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Conservation Easement Guidelines: What Every Colorado Landowner Should Know

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Introduction

In Colorado, landowners have become increasingly aware of conservation easements as an option for preserving family lands and maintaining a sense of place in their community—and there is good reason for the excitement over conservation easements, too! Landowners can leave a legacy behind for future generations, and there are a number of financial benefits that landowners can receive for conservation-worthy lands. While conservation easements are an effective tool for land protection, recent changes in tax laws, land trust policies, and appraisal practices have created confusion for many landowners. Even though many of these practices and policies have the potential to provide tremendous benefits to landowners, with much at stake, it can be difficult for landowners to sort fact from urban legend.

We have written this reference guide for landowners who are either considering a conservation easement, or who would like to know more about the conservation easement process. While we emphasize that this document neither provides nor replaces legal advice, we would like to share with you our experience with land protection at a national and a state-wide level. We also summarize many conservation easement studies that specifically focus on landowner perspectives about land protection.

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This is how the paper is organized: We first provide the definition of a conservation easement and facts about the increasing popularity of conservation easement practices across the nation and Colorado. Then we present three reasons why landowners place conservation easements on their land, including a summary of the current financial benefits that are available to landowners who enact a conservation easement in 2007. Finally, we outline recommendations and considerations for those who are interested in placing a conservation easement on their land. Many of these recommendations and considerations come directly from landowners who already have placed, or are in the process of enacting, a conservation easement on their land.

What are Conservation Easements? Why Are Conservation Easements So Popular?

A conservation easement is a voluntary legally binding agreement by which the landowner chooses to prevent development of a property and/or limit future changes in land use. Typically, the landowner still privately owns the land, but has agreed to protect the land by limiting future development or changes in land use...forever. A common example is where a landowner places a conservation easement to prohibit future building on the property, or to limit future buildings to certain areas on the parcel while designating their land to be used only for agricultural purposes in the future.

The landowner must work with a land trust,³ a government agency like a county open space program or a non-government organization like The Nature Conservancy to place a conservation easement on his or her property. In some cases, landowners sell their conservation easements, but the practice of donating conservation easements is more prevalent, due to limited resources for purchase programs and intense competition. In either case, the contracting party agrees to ensure that the land stays consistent with the conservation values of the original agreement. This usually involves an annual visit to the property at minimum to ensure that the land is being maintained in compliance with the conservation easement terms and stated goals.

In order for the landowner to qualify for financial tax benefits in the form of Colorado state tax credits or federal tax deductions, the conservation easement MUST exhibit one of the following conservation values, as outlined in Section 170 (A)(2)(d) of the U.S. IRS Tax Code.

- 1) Public outdoor recreation and education
- 2) Significant wildlife habitat
- 3) Qualifying open space or scenic views
- 4) Historic property

These conservation values are consistent with the practices of protection, and must provide social benefits consistent with outdoor recreation or general education purposes, protection of open space for natural habitats, scenic enjoyment, relief of “urban closeness,” farmland, and lands of historical value, and protection of environmental systems.

A central attribute of easements is that their restrictions and terms can be designed to fit the needs of the underlying fee owner and the easement holder so long as they retain a public purpose or intent. While this flexibility has facilitated their use, it has also meant that easements vary widely in their terms and conditions thus making their interpretation and enforcement far more complex than the defense of fee ownership of land and water (The Nature Conservancy, 2004).

³ A land trust qualifies to hold conservation easements because trusts are designated as 501(c)(3) “charitable organizations.” The primary mission of a land trust must specifically focus on land protection. This commitment also requires stewardship, or reinforcing that the conservation values of the land are maintained in accordance with the agreement.

Another reason for the rise in conservation easement popularity in the last decade is because private land protection is usually more cost effective and more politically feasible than for government agencies to outright purchase land. The Land Trust Alliance (The Alliance) provides guidelines, land trust accreditation, and recommendations to land trusts and entities (like the government) that utilize conservation easement agreements. According to most recent Alliance data, 6,245,969 acres of land were under conservation easement in the United States at the end of 2005. This is part of the 37 million total acres that land trusts and large conservation organizations have protected. The rate of land protection by state and local land trusts has *tripled in the past five years, and the West is the fastest growing region for both the number of acres under conservation easements and number of land trusts*. Clearly, protection of privately owned lands is gaining momentum both nationally and in the West. In this next section we provide three well-researched reasons to engage in a conservation easement.

