

Conservation Easements on the Move
submitted by Clarice Ryan,
Member of the Board, Montanans for Multiple Use

Here are four (4) documents compiled into a single document. Note that no editing was done by Freedom Advocates. We provide this information as a service to all who care about property rights and the unalienable rights they represent.

www.mtmultipleuse.org

May 31, 2008

Dear _____,

Land ownership, management and control are undergoing major changes since the founding and settlement of this country. The bulk of populations and livelihoods have shifted from farms and ranches to urban and metropolitan centers and now back again to rural settings with residential concentrations merging with rural living.

In conjunction with these shifts are the forces of local government operating largely through planning and zoning regulatory authorities and committees. Furthermore non-profit, tax-exempt entities are gaining control and management of land "use" when owners agree to contract terms and immediate financial returns provided through conservation easements or transfer of development rights. This basically hinges on sharing of property ownership (use vs. real property) through a form of partnership and split title with funding derived primarily from federal taxpayer sources. The nation's citizens are basically paying for the buyout of the private property throughout this country as well as in our own state. Essential to the process are federal government regulatory directives and procedures as well as mandatory guidelines and implementation standards, better known as "strings attached".

The enclosed printed materials from the April 19, 2008 MFMU Conservation Easement Forum addressed various aspects of conservation easements and trends in land ownership and management.

1. Federal directives which merit in-depth investigation.

Potential pitfalls advising grantor beware prior to contract signature

Reference listing federal documents containing Requirements and Regulations

Selected language deserving careful analysis and experienced legal council

2. Assorted Case Histories

Documentaries

Letters

3. Forum Proceedings and Speeches

Summary of presentations content

Joel Kretz, Washington State Representative:

Defeated Y2Y bill incorporating expanded wilderness on public land and new corridors through private property.

Aubyn Curtiss, Montana State Senator:

State audit of conservation easements leading to improvements in data recording procedures, and bill amendments to existing CE law.

Clarice Ryan, MFMU board member:

Developing trends, ramifications and potential pitfalls of conservation easements on farm and ranch lands.

The very foundation of our form of government is based upon private property. However, more and more of the land in America is being targeted for government controlled preservation and restricted use in accordance with environmental demands. Montanans for Multiple Use as an organization is watchful and concerned about programs and legislation leading to the decline of resource industries and related economy, combined with erosion of private property rights.

We would appreciate your review of the enclosed material and its distribution to those within your organization who may benefit from the information. We thank you for your attention to this important

matter and would appreciate hearing your opinions and possible impact and active involvement of your membership.

Sincerely,

Clarice Ryan

Member of the Board

Montanans for Multiple Use

253 Pine Needle Lane

Bigfork, MT 59911

cc: George Culpepper, NW Montana Assn. of Realtors, Inc.

John Youngberg, Montana Farm Bureau

Lola Raska, Graingrowers Association

Steve Yeakle, Montana Independent Bankers

Stuart Dogget, Montana Land Title

Pam Langley, Montana Agr. Business Assn. & Montana Grain Elevator Assn.

Errol Rice, Montana Stockgrowers Association

Jay Bodner, Mt. Stockgrowers Assn. & Mt. Lands Council & Mt. Beef Org.

Harold Blattie, Montana Association of Counties

John Bloomquist, Attorney

Chuck Cushman, American Land Rights

Henry Lamb, Environmental Conservation Organization, Inc.

Fred Kelly Grant, Stewards of the Range

Dan and Margaret Byfield, Stewards of the Range

Dr. Michael Coffman, Environmental Perspectives, Inc.

Carol LaGrasse, Property Rights Foundation of America, Inc.

Brad Johnson, Montana Secretary of State

REFERENCE MATERIALS

CONSERVATION EASEMENTS: Federal Directives - Procedures

Below are the documents that provide the directives and requirements for obtaining federal funding for conservation easements key to implementation of the Farm and Ranch Lands Protection Program. The promotional tool being utilized in support of the program is a 50-page promotional pamphlet, "COOPERATING ACROSS BOUNDARIES, Partnerships to Conserve Open Space in Rural America" USDA, Forest Service publication FS-861. The National Grasslands Visitor Center in Wall, SD (the only one in the U.S.) distributes a flyer showing the National Grasslands established throughout the western states, heralding the return of buffalo herds to these regions. (for copies of flyer phone Grasslands Visitor Center: 605-279-2125)

<http://directives.sc.egov.usda.gov/viewDirective.aspx?id=1988>

Subpart G-Conservation Easements (pages 1 through 19)

519.60 Conservation Easement General Information (page 1)

519.65 Model Easement Provisions (page 13)

This document provides the rules and procedures for obtaining federal funding for private land acquisition by the U.S. Forest Service, going far beyond the 193 million acres of public land allocated to that agency. As a branch of the Department of Agriculture authority is apparently provided the Forest Service to initiate the formation of partnerships to place farm and ranch lands under conservation easements throughout the United States. This is being done in the name of preserving "open space". Very few property owners realize the scope of the project with the ultimate outcome being the federal acquisition in perpetuity of private property nationwide. Federal and private land ownership and management are thus being merged and controlled by this single Federal Forest Service agency.

