that in time, the courts will strike down the "perpetual" aspect of conservation easements, others believe that because statutes supersede common law, state laws allowing for perpetual easements will prevail.[84]

Tax Incentives

Another controversial aspect of conservation easements are tax incentives.[85] From the viewpoint of the owner donating an easement, the tax benefit is pivotal; it is considered by many the key incentive driving the landowner to donate the use of his land.[86] As noted recently by *The Wall Street Journal*, the increase in the federal income tax deduction for easement donations "spurred a sharp increase in the number of landowners interested in placing easements on their property."[87]

Yet to some critics, the tax incentives are considered a "tax bonanza," largely rewarding wealthy landowners and costing the U.S. Treasury over $1 billion, while providing questionable public benefit.[88] Easements received wide public attention following a series in *The Washington Post* in 2003, exposing significant abuses and violations by land trusts, most notably, The Nature Conservancy. The articles revealed a typical practice in which the land trust acquires an easement for millions of dollars, then turns around and sells it at a loss for a considerable tax write-off. In some cases, easements had little to do with conservation, such as using the tax-funded arrangements to build golf courses.[89]

The series triggered a Congressional investigation, followed by a 2005 report by the Joint Committee on Taxation, concluding that current tax policy also enables "taxpayers to claim substantial charitable deductions for conservation easements that arguably do not serve a significant conservation purpose."[90] Similarly, the report found that the process for appraising the value of the easement is ripe for error, and that the subjective nature of assessing the value of the easement before and after the donation makes it "virtually certain that many appraised values are incorrect."[91]

The IRS since then has cracked down on such activities and unlike previously, now audits conservation easement donations routinely. Furthermore, the Land Trust Alliance is working closely with its members on proper and ethical handling of easements. In 2004, it revised its "Land Trust Standards and Practices," devising new accounting and ethical procedures and requiring its members to adopt the new policies. In 2005, it introduced an accreditation program for conservation groups and worked closely with the Senate Finance Committee to adopt new uniform appraisal standards and rules on

conflict of interest.[92] Furthermore, a new law enacted in 2006 tightens the rules governing appraisals and establishes harsh penalties.[93]

But reforms have not changed another problem with the tax incentives - what many view as conservation easement's unfair tax treatment of non-wealthy property owners. Because the allowable charitable income tax deduction is based on annual income, individuals in high income brackets earn disproportionately larger tax savings than those in middle and lower.

As an example, consider three individual grantors with different income levels, each donating a conservation easement worth $500,000. The grantor with an adjusted growth income of $35,000 will receive an annual charitable tax deduction of $10,500, an aggregate tax deduction over six years of $63,000, and an aggregate tax savings of $9,450. The individual earning $75,000 receives an annual deduction of $22,500, a deduction over six years of $135,000, and an aggregate tax savings of $36,450. A donor earning $250,000, however, will receive an annual deduction of $75,000, a six-year aggregate tax deduction of $450,000, and an aggregate tax savings of $157,500.[94]

Pending Legislation

**** Rural Heritage Conservation Extension Act of 2007 (S. 469)***
In 2006, the president signed into law a bill increasing the charitable tax deduction for qualifying farmers and ranchers[95] who donate property for a perpetual conservation easement from a maximum of 30 percent of adjusted gross income to 100 percent. It also raised the maximum deduction for other landowners donating land for easements from 30 percent to 50 percent and extended the period allowable to carry the tax deduction forward from five years to 15. The tax benefits expired December 31, 2007.[96]

But the Food and Energy Security Act of 2007 (the "farm bill" - pending when this report went to print) would extend the tax deduction increases for two years.[97]

**** Endangered Species Recovery Act of 2007 (S. 700)***
Sponsored by Senators Mike Crapo (R-Idaho) and Baucus, S. 700 would increase the tax benefits to property owners who donate land for conservation easements to the federal government. The easement can either be perpetual, 30-years, or a negotiated time limit. The bill would allow an income tax credit of 100 percent for perpetual conservation easements, 75 percent for 30-year easements, and 50 percent for negotiated limits. The bill is pending in the Senate Committee on Finance. Rep. Mike Thompson introduced the House companion bill H.R. 1422.[98]

Recommendations

1. Government should not be allowed to obtain conservation easements through prearranged acquisitions.
An easement acquired by a government agency through a public land trust does not require any approval process from either the public or the property owner and, therefore, is not accountable. Government agencies at any level of government should not be permitted to obtain land through preacquisitions or any form of arrangement with land trusts. If a landowner wishes to donate or sell an easement directly to a government entity, there is nothing preventing him from doing so.