Three Reasons to Consider a Conservation Easement...And How to Make the Most of Land Protection

1) Preserve Family Heritage and a Community's Sense of Place

Enacting a conservation easement affords you the opportunity to preserve your family's legacy of the land. Many of those who enact conservation easements are multi-generation landowners, whose grandparents (and even great-grandparents) homesteaded the property. Family heritage is not limited to past decades, though. Many landowners feel compelled to leave their land to their children and grandchildren to maintain a future family connection to the property. In fact, several studies (Hoag et al., 2002; Elconin and Luzadis, 1998; Stewart and Libby, 1997; Rowe, Bartlett, and Swanson, 2001) found that personal attachment to the land was one of the, if not *the primary*, motivations for landowners to engage in land conservation. McLaughlin (2004 p. 43) also cites a joint effort by the State University of New York and the University of Vermont. McLaughlin's study noted that the landowner enacting the conservation easement was motivated to do so primarily as a result of their "*personal attachment to their land, a sense of altruism, and a commitment to the stewardship of their land.*" In the majority of cases the desire to preserve family heritage outweighs financial motivations. If you would like to leave a family legacy for your children or the community, you are part of a majority of conservation easement holders. It is also documented that in many cases, land protection can sustain the economic framework of a rural community, especially when working lands are protected. (McLeod et al, 2003).

Protecting community heritage, or a community's sense of place, is also a key motivation for landowners to preserve critical parcels of land. While Section 170 of the IRS regulations mandate that conservation easements provide social value, landowners also are also intrinsically motivated to preserve land to maintain a sense of community (Keske, 2006). A community's sense of place is very closely tied to family heritage (Cross, 2001). In a sense, by preserving a community's sense of place, landowners are maintaining their own family heritage.

Finally, the financial benefits from an easement can help you leave a family legacy by strengthening your financial health. Placing a conservation easement on your property can mean the difference between having to sell or develop your property to pay property taxes or inheritance taxes, which is often a concern for landowners who are "land rich" and "cash poor." A conservation easement may provide financial benefits that can help you achieve a number of operational goals.

2) Protect Ecosystem Integrity

Conservation easements are one of the primary tools for conserving wildlife, fish, plants, and important habitat on private land. Landowners may be particularly attached to a view, migrating songbirds, or fishing in their favorite stream. A conservation easement can be a way to ensure that future generations will be able to share in that same love of place and nature. In the case of organizations that hold conservation easements for habitat for plants and animals such as The Nature Conservancy, the majority of the conservation easements aimed to provide core habitat to protect species or communities on-site, and nearly all were designed to reduce development (Rissman et al 2007).

The good news is that according to several research studies, protection of ecosystem integrity need not interfere with maintaining a working landscape. The Rissman et al study also found that a recent study of 119 conservation easements held by the Nature Conservancy found that conservation easements also allowed for a wide range of private uses:

- Some residential or commercial use, new structures, or subdivision of the property were permitted on 85% of sampled conservation easements.
- Over half (56%) allowed some additional buildings, of which only 60% restricted structure size or building area.
- Working landscape easements with ranching, forestry, or farming made up nearly half (46%) of the easement properties sampled. ***Working landscapes with conservation easements were more likely to serve as buffers to enhance biodiversity in the surrounding area, than conservation easements without working landscape uses!***

Determining which retained uses you, as a landowner, can keep will depend on the conservation values on your property. However, it is ***critical*** to recognize that the associated conservation values of the conservation easement cannot be compromised by the retained uses.

3) Financial Benefits

Financial benefits play a large part of why many landowners are able to afford the choice of preserving their lands rather than succumbing to the pressure of selling off part or all of their land for development. As will be discussed in the next section, Coloradoans who donate conservation easements are eligible for tax relief in the form of federal tax deductions, tax credits which are transferable, reductions in the local tax rates, and reduction in estate taxes.

Plain and simple, some of these benefits may provide an infusion of cash which can provide many management alternatives to landowners. In some cases, the financial benefits make it possible for many “land-rich, cash-poor” farmers to keep their operations afloat because it improves their cash flow. An infusion of cash can also allow many producers to expand their operations, increase their capital equipment, add additional family members as partners, and set aside additional money for retirement or college educations. Easements are often an important part of sophisticated estate planning that aid in intergenerational transfers. Colorado provides one of the best programs in the nation for financial benefits to landowners for conservation worthy properties of all different uses, including residential. These programs ease the landowner’s financial sacrifice for choosing the land protection, as opposed to land development option. In the next section, we provide a summary of the financial benefits that are available to conservation easement holders.