In an AP article, December 2007, Forest Service Chief Gail Kimbell made the following statements: "The Forest Service will work with Congress to create tax breaks and other incentives to promote conservation and reduce development in ecologically sensitive areas." She also said, "**The conservation plan takes effect immediately and does not require congressional approval.**" Should the American public be pleased that their tax dollars are being utilized by

non-profit, tax-free entities to accomplish virtual buy-out of our private property by our own government?

In Montana conservation easements were made possible by the Open Space Land and Voluntary Conservation Easement Act, which became the law of this state more than 30 years ago. The first recorded CE in Flathead County was in 1981 and they have been steadily increasing in popularity and acreage ever since as more funding becomes available. CE contract documents are becoming more refined and standardized in terminology to meet federal requirements, and also more binding.

OPEN SPACE pamphlet: "Cooperating Across Boundaries: Partnerships to Conserve Open Space in Rural America"

USDA Forest Service publication: FS-861, August 2006

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Conservation Easement Directives
USDA, Natural Resources Conservation Service

Following excerpts from the Directives Manual identify required language and provisions to be included in Conservation Easement contracts in order to qualify for federal funding.

The source is the official manual for Title 440 Programs: Part 519 – **Farm and Ranch Lands Protection Program.** (The USDA, Natural Resource Conservation Service eDirectives)

<http://directives.sc.egov.usda.gov> or

<http://directives.sc.egov.usda.gov/viewDirective.aspx?id-1988>

*It is recommended that property owners take a close look at these details prior to the signature of the conservation easement contract in perpetuity. Also it is very wise to have **an attorney experienced in conservation easement law** review the draft contract and interpret the requirements, watchful for possible ramifications and pitfalls.*

The federal government has skillfully developed an intricate program, utilizing tax payer dollars, to provide appealing incentives for private property owners to relinquish management of their lands, while assuming all financial burdens on their property, including any legal expenses which might ensue. The interests of the federal government have been carefully protected in these transactions while locking in forever, control of property, ownership and overall operations and performance. Ultimately over time, full ownership by the government is almost assured with remuneration to the original property owner being far below market value, if not an actual significant financial loss and encumbrance.

EXPLANATORY DETAIL OF SPLIT TITLE:

The easement holder (Grantee) holds title to the use and management of the land.

The landowner (Grantor) remains holder of title to the real property.

Easement Duration: All FRPP conservation easements are perpetual. (H, p 2)

Rulings are categorized below in order of relative importance and possible concern.

Clarice Ryan

CONSERVATION EASEMENTS

M.440.519 – Subpart G – Amendment 31 –August 2006

Conservation Easement General Information (519.60 p. 1)

Goals and objectives: (A, pg. 1) protection of farm and ranch land from conversion to nonagricultural uses and/or protection of historical or archaeological resources on agricultural land.

Acquisition Method: (B, pg. 1) **The United States** may enter into a cooperative agreement with a **State, Tribal, or local government entity or non-governmental organization** to provide matching funds up to 50% of the purchase price, not to exceed appraised fair market value, for the purpose of acquiring easements to protect farmland from conversion to non-agricultural uses. The cooperating entity will carry out the actual acquisition process, hold title to the easement, manage, monitor and **enforce the easements with the United States holding a reversionary interest.**

Contingent Right: (D. pg 17) In the event that the Grantee fails to enforce the terms of this Easement, as determined in the sole discretion of the Secretary of **the United States Department of Agriculture (Secretary)**, the Secretary, his successors and assigns shall **have the right to enforce the terms of the Easement through any and all authorities available under Federal or State law.** Further, in the event that the Grantee attempts to terminate, transfer, or otherwise divest itself of rights, title, or interest in this Easement or extinguish the Easement without prior consent of the Secretary and payment of consideration as provided herein, then at the option of the Secretary, **all right, title, or interest in this Easement shall become vested in the United States of America**

(The Contingent Right provision is required by the cooperative agreement.)