2. No federal funding for nonprofit conservation groups.

Land trusts, through their definition as public charitable organizations, already benefit enormously by their federal tax-exempt status. Beyond this benefit, land trusts should work independent of tax-dollar handouts, which too easily can subject them to political pressures, coercion or influence from government. Government should end its use of subsidies, grants, and other funding to these nonprofit organizations.

3. Tax deductions should not require perpetuity.

A property owner has the right to do with his land as he wishes and should be entitled to place restrictions, if desired. However, given that changes in nature and science over time alter society's definition of what is ecologically beneficial - and given the economic and ecological uncertainties of permanently encumbering land - government should not use tax dollars to effect perpetual conservation easements. Conservation easements differ from regular easements in that the "party" to be affected by the agreement is not one individual but the public as a whole. Future generations should not be burdened with inflexible, irreversible policies based on today's land use decisions.

Specifically, conservation easements should be time-limited ("term easements,") providing charitable income tax deductions to those individuals who restrict land use on their property in, say, 10- or 20-year increments.

Legislative language based on The Uniform Conservation Easement Act allows for easements limited in time as well as perpetual.[99] Furthermore, a number of states provide tax incentives for term easements.[100] California's Williamson Act gives tax incentives to landowners who place agricultural easements on property for a minimum of 10 years under a "rolling contract" with local government.[101] Other states such as North Dakota allow only term easements. Neither the federal nor state governments should be able to mandate perpetual terms as a condition of tax benefits.

4. Eliminate the estate tax.

It must first be said that the right to sell or donate one's land or a portion of one's land to a nonprofit organization or to a government entity is a property right. No matter what public policies are enacted governing conservation easements, individuals will always have the right to do with their property as they wish.

The issue is whether government through tax incentives should be able to influence property owners' land use decisions, particularly considering problems with conservation easements outlined in this report.

While the overall objective of conservation easements is to discourage development, the rising burden of estate taxes on heirs is often the factor driving them to sell their property to developers. As Environmental Defense's Michael Bean wrote back in 1997, the estate tax is "highly regressive in the sense that it encourages the destruction of ecologically important land in private ownership."[102] This is particularly true for farmers, whose annual income may pale compared to the value of the land. For the descendants of these land-rich, cash-poor landowners who simply do not have the resources to pay the taxes, their only option may be to sell the land to developers.[103]

Rather than attempting to patch up the problem by manipulating the tax code with tax breaks, a far more effective means of protecting land from development would be for federal and state governments to eliminate the "death tax" altogether.

As Jonathan Adler, a law professor at Case Western University, observes, "For too long policymakers have labored under the assumption that the only way to enhance environmental protection is the enactment of more federal rules and regulations. We forget that existing federal laws are often part of the problem."[104] A better alternative to tinkering with the tax code is to eliminate those policies that damage land preservation in the first place.

At the state level, 27 states - slightly more than half - impose an estate tax. Yet a number of these states, recognizing its damage on small, family farms, as well as its deterrence to retirees who otherwise might move to the state, are abolishing it. Virginia's death tax expired in July 2007, Wisconsin's in December 2007, and Kansas' will end in 2009.[105]

5. Pending legislation.

The Food and Energy Security Act of 2007 (H.R.2419), Section 12203, would particularly benefit farmers and ranchers, who would receive a maximum 100 percent tax deduction on adjusted gross income for encumbering land via an easement. But rather than require perpetuity, landowner should be allowed to reconsider the conditions of the easement every 10 years. One way to handle the charitable income tax deduction would be to adjust the amount of the allowable tax benefit to correspond with the length of the term of the easement. In other changes, banning the transfer of a conservation easement from a land trust to a federal, state, or local government would ensure easements remain in private hands.