Summary of Benefits for Conservation Easement Holders in the State of Colorado

On August 17, 2006, the President signed into law the Pension Protection Act of 2006. The legislation includes some important modifications to the federal tax treatment of conservation easement donations. Although this next section is a bit technical, we attempt summarize benefits for landowners because ***the combination of federal and state tax law changes provides significant incentive for landowners to donate conservation easements in 2007. This is particularly true for farmers and ranchers!*** Although the changes are effective immediately, ***they are currently set to expire at the end of 2007, unless they are renewed!*** Fortunately, legislation has been introduced in both the House and the Senate to make these changes permanent, but land protection advocates and landowners must be actively involved in order to see the process through.

2007 changes to federal tax laws are summarized as follows:

- Income tax deductions for qualified conservation contributions ***increase from 30% of taxpayer’s adjusted gross income (AGI) to 50% of AGI.***
 - Landowners can ***carry-forward their tax deduction for 15 years instead of 5 years.***
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- ***Qualified farmers or ranchers*** (defined as taxpayers who earn more than 50% of their gross income from the business of farming in the taxable year in which the conservation contribution is made) ***may deduct the conservation easement value up to 100% of their AGI, with a 15 year carry-forward.***⁴

Colorado state tax laws, which are in addition to federal benefits, are summarized as follows:

- State tax credits are provided at a rate of 50% of the value of the conservation easement donation (up to \$750,000 in the easement's value). ***In other words, the potential total allowable credit per donation is \$375,000.***
- The tax credit is ***transferable***. The landowner can either use the tax credit themselves or they can sell it from anywhere from \$0.82-\$0.92 per dollar of tax credits (Strugar, 2007).
- Although Colorado state tax credit proceeds are typically considered taxable, ***under the new federal law, landowners can offset 50% (versus 30%) of their income credit. If they meet the qualified farmer or rancher definition, they could offset 100% of this income credit. This helps landowners keep more income and pay less in taxes!***⁵

Here is a brief example of how these laws may be potentially applied to a ranch under 2007 tax laws:

- If Rancher Jones has an adjusted gross income (AGI) of \$50,000 and owns agricultural land valued at \$3,000,000, a conservation easement on the property could reduce the value of the property to \$2,000,000. The value of the conservation easement would be \$1,000,000 (or the amount by which the value of the ranch is reduced by the restrictions).
- Jones could either attempt to find a buyer to purchase part or all of the conservation easement or Rancher Jones could donate the conservation easement.
 - If Jones sold the conservation easement, he would receive compensation for the conservation easement as agreed upon by the collaborating conservation organization. This would be money in his pocket.
 - If Jones donated the conservation easement, based on the numbers above, Jones would receive a \$375,000 tax credit that he could use over 20 years.
 - If Jones wanted to, he could sell the tax credit for approximately \$320,000, assuming a payment of roughly \$0.85 per \$1 of tax credits. This would be \$320,000 cash in his pocket.
 - There are also further benefits on federal taxes that depend too much on personal circumstances to provide examples here. These tax benefits should be explored with your tax expert.

Recommendations and Considerations:

Three Recommendations:

- 1) Communicate with your family to determine their feelings on conservation easements. Perpetuity is a long time. When you enter a conservation easement agreement you are committing to a contract that will last indefinitely. This is a perpetual contract and your family's support is important, as the contract affects your family's future management of the land and their financial gains. Therefore, consider all aspects of potential property rights that you might want to maintain, as well as proposed land use and management issues. Be sure to balance these "reserved rights" while making sure that the property maintains conservation values.

⁴ The easement must contain a restriction that the property will remain available for agricultural or livestock production.

⁵ You need to discuss in of these issues with an appropriate tax advisor. It is possible for gross income from the sale of tax credits OR from proceeds derived from the bargain sale of easements will likely be considered as income not derived from farming or ranching, potentially disqualifying the landowners as a farmer or rancher under the law.

- 2) Learn as much information as possible as you can about the conservation easement process, and include your family in the learning experience. A great resource to get you started is Land Trust Alliance website (www.lta.org). Coloradans can also refer to information provided by the Colorado Coalition of Land Trusts (CCLT) at cclt.org.
- 3) It is critical to hire experienced professionals to assist you with writing and enacting a conservation easement, and to assist you in the appraisal process. Good documentation is crucial to protecting yourself and your land in the event of an IRS audit, and the money spent to support this process is well worth the investment. We make the following recommendations, and address some of the specifics about financial benefits in the next section of the paper:
 - 1) Consult a reputable conservation easement attorney.
 - 2) Utilize an appraiser experienced in conservation easement appraisals, as the conservation easement appraisal process can be challenging. The importance of using an experienced appraiser cannot be overstated! One key consideration in IRS audits is whether an accurate appraisal has been performed. Conservation easement appraisals have also been the target for legislative reform at the state and federal level. For more information on the conservation easement appraisal process, contact the Appraisal Institute: <http://www.appraisalinstitute.org/>. Local land trusts will also provide you with the names of qualified appraisers.
 - 3) Work with a reputable organization to broker any potential conservation easement tax credits, whether you are selling or purchasing the tax credits. Other than receiving recommendations from land trusts, you might want to ask whether the broker is a member of a statewide group, the Alliance, or how many of their easements are being audited.
 - 4) Attain a qualified financial adviser to guide you through estate planning.
 - 5) For professional references, contact the Colorado Coalition of Land Trusts (CCLT). Local land trusts listed on the CCLT website will also help you find a good match of professional that may be compatible with your land protection focus:

Colorado Coalition of Land Trusts (CCLT)
 1410 Grant Street, Suite C209
 Denver, CO 80203
 Phone: 303-271-1577
 Website: cclt.org

Nine Important Considerations:

- 1) To qualify for conservation easement financial benefits, the land must present conservation values that comply with IRS regulations. Land trusts and conservation organizations will help you to determine whether your land reflects IRS conservation values. Maybe a conservation easement isn't right for you, but there are other land conservation opportunities available. Discuss conservation alternatives with several conservation organizations. Select a land trust that reflects your similar conservation values. Many regional land trusts are focused upon preserving a specific conservation value, like wildlife habitat. Other land trusts seek out agricultural lands.

In addition to the list of land trusts on the Colorado Coalition of Land Trusts website, there is also a U.S. map on the Alliance website (www.lta.org) that you can click on and find out what land trust operates in your region. Talking to a few land trusts will help you to decide the most appropriate organization that will uphold the conservation values that are important to you and your family, and your family's future goals on the property.

- 2) Be cautious when talking to land trusts not to give the impression that you are "trust shopping" to maximize your financial benefits, as this may cast a negative light and your efforts may not come across as sincere. Be sure to explain to the land trusts that you are trying to understand their organization's mission and you want to work with the best land trust that reflects conservation values that are important to you and your family. (Keske and Hoag, 2006).
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- 3) Despite the fact that conservation easement restrictions reduce the value of the land, in some instances land prices of the property continue to rise and the conservation easement *appears* to not restrict the value of the land (Anderson and Weinhold, 2005). Although this may be counterintuitive to market behavior, this is not uncommon for lands near resort communities (Keske and Hoag, 2006; Keske, Hoag, and Bastian, in progress). As a result, timing your conservation easement is important, because you do not want to restrict future family revenue streams, but it is difficult to predict what happens to home prices in the region where conservation easements are in place. If you are in a community with rapidly increasing property prices, obtain as much information as you can about the conservation easement properties in your area.
 - 4) Recognize that when entering a conservation easement agreement, the land trust will have the right to “steward” your land. This means that the land trust is permitted to come to your property at specified times (usually annually, although schedules change, due to property specifics). Land trusts typically contact the landowner to arrange times where the landowner may be present during the stewardship process. The purpose behind the visit is to ensure that the terms and conditions of the easement are being upheld. The stewardship visit should NOT allow the land trust any opportunity for management activities, unless these management activities have been included in the conservation easement agreement. Stewardship provides protection for both the landowner and the land trust because the process ensures that conservation values are being upheld.
 - 5) You can always sell your land with a conservation easement to a third party, but the conservation easement remains with the land. In some cases this may deter future buyers, although in other cases the preserved conservation values are very attractive to interested buyers.
 - 6) Despite the decrease in local property taxes that result from conservation easements, landowners are still responsible for their property taxes. Be diligent to pay property taxes, as opponents of conservation easements often (incorrectly) express concern that conservation easement holders are removed from property tax roles.
 - 7) The Alliance, the Colorado Coalition of Land Trusts (CCLT), as well as the large body of previously cited research concur that the majority of conservation easements are altruistic in nature. Usually the landowner’s property is consistent with preserving conservation values, and the landowner forgoes income that they would have otherwise received from development. However, in the past there have been a minority of landowners whose land is either NOT conservation-worthy, or they have received a flawed or inflated appraisal. When there has been a problem with appraisals, generally speaking, the audits have all basically hinged on one appraiser with a questionable approach. Unfortunately, much of this problem seems to stem from a minority of inexperienced appraisers. As a result, the IRS has increased its number of audits of conservation easement lands, particularly in Colorado, due to the enormous amount of tax incentives. Seeking good professional assistance will help you stand up to an audit, should the case arise.
 - 8) At this writing, the policies that provide landowner benefits are dynamic. While there are currently numerous benefits available to landowners (particularly farmers and ranchers), some of those benefits may not be renewed at the end of 2007, unless land protection leaders and landowners partner with legislators to renew the practices. Furthermore, policies and regulations are being introduced to lawmakers that may place restrictions on new conservation easements. If you are considering a conservation easement, time is of essence now more than ever before. Set aside time to learn as much as you can about the conservation easement process, and if you believe that conservation easements are right for you and your family, consider expediting the process.
 - 9) Landowners may place parcels of land under conservation easement in “phases.” This provides an extension of financial benefits to landowners, because they have essentially enacted additional conservation easements. While this is often considered a wise financial move, each phase, or parcel of the land, must demonstrate conservation values. In addition, because the initial parcel is essentially divided into multiple parcels, these separate parcels may be bought and sold separately, making it difficult to monitor conservation values, and protect landowner motivations. Many phased easements communicate clearly to the IRS that an additional
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donation has been made. However, each conservation organization has its own internal policy regarding phased easements. Be sure that you understand the policy of the conservation organization before you select a phased conservation easement option.