Responsibilities of the Grantor: The landowner is responsible for payment of all taxes, upkeep and maintenance of the property and any liability arising from personal injury or property damage occurring on the property. (k, pg 16)

Liability & Indemnification: Grantor shall indemnify, defend and hold harmless the Grantee and the United States from any liability resulting from Grantor's negligent acts, including, but not limited to, the release, use or deposit of hazardous substance on the property. (pg 16) **Particular language is needed to adequately protect the resource and the Government's property interest.**

(New environmental rulings unknown at time of signature, incurring large mandated implementation costs must be adhered to as they may appear, forever. cr insert)

Costs of Enforcement:

Any costs incurred by Grantee in enforcing the terms of this Easement against Grantor, including reasonable costs of suit and attorneys' fees, and any costs of restoration necessitated by Grantor's violation of the terms of this easement shall be borne by Grantor.

(D) Recovering Costs, (page 19 final statement)

The United States or the Department shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action. Legal action can take either or both of two forms:

- Civil Action to prevent further easement violation or to collect monetary damages, and

- In especially egregious circumstances, criminal prosecution of the person who violates the easement, Federal Law, or regulation.

(No mention is made of justified law suits brought by the property owner against the Grantee when, almost assuredly, the case will be lost with all legal expenses being born by the Grantor for both sides. cr insert)

EASEMENT PROPERTY DEALINGS:

The cooperating entity and a non-profit organization or other eligible entity **may co-hold title to the easement/interest.**

The United States, through CCC, **may acquire the easement that has a pending offer from a State, Tribal, or local government entity or non-governmental organization.** For example, this option may be considered where the United States holds or will hold an easement on the adjacent land. (G, pg 2)

Transfer of Easement: Upon prior written consent from USDA, Grantee may transfer this easement to a public agency or non-profit organization. (pg 17)

(This includes potential state and tribal negotiations. An opportunity for tribes to reclaim historic lands? cr insert)

Extinguishment: (D. pg 17) The easement **may only be terminated or extinguished by a court** of competent jurisdiction upon a request to terminate made by the Grantor, Grantee, and the USDA and after a finding by the court that the conditions or circumstances on or surrounding the Property have changed to such a degree that it has become impossible to fulfill the conservation purposes of the easement.

(Suggest state legislation to over-ride federal rules and limitations to achieve possible contract nullification in the event property reverts to the County through default on taxes or for use of property for affordable housing. cr insert)

Condemnation: (pg. 17) States do not have the power to condemn a Federal property interest. Consent of the Federal Government should be sought before a condemnation action proceeds. If the Federal Government consents to condemnation, **proceeds from condemnation would be owed to the USDA.** If the easement is extinguished/terminated or condemned, in whole or in part, then **Grantee and the USDA** are entitled to their **proportional share** each of ___percentage of gross sale.

(The property owner, grantor, must demand clear statement in the contract as to the percentage worth (declared value) of the real property as opposed to the easement holder grantee. cr insert)

PROCEDURAL STATEMENTS:

The Conservation Plan (C. pg 4)

NRCS is responsible for assisting the landowner in developing an appropriate conservation plan. The easement holder is responsible for **enforcing** the terms of the easement. **Failure of enforcement will result in USDA holding the easement** or finding a suitable easement holder. (C. p. 4)

Determining Easement Price: (F 7, pg 6)

Property appraisers shall be State Certified General Real Property Appraisers, or obtain a temporary practice permit. (C. p. 5)

Technical reviewers may enlist the help of **partner agencies** such as Forest Service, Rural Development, or Farm Service Agency staff appraisers.

Title Insurance (A, pg 10)

Title Review Requirements: Prior to purchasing an easement or other interest in land, all title evidence, such as public land records, **should** be reviewed to ensure that good and legally sufficient title in the property is obtained. NRCS State Managers should request a copy of the cooperating entity's policy on title standards. At a minimum, the cooperating entity shall ensure:

American Land Title Association (ALTA) title insurance will be issued for all acquisitions. The parcel will be free and clear of any and all encumbrances on the title except those that the Grantee and NRCS decide are acceptable.

Note: If any such encumbrances are allowed, they shall be **subordinated to the easement**, e.g. mortgages, farming leases, etc. Such subordination clauses will be included in the easement.

