

Basic Outline for a Conservation Easement Deed

A conservation easement is a recorded deed restriction which, for favorable federal tax treatment, must restrict the uses of a property in perpetuity. A conservation easement must be conveyed to a qualified 501(c)(3) organization whose purpose is the protection of land, or to a governmental entity. A conservation easement must also have a conservation purpose that either: (1) provides for the recreation or education of the general public; (2) protects relatively natural habitat; (3) protects open space (a) for scenic purposes, or (b) pursuant to a clearly delineated governmental conservation policy (such as the protection of agricultural land); or (4) protects a historical building or land area. Although styles of easement drafting vary, all conservation easements include land use restrictions framed by deed language. Easements generally include the following elements:

Form of Conveyance – This includes the identification of the parties, a description of the land, required words of conveyance, and a statement of consideration (if any). Everyone with an ownership interest in the affected land must be a party to the deed.

Recitals – The recitals identify the subject matter of the agreement and describe the intent of the parties in establishing the agreement, the characteristics of the property that warrant protection, and the statutory foundation for the transaction.

Purposes Clause – Is the first provision of the easement and establishes the foundation for easement interpretation. The crafting of the purposes clause also is critical as the basis for determining whether the inconsistent use provision of the Treasury Regulations has been violated.

Holder's Affirmative Rights – At a minimum the easement holder must be granted the right to enforce the restrictions of the easement and the right to access the land for monitoring purposes. Ancillary rights related to these two primary functions of the holder are also granted.

Land Use Provisions: Restrictions and Reserved Rights – This section is the heart of the conservation easement. Restrictions and reserved rights should be directly relevant to the conservation purposes of the easement and, to the extent possible, unambiguous and quantifiable.

Administrative Provisions and Legal Boilerplate – The easement must include all provision required by the applicable Federal Treasury Regulations. The easement should also include provisions establishing the easement holder's rights and remedies in case of a violation. The easement will include an environmental indemnity to help ensure that the easement holder will not be liable under CERCLA or RCRA. While not essential to conveying a valid easement, additional administrative clauses governing, among others, procedures for enforcement, notices, required approvals, issuance of compliance certificates can be extremely helpful over time.

Signatures of Necessary Parties – All owners and the easement holder must sign the document. Signatures must be notarized.

Exhibits – The legal description of the property is incorporated as an Exhibit at the end of the easement. The easement may also be clarified by attaching maps and lists.