Summary

This purpose of this document is to educate landowners on several aspects of conservation easements. In our publication we outline the definition a conservation easement, and present several altruistic and financial reasons to enact a conservation easement. Likewise, we provide several recommendations and considerations for land protection, many of which have been articulated by landowners. We also summarize the federal and state financial beneficial that are available to Colorado landowners.

It is critical to realize that enacting a conservation easement at any time will enable you to enjoy the legacy that you can leave behind for yourself, your family, and your community. However, as we have also noted, several of the financial benefits may be reduced at the end of 2007 if these benefits are not renewed. If you and your family are considering a conservation easement, we highly encourage you to consider enacting one this year. In addition, if you believe strongly in this land protection mechanism, we encourage you to contact your state and local legislators to express your support for conservation easements, for this policy is one valuable tool to maintain the natural beauty and the agricultural viability of Colorado.

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About the Authors

Dr. Catherine Keske is an Assistant Professor in the Colorado State University Department of Agricultural and Natural Resource Economics. Dr. Keske earned her Masters degrees from Vanderbilt University and the Colorado School of Mines in Mineral Economics, and her Ph.D. in Agriculture and Natural Resource Economics from Colorado State University.

Dr. Keske is considered one of the leading researchers in the economics of conservation easements and she has conducted numerous studies based in land economics, including the economic valuation of Colorado Fourteeners and risk management practices for female agricultural producers. She is the owner of Natural Elements Economics Consulting, a consulting firm that specializes in natural resource management and valuation. She is also on the Board of Directors of the Mountain Area Land Trust, based in Evergreen, Colorado. Dr. Keske was raised in an agricultural environment and she is an avid outdoor recreationist.

Dr. Stephanie Gripne is part-owner of Compatible Ventures, LLC, an environmental consulting company (www.compatibleventures.com). She is also a Land Conservation Program Manager for the Colorado Chapter of the Nature Conservancy. Dr. Gripne earned her B.S. in Biology and Wildlife Management from the University of Wisconsin at Stevens Point, her Masters. in Ecology from Utah State University, and her PhD from the Boone and Crockett Wildlife Conservation Program in at the University of Montana.

Dr. Gripne's most recent area of work has been in the evaluation of grass banking as a cost-effective private land conservation tool. Her research is generally in the areas of conservation finance, conservation real estate, and economic strategies that provide non-market goods and services. She has also worked and volunteered of a number of government and non-government agencies during the past 16 years, and she is a proud descendant of Colorado pioneers!

Ms. Lynne Sherrod

Ms. Sherrod is considered one of the foremost leaders in land protection in the state of Colorado, and she is currently the Western Region Policy Manager for the Land Trust Alliance. She has an extensive background in land conservation and has worked extensively with a variety of partners and diverse interests, building bipartisan and positive political support from the grassroots level. Her previous background includes serving as Executive Director of the Colorado Cattlemen's Agricultural Land Trust (CCALT), which was named in *Livestock Market Digest's* "Digest 25," as one of the top 25 persons or organizations having a positive impact on the American Livestock Industry.

Ms. Sherrod has received numerous awards for her land protection efforts and has served a number of boards and advisory boards. Her work has prompted awards from the Governor's Smart Growth Initiative, the Rocky Mountain Elk Foundation. She has also received awards as Land Steward of the Year (Colorado Wildlife Society), Land Conservation Excellence Award (Colorado Coalition of Land Trusts), and the Wirth Chair at University of Colorado Community Award. She is also proud of her personal heritage as a Colorado rancher.