General Guidelines for Easement Review (519.64, pg 11)

Construction of Buildings and other Structures. (C. pg 14-15) The construction of any building or any other structure prohibited except in accordance with. a) New buildings and improvements to be used solely for agricultural purposes. b) The **existing** single-family dwelling and related structures (e.g., swimming pool, garage, etc.) located in the

Farmstead Complex identified in the document, may be repaired, reasonably enlarged, and replaced within the Farmstead Complex. No additional single family dwellings may be built anywhere on the Property. The building of **additional** single family dwellings should be prohibited. A limited exception, upon approval of official request, may be made for landowner's children with right of construction terminating upon death of the children.

New buildings and improvements are to be **used solely for agricultural purposes**. No new roads may be constructed except unpaved roads for agricultural operations on the property. (d. pg 15)

(This would limit the appeal for the purchase of CE encumbered land by wealthy urbanites seeking open space setting with construction of prestige home. cr insert).

Subdivision: (f. pg 15) The subdivision, partition, or conveyance of the Property into two or more parcels is prohibited.

Mining: (g. pg 15) Mining or extraction of soil, sand, gravel, oil, natural gas or other mineral is prohibited, except that Grantor may extract soil, sand, and gravel solely for a permitted use on the Property in a manner consistent with the conservation purposes of this deed, minimal in scope and impact, and not exceeding ____ (a defined acreage or area should be specified in this provision.)

Conservation Plan: (i. pg 15) The Grantor, his heirs, successors, or assigns, shall conduct all agricultural operations in a manner consistent with a **conservation plan** prepared in consultation with the Natural Resources Conservation Service (NRCS) and approved by the Conservation District.

Rights of Grantee: (C pg 14) Include protection of the conservation values of the Property; ability to periodically monitor compliance on the Property; **ability to enforce terms of the easement**. The USDA's **right to inspect** conservation plan compliance, the government's Contingent Right, a clause **required** under all FRPP cooperative agreements,

The following is excerpt from an actual Conservation Easement contract incorporating exact terminology traditionally used to meet federal requirements for funding:

“Grantor shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Property, including responsibility for the control of noxious weeds in accordance with Montana law. Grantor shall pay any and all taxes, assessments, fees, and charges levied by competent authority on the Property, except any tax or assessment on this Easement herein granted. Any lawful tax or assessment on this Easement shall be paid by the Grantee. Grantor shall also be responsible for and shall bear all costs associated with ensuring compliance with all federal, state and local laws, regulations, rules, and ordinances.”

(Keep in mind that such legislation is continually on the increase especially as related to environmental issues, endangered species, restoration demands, etc. Also fire-fighting, as an example, will be the complete financial responsibility of the Property owner. cr insert)

POTENTIAL COMPLICATIONS OF CONSERVATION EASEMENTS: Possible pitfalls for land owners as well as Local Government

The true threat of conservation easements, now escalating with reckless abandon throughout the country, is their ominous, insidious nature. The permanency of the outcomes is not immediately apparent. On the surface they are sold as an almost patriotic endeavor by unselfish land owners to preserve the environment and rural life style which they love. Unpublicized monetary incentives are treated as almost incidental, but serve as an appealing sales tool, especially for those under financial stress.

Nationwide the extent of proliferation may not be realized or acknowledged until conservation easements have virtually destroyed the private property principles upon which our form of government was founded. Similarly property owners still be basking in the warm glow and publicity of the wonderful thing they have done, will gradually awaken to their mistake. Upon seeking escape from the contract signed in perpetuity they will discover that there is no way out. They and all future heirs are virtually chained to contract commitments and are now serfs on their own land.

Directors of the U.S. Department of Agriculture and the U.S. Forest Service saw this as an opportunity to convert privately owned lands on a grand scale to de-facto Wilderness with neither Congressional nor Public involvement. The intricate "Open Space" Farm and Ranch land Protection Program was developed promoting conservation, partnerships, tax breaks and other incentives which would appeal to property owners, state and local governments. Forest Service Chief Gail Kimbell stated in December, 2007, **"The conservation plan takes effect immediately and does not require congressional approval"**. Since that time this program, now well underway, is gaining rapid momentum throughout rural America with blind acceptance by county governments and the agricultural populations they serve. Eventually these lands when acquired by Federal Government are removed from local tax roles.

Attached are excerpts from the Federal Conservation Easement Directives, USDA, Natural Resources Conservation Services. They are very revealing of the mandates applied to federal funding for conservation easements nationwide. These are well worth reading to identify "red flag" portions deserving careful consideration in CE contracts.

For ongoing reports and links refer to the following information sources:

<http://www.nationalcenter.org/NPA569.html> .

<http://directives.sc.egov.usda.gov/viewDirective.aspx?id=1988>

Google Blogs Alert for: **conservation easements**