

## **CONSERVATION EASEMENTS**

### **Acquiring a Limited State Interest in Land**

#### **INTRODUCTION**

Land ownership can be described as a bundle of rights, such as the right to harvest crops or timber, to construct buildings, to limit access, or to subdivide the land. The full bundle of rights is described as a “fee simple estate.” A landowner may sell or donate the whole bundle of rights or just one or two of those rights. By selling or donating a conservation easement, a landowner exchanges a subset of those rights for cash or tax benefits for the purpose of protecting the land.

Typically it is in the best interest of the state to acquire fee, the full bundle of rights, when acquiring land. In some cases however, a situation may arise in which a fee acquisition is not practical, desirable, or possible. In those situations acquiring a limited interest in land may be a useful tool.

Conservation easements are based on a voluntary contract between a willing buyer and a willing seller; the contract determines what uses and developments will be allowed under the easement and binds present, as well as future, parties. Conservation easements are noted for their flexibility - each easement can be tailored to meet the needs of both the landowner and the entity that will hold the easement. Typical restrictions placed on land under conservation easements include limitations on the right to subdivide or construct buildings, restrictions on the rights to timber development, and limits on the rights to commercial development of the property.

Generally, an easement is a "non-possessory interest in land of another." An easement is defined as “an interest in land in the possession of another which ... entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists ... [and] is not subject to the will of the possessor of the land.”

While traditional easements grant the right to use the land for a certain purpose, conservation easements differ in that they restrict certain uses of the land. Further, the holder of a conservation easement typically cannot use the land or rights conveyed; rather the holder ensures that those rights are held in trust for the duration of the easement. Thus, if a conservation easement is designed to limit future subdivision and commercial development of the land, the holding organization will monitor uses of the land and enforce the easement terms as necessary.

DNR has the statutory authority (A.S. 38.05.035(a)(11) to acquire property on behalf of the State. In this capacity DNR has a responsibility to limit the State’s exposure to future risk. Conservation Easements present potentially greater challenges for management and long- term stewardship. The State rarely, if ever, has an interest in acquiring a conservation easement over land not owned by a government agency or non-profit organization, except when the parcel is an in-holding in, or adjacent to, a state park or similarly legislatively designated area. The State may choose to hold a conservation easement designed to provide financial protection in the case of grant-funded acquisitions implemented as pass through grants to municipal or other entities.

The Uniform Conservation Easement Act, Chapter A.S. 34.17 defines conservation easements, describes the creation of conservation easements, and sets forth relevant legal requirements.

### **POLICY - GRANT FUNDED ACQUISITIONS**

Federal grant programs have strict requirements that the interests in land purchased using federal dollars must continue to be used for the purposes for which they were acquired in perpetuity. In order to ensure that this restriction on use carries with the land, restrictive language such as that included in Attachment II is included in every deed or interest in land acquired by the State or its partners using federal funds. Further when title is vested with the state and an interest in land is entered into the State Land Administration System, a restrict transaction is added to the record to alert staff to the unique status of the parcel.

***Note: Generally federal grant programs require that the state repay the funds awarded or provide replacement lands should the lands be used for purposes other than those for which the funding was intended.***

### **POLICY**

Acquisition of limited interests in land may only be acquired for purposes of:

- Consolidating state land holdings and interests,
- Providing public access to state or other public land,
- Creating land ownership and use patterns which will permit more effective management of state land and resources,
- Facilitating the objectives of state programs, or
- Other public purposes related to the mission of the department or another state agency.

Before the department will accept a limited interest in lands, such as a conservation easement, evidence must be provided that the easement:

- Has the support of the DNR Commissioner's office,
- Is necessary for one or more of the above purposes,
- Provides a benefit to the state,
- Does not expose the state to unnecessary risk or liability,
- Can be reasonably incorporated into existing agency management strategies,
- Does not create an unreasonable administrative or financial burden, and
- There is no alternative strategy available to meet management objectives.

In addition, if the State acquires a conservation easement, there MUST be an entity of state government willing to accept long-term management responsibility for the interest acquired. The entity accepting management must demonstrate a strategy for managing the interest, including a strategy for monitoring, enforcement of terms and conditions, and conflict resolution.

In the case of interests in land acquired using federal grant funds, there are typically restrictions on use of the acquired property as well as longer-term financial consequences

associated with mismanagement. When title vests in an entity other than the State, in order to minimize long-term financial risk to the State, the State (through DNR) will require a conservation easement protecting the state from financial liability should the acquiring entity such as a municipal government fail to comply with the terms of the grant. Sample language is attached (Attachment I). Restrictive language will also be required in conveyance documents (Attachment II)

Should your Division or Agency wish to acquire a conservation easement, a request for assistance from Realty Services Section in the Division of Mining, Land, and Water should be accompanied by a memo addressing all of the points listed above. Suggested format:

- Legal description of the proposed easement.
- Physical description of the parcel.
- Purpose of the property interest.
- Proposed terms and conditions associated with the limited interest.
- Long-term management of the easement.
  - Analysis of management and administrative implications.
  - Proposed management strategy.
- Analysis of risks and benefits to the state.
- Documentation of DNR Commissioner's office support.

**Note:**

When presenting an analysis of management and administrative implications and describing the proposed management strategy clearly identify how and with what resources your organization plans to address on the ground management responsibilities such as removal of trash, trespass, unlawful or annoying behavior, property damage, restoration of damage, or any other stewardship responsibilities. Also describe how your organization plans to address proposed monitoring of the limited interest, and any proposed modifications or alterations proposed in the future.

