



## CONSERVATION EASEMENTS FREQUENTLY ASKED QUESTIONS

CCALT Founder and Steamboat rancher, Jay Fetcher notes, “You shouldn’t even be considering a conservation easement unless two things have happened: (1) you’ve run the numbers and it makes financial sense for you and your family; and, (2) you feel in your heart it’s the right thing to do.”

Our objective in the Frequently Asked Questions section is to address typical concerns and answer some common questions regarding conservation easements, so that landowners can make a better informed choice regarding whether a conservation easement is the right option for their particular situation. This document has been broken into four (4) sections:

- (1) The Basics – this section deals with the basic elements of conservation easements (what an easement is, what rights are conveyed in an easement, how long it takes to convey an easement, the costs of conveying an easement, etc.
- (2) The Financial Aspects – this section details how conservation easements are valued, how much they cost, and describes the financial incentives that are associated with conveying a conservation easement;
- (3) The Specifics (Water, Minerals, Renewables, Condemnation, etc.) – this section details specific information related to water rights, oil and gas development, renewable energy, condemnation and other specific issues that typically generate questions from landowners; and,
- (4) Stewardship – this section details the relationship between the land trust and landowner once the conservation easement has been completed.

### Section 1. The Basics

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**1.1 What is a conservation easement?** A conservation easement is a voluntary agreement that a landowner may enter into with a qualified conservation organization (typically a land trust), restricting development and uses of the landowner’s property in order to protect certain resources. For example, agricultural conservation easements are designed to keep land available for farming or ranching and often limit non-agricultural commercial development of agricultural lands. Conservation easements are perpetual, meaning

they last forever. Once an easement is in place, it can only be removed in extremely limited circumstances typically requiring either a judicial proceeding or condemnation. Every conservation easement is unique and subject to conditions agreed upon by the parties.

### **1.2 What rights are typically conveyed to the designated land trust?**

- All development rights are extinguished except for those specifically retained by the landowner in the deed of conservation easement (this includes the right to sell the property in multiple parcels).
- The right to share in proceeds from a condemnation action that affects the property;
- The right to enforce the terms of the conservation easement;
- The right to be a party to all negotiations of third party requests to use the land. Specifically, this relates to negotiations for oil and gas leases, surface use agreements, right-of-way agreements, etc. (**NOTE:** this right does not include the right to be a party to the negotiations of agricultural and recreational-based agreements).

**1.3 How are my private property rights affected by a conservation easement?** With regard to land, or “real property,” private property rights include the right to reasonably develop and use the property. By placing restrictions on usage and development, a landowner is voluntarily giving up a portion of their rights. Other private property rights include the right to sell or lease the property, as well as the right to exclude others from accessing the property. Typically, conservation easements do not significantly impact these other rights, and the landowner retains full title to the property and all other rights not transferred under the easement.

The easement is specifically tailored to the property owner’s wishes. Thus, current use and management of the land is usually maintained, with minimal to no impact on day-to-day activities. Indeed, in a well-crafted document, the only rights given up are often rights that the property owner had no intention of exercising, such as the right to build a subdivision or shopping mall. In addition, conservation easements often do not limit development altogether and the property owner can designate areas to be used for buildings, such as barns and other agricultural structures, or home sites. An easement does give the land trust certain rights, such as the ability to enter the land during “monitoring visits,” to ensure the terms of the easement are being upheld and the right to enforce restrictions