The Endangered Species Recovery Act of 2007 (S. 700) promotes government management and control of private lands and runs counter to the concept that easements work best operating under private ownership, private initiative, and private stewardship. Even zoning restrictions and takings require some degree of public approval and accountability. This bill would enable the government to control private property by appealing directly to land-rich, cash-poor landowners through generous tax credits.

Conclusion

What once showed promise as an effective tool for preserving lands through private ownership and stewardship is increasingly becoming a questionable practice, particularly as land trusts join government in partnerships and, in some cases, use conservation easements to turn private land over to government ownership. As the conservation easement and land trust movement continues to grow by leaps and bounds, it is imperative that reforms be put into place that return easements to their original intent to protect property through private means.

Requirements that easements encumber land in perpetuity remove one of the arrangement's most significant benefits - flexibility. As the natural state of our environment and scientific discovery evolve, so do society's definitions of what should be preserved and how. Tax policy should not lock future generations into relatively shortsighted visions of what today is considered ecologically-beneficial.

Finally, through manipulations to the tax code, government influences property owners' decisions on land use, promising immediate tax relief to those who forfeit full rights and ownership of property. Were land trusts fully private organizations, free from government association and influence, there could be value. But given inherent problems with conservation easements, most pointed, the rise in government involvement, influence, and acquisition of lands under easement, a far more effective means would be to eliminate the estate taxes that discourage land preservation in the first place.

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Footnotes:

[1] Also called a conservation covenant or servitude.

[2] The focus of this paper is on conservation easements held by land trusts.

[3] Under the federal tax code, the donor must agree to place the easement in perpetuity in order to receive tax benefits.

[4] Exceptions are made in most cases for farming or ranching.

[5] Federico Cheever and Nancy A. McLaughlin, "Why Environmental Lawyers Should Know (And Care) about Land Trusts and Their Private Land Conservation Transactions," *Environmental Law Reporter News & Analysis*, Environmental Law Institute, Washington, D.C., March 2004, p. 10226.

[6] Carol W. LaGrasse, "Conservation Easements: A Critical Commentary," The Property Rights Foundation of America, Inc., March 14, 2000, at http://www.citizenreviewonline.org/feb_2002/conservation_easements_a_critical_commentary.htm.

[7] Many, if not most, conservation easements are created to protect farming or ranching activities. Comments of Jean Hocker, President of the Land Trust Alliance, "What Makes for a Good Land Trust? A Roundtable Discussion," Competitive Enterprise Institute, October 7, 1997.

[8] Federico Cheever and Nancy A. McLaughlin, *op. cit.*, p. 10226.

[9] I.R.C. 170(h)(3) in Cheever and McLaughlin, *op. cit.*, pp. 10225-6.

[10] See Nancy A. McLaughlin, "Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," Abstract, *University of Richmond Law Review*, Vol. 40, p. 1031, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903845. Also, Duncan M. Greene, "Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation," *Seattle University Law Review*, Vol. 28, No. 3, Spring 2005, p. 891, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=724281#PaperDownload.

[11] Cheever and McLaughlin, *op. cit.*, p. 10224.

[12] See Sean Mulholland, "Land Trusts: The Growth of the Non-Profit Land Conservancy Movement," *Incentives and Conservation: The Next Generation of Environmentalists*, ed. Daniel K. Benjamin, PERC (Bozeman, Montana), 2004, p. 8, at http://www.economicissues.net/papers/PERClandtrust.pdf.

[13] They also differed from today's conservation easement in that they were "appurtenant easements," meaning the owner of the easement – in this case, the federal government – owned (bought up) land adjacent to the easement and, therefore, the arrangement was recognized under common law. See Mulholland, *op. cit.*, p. 8. (More discussion on this under the section in this paper on common law.)

[14] See Cheever and McLaughlin, op. cit., p. 10224-5. Also, see Mulholland, op. cit., pp. 9-12.

[15] States needed to pass enabling legislation to allow conservation easements since the arrangements are not fully recognized under common law, which values active use of land rather than restrictions. See section "Are perpetual conservation easements inconsistent with common law?"