## **ATTACHMENT I**

### Sample Easement Language

Land acquired by the State of Alaska using federal grant monies comes with restrictions. For instance, the land must be used and maintained in accordance with the public law creating the federal grant or funding program, as well as other federal laws and regulations and the grant agreement. Most federal grants require that if the land is not so used and maintained, the State may be responsible for reimbursing the federal government for the grant monies. The State is willing to assume this responsibility when taking fee title to land. However, when the State is acquiring a conservation easement using federal grants, the State will REQUIRE that the following paragraphs be part of the conveyance documents:

#### **Rights of the State**

Subject to the terms and conditions of this Easement, the State shall be entitled to enforce the terms of the following restrictive covenants against the Grantor as fee simple owner of the Property:

- a. To prohibit or enjoin any activity on the Property that is inconsistent with Public Law 101-646, 50 C.F.R. §84, and other applicable federal laws and regulations and the Grant Agreement.
- b. To enter the Property at reasonable times in order to monitor the Grantor's compliance with and otherwise enforce the terms of the Easement. The State shall give the Grantor at least seven (7) days prior written notice of such entry unless public health, environmental emergencies or other exigencies arise that require immediate entry, and will not unreasonably interfere with the Grantor's use and quiet enjoyment of the Property.
- c. To require, enforce or undertake restoration of the areas or features of the Property which may be damaged by any activity or use that is inconsistent with Public Law 101-646, 50 C.F.R. §84, and other applicable federal laws and regulations and the Grant Agreement.

#### **Costs and Liabilities**

- a. The Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property.
- b. The State shall have no liability or other obligation for costs, liabilities, taxes, or insurance of any kind related to the Property as a result of this Easement.
- c. The Grantor shall hold harmless, indemnify, and defend the State and its employees, officers, trustees, governors, agents, and contractors (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 fees, arising from or in any way connected with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition or other matter relating to or occurring on or about the Property, regardless of cause, except to the extent due to the negligence of the Indemnified Parties; or (2) breach of the Grantor's obligations specified in this Easement.

### **Disposition of the Property**

The Grantor may not dispose of the Property, or encumber its title or other interest in the Property without prior written permission from:

Commissioner  
Department of Natural Resources  
State of Alaska  
550 West 7<sup>th</sup> Ave.  
Anchorage, AK 99501

and

federal agency administering the grant

or their duly authorized designees.

In the event that the Grantor disposes of the Property or encumbers its title or other interest in the Property without the written permission of the State and federal government as provided herein and the federal government requires that the State reimburse it a portion or all of the Grant proceeds, the Grantor shall reimburse the State that same amount.

### **Use and Maintenance of the Property**

The Property shall be used or maintained in a manner consistent with Public Law \_\_\_\_\_, \_\_\_ C.F.R. §\_\_, and other applicable federal laws and regulations and the Grant Agreement. In the event the Property is used for reasons inconsistent with Public Law \_\_\_\_\_, \_\_\_ C.F.R. §\_\_, and other applicable federal laws and regulations and the Grant Agreement, the Grantor shall, at the request of the State, cease the violative activity and correct any adverse effects caused by the inconsistent activity using non-federal monies. In the event the Grantor refuses to correct adverse effects and the State is required by the federal government to correct said effects, the Grantor shall reimburse the State its costs for correcting the adverse effects using non-federal monies.

## **ATTACHMENT II**

Examples of restrictive language to be included in conveyance documents for federally funded acquisitions.

### **Forest Legacy Program – USDA Forest Service**

This property is being acquired in part through the Forest Legacy program in accordance with the provisions of Title XII of the Food, Agriculture, Conservation and Trade Act of 1990 (16 U.S.C. 2103c). The purposes for acquiring the subsurface estate of the herein described property include protecting environmentally important forest areas that are threatened by conversion to non-forest uses and for promoting forest land protection and other conservation opportunities. The purposes also include the protection of important scenic, cultural, fish, wildlife and recreational resources, riparian areas and other ecological values. Title to the subsurface estate conveyed by this deed cannot be sold, exchanged, or otherwise disposed, unless the United States is reimbursed the market value of the interest in the land at the time of disposal.

### **National Coastal Wetlands Program – US Fish and Wildlife Service**

This property is being acquired in part through the U.S. Department of Interior, Fish and Wildlife Service, pursuant to the National Coastal Wetlands Conservation Grant Program (50 CFR Part 84). The purpose of acquiring this subsurface estate under this grant program is to permanently protect, use and manage the property to ensure long-term conservation of coastal wetland ecosystems, and to perpetuate the anadromous fish, wildlife and habitat values and the public benefits they provide. Title to the subsurface estate conveyed by this deed cannot be transferred, sold, exchanged or otherwise disposed without the prior approval of the Regional Director – Alaska Region, U.S. Fish and Wildlife Service.

### **National Coastal and Estuarine Land Conservation Program - NOAA**

This subsurface estate is being acquired in part with funds from a Federal financial assistance award (NA05NOS4191266), through NOAA's Coastal and Estuarine Land Conservation Program (16 USC 1456d). Title to the subsurface estate conveyed by this deed shall vest in the Grantee subject to the understanding that the rights were acquired to ensure that the property can be managed for conservation purposes, consistent with the purposes for which it was entered into under the CELCP, and shall not be converted to other uses. The State of Alaska shall not dispose of, exchange, encumber or convert the use of the subsurface estate without the approval of NOAA or its successor agencies.