[16] McLaughlin, "Conservation Easements – A Troubled Adolescence," *Journal of Land Resources & Environmental Law*, Vol. 26, no. 1, p. 48, Note 2.

[17] National Conference of Commissioners on Uniform State Laws, "Uniform Conservation Easement Act," 1981, at http://www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf.

[18] Land Trust Alliance in McLaughlin, "Conservation Easements – A Troubled Adolescence," *op. cit.*, pp. 49-50.

[19] Land Trust Alliance, *2005 National Land Trust Census Report*, November 30, 2006, p. 3-4, at http://www.lta.org/census/2005_report.pdf.

[20] While the national membership organization for land trusts, the Land Trust Alliance, keeps track of data on conservation easements held by the nation's local, state and regional land trusts, there is no source that carefully tracks the number of conservation easements held by the large national organizations. Also, see John Hart, "Private

Land, Public Good: Taking Stock of Conservation Easements," *Bay Nature*, Special Section: January-March 2006, at http://www.baynature.com/2006janmarch/easements_main.html.

[21] Land Trust Alliance in McLaughlin, "Conservation Easements – A Troubled Adolescence," *op. cit.*, pp. 49-50.

[22] Testimony of Steven J. McCormick, President and CEO of The Nature Conservancy, before the U.S. Senate Finance Committee, June 8, 2005; and Joseph M. Kiesecker, et. al., Conservation Easements in Context: A Quantitative Analysis of their Use by The Nature Conservancy," *Frontiers in Ecology and the Environment*, Issue 3, Vol. 5, April 2007.

[23] Land Trust Alliance, *2005 National Land Trust Census Report, op. cit.*, p. 15. Note: Dominic Parker maintains the portion of controlled land that trust groups hold in conservation easements is much higher – 78 percent in 2003 – than what the Land Trust Alliance reports because the Alliance counts "a handful of public agencies" it considers to be land trusts. See Dominic P. Parker, *Conservation Easements: A Closer Look at Federal Tax Policy*, PERC Policy Series, PERC, October 2005, pp. 6 & 24, at http://www.perc.org/perc.php?id=743.

[24] McLaughlin, "Conservation Easements – A Troubled Adolescence," *op. cit.*, p. 51.

[25] See Carol W. LaGrasse, *op. cit.*.

[26] See the Land Trust Alliance web site at www.lta.org. Also, Mulholland, *op. cit.*; and Parker, *Conservation Easements: A Closer Look at Federal Tax Policy, op. cit.*, p. 6.

[27] *Ibid.* Also, Mulholland, *op. cit.*, p. 6.

[28] See Cheever and McLaughlin, *op. cit.*, p. 10232.

[29] According to the Land Trust Alliance, the fastest increase in easement donations has occurred in states that provide the most generous state tax incentives. Land Trust Alliance, *2005 National Land Trust Census Report, op. cit.*, p. 8.

[30] Rachel Emma Silverman, "Tax Break with a View," *The Wall Street Journal*, February 7, 2007.

[31] H.R.2419, Food and Energy Security Act of 2007, Section 12203.

[32] See Cheever and McLaughlin, *op. cit.*, p. 10225.

[33] Parker, *Conservation Easements: A Closer Look at Federal Tax Policy, op. cit.*, p. 9. Also, Land Trust Alliance, "State Tax Credits for Conservation," Updated November 16, 2006, at http://www.lta.org/publicpolicy/state_tax_credits.htm.

[34] Defenders of Wildlife, "State Government Incentives for Habitat Conservation: A Status Report," March 2002, in Parker, *op. cit.*, p. 9.

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[36] See Darla Guenzler, *Ensuring the Promise of Conservation Easements*, Bay Area Open Space Council, and Debra J. Pentz, *Planning for Perpetuity: A Study of Colorado Conservation Easement Practices*, Bay Conservation Resource Center (Boulder, Colorado), in Dominic P. Parker and Walter N. Thurman, "The Private and Public Economics of Land Trusts," *NC State Economist*, NC State University, July/August 2004, p. 2, at http://www.ag-econ.ncsu.edu/VIRTUAL_LIBRARY/ECONOMIST/julyaug04.pdf.

[37] Federico Cheever and Nancy A. McLaughlin, *op. cit.*, p. 10233.

[38] Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, UVA Law & Economics Research Paper no. 01-6 and UVA School of Law, Public Law Research Paper no. 01-11, University of Virginia School of Law, December 2001, pp. 38, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=291537.

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[40] Roger A. Cunningham, "Scenic Easements in the Highway Beautification Program," 45 *Denver Law Journal*, 1968, pp. 182-3, in Nancy A. McLaughlin, "Increasing the Tax Incentives for Conservation Easement Donations: A Responsible Approach," *Ecology Law Quarterly*, Vol. 31:1, pp. 102-3, *supra note* 405.

[41] *Ibid.*

[42] Mulholland, *op. cit.*, p. 8.

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[54] Edward Thompson, Jr., "Preserving Farmland: The American Farmland Trust and Its Partners," *Land Conservation Through Public/Private Partnerships, op. cit.*, p. 47.

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[56] U.S. Government Accountability Office, *Report to the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives*, "Prairie Pothole Region," GAO-07,1093, September 2007, p. 20 & 34, at http://www.gao.gov/new.items/d071093.pdf.

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[58] American Farmland Trust, *Annual Report:* 2006, p. 18; The Conservation Fund, *Combined Financial Statements, Years Ended December 31, 2006 and 2005*, p. 18; and The Nature Conservancy, *Consolidated Financial Statements As of June 30, 2007 and 2006*, p. 4.

[59] U.S. Department of Agriculture, Forest Service, *Forest Legacy Program National Report for Fiscal Year 2004*, FS-816, December 2004, p. 2, at http://www.fs.fed.us/spf/coop/library/flp_nat_reprt_2004.pdf; Congressional Testimony, Dale Bosworth, Forest Service Chief, USDA Forest Service, before the Senate Finance Committee, March 4, 2005; and Congressional Testimony, Mark Rey, Undersecretary, USDA, before the Senate Energy and Natural Resources Committee, February 28, 2006. Dollars adjusted for inflation, using 2007 dollars.

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[71] Nancy A. McLaughlin, "Rethinking the Perpetual Nature of Conservation Easements," *Harvard Environmental Law Review*, Vol. 29, Research Paper No. 05-03, 2005, p. 425, at http://www.law.harvard.edu/students/orgs/elr/vol29_2/mclaughlin.pdf.

[72] Most land trusts make it clear to prospective grantors that a conservation easement will not likely be terminated and that "such changes are extremely rare and only occur where the amendment does not reduce the protection of conservation values." See, for example, Vermont Land Trust, *Conservation Easements: Guide to the Legal Document* in Mahoney, p. 34.

[73] UCEA Sec. 2 (a) & 3 (b), *op. cit.* Also, Cheever and McLaughlin, *op. cit.*, p. 20131.

[74] McLaughlin, "Rethinking the Perpetual Nature of Conservation Easements," *op. cit.*, p. 426. Also, see Cheever and McLaughlin, *op. cit.*, p. 10231: "Relying on the vagaries of state law to resolve disputes regarding the modification and termination of perpetual easements may well prove to be difficult and costly."

[75] Mahoney, *op. cit.*, p. 34.

[76] See McLaughlin, "Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," *op. cit.*, p. 1041.

[77] Greene, *op. cit.*, p. 904.

[78] See McLaughlin, *op. cit.*, p. 10231. Also, Greene, *op. cit.*, p. 904.

[79] Mahoney, *op. cit.*, p. 43.

[80] See Greene, *op. cit.*, p. 891-2. Also, Mahoney, *op. cit.*, p. 9.

[81] Greene, *op. cit.*, p. 892.

[82] McLaughlin, "Conservation Easements – A Troubled Adolescence," *op. cit.*, p. 48, note 2.

[83] Greene, *op. cit.*, p. 893.

[84] See James Burling in Pat Taylor, "Sacrificing Rights To Protect Property," *Insight on the News*, May 13, 2002, Vol. 18, Issue 17. Also, Greene: "...neither [state] case law nor its statutory law eliminates the possibility that conservation easements will face common law challenges. However, practitioners can mitigate such risks by drafting the conservation easement with proper attention to common law and statutory requirements and to the perpetual nature of the easement." *Op. cit.*, p. 896. Note: A number of commentators on perpetual conservation easements have referred to the "rule against perpetuities" as a direct violation of common law. This is false. The rule refers to a limit under common law to when property is allowed to vest, that is to be transferred from the owner. It does not refer to how long one holds the property once the transfer takes place. See Melinda Harm Benson, "Perpetuity – What Does it Mean for Conservation Easements and the Wyoming Constitution?" November 2004, William D. Ruckelshaus Institute of Environment and Natural Resources, University of Wyoming, at http://www.uwyo.edu/OpenSpaces/docs/Perpetuities.pdf.

[85] This section refers to "perpetual conservation easements," since, in most cases, tax benefits are not available to grantors unless they are perpetual.

[86] See Land Trust Alliance, *2005 National Land Trust Census Report*, *op. cit.*, p. 8.

[87] Silverman, *op. cit.*

[88] Stephen & Ottaway, "Developers Find Payoff in Preservation: Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System," *Washington Post*, December 21, 2003.

[89] See Joe Stephens & David B. Ottaway, "Nonprofit Sells Scenic Acreage to Allies at a Loss: Buyers Gain Tax Breaks with Few Curbs on Land Use," *Washington Post*, May 6, 2003. Also, Stephens & Ottaway, "Developers Find Payoff," *op. cit.*

[90] Joint Committee on Taxation, *Options To Improve Tax Compliance and Reform Tax Expenditures*, Prepared by the Staff of the Joint Committee on Taxation, #JCS-02-05, January 27, 2005, pp. 281, 284 & 427, at http://www.house.gov/jct/s-2-05.pdf.

[91] *Ibid*, p. 285.

[92] See the Land Trust Alliance, "Land Trust Standards and Practices," last updated July 23, 2007, at http://www.lta.org/sp/. Also, Joe Stephens, "Alliance Starts Plan to Improve Land Trusts," *Washington Post*, April 20, 2005, p. A08; and Joe Stephens and David B. Ottaway, "Senators Question Conservancy's Practices," *Washington Post*, June 8, 2005, p. A03.

[93] Silverman, *op. cit.*

[94] The example assumes a charitable tax deduction capped at 30 percent. See McLaughlin, "Increasing the Tax Incentives for Conservation Easement Donations: A Responsible Approach," *op. cit.*, p. 32.

[95] Defined as individuals who earn at least half their annual income from farming or ranching. Public Law 109-280, Section 1202.

[96] *Ibid.*

[97] H.R.2419, Food and Energy Security Act of 2007, Section 12203. See Library of Congress, Thomas, at http://thomas.loc.gov/.

[98] *Ibid.*

[99] National Conference of Commissioners on Uniform State Laws, "Uniform Conservation Easement Act: Summary," at http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ucea.asp.

[100] Anita M. Zurbrugg, *Less-than-perpetuity and Agricultural Conservation Easements*, American Farmland Trust, Center for Agriculture in the Environment, April 14, 2003, p. 15.

[101] See *The California Land Conservation (Williamson) Act: Status Report*, 2006, p. 1, at http://www.consrv.ca.gov/DLRP/lca/pubs/status%20reports/2006/Williamson%20Act%20Status%20Report%202006%20(complete).pdf.

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[103] See Jonathan H. Adler, "The Anti-Environment Estate Tax: Why the 'Death Tax' Is Deadly for Endangered Species," Competitive Enterprise Institute, *On Point*, No. 35, April 20, 1999.

[104] *Ibid.* Also, see "Living on Earth," Public Radio International, *Estate Tax Battle*, June 7, 2002, at http://www.loe.org/shows/shows.htm?programID=02-P13-00023#feature6.

[105] Ashlea Ebeling, "Tax-free in the Rust Belt," *Forbes*, August 13, 2007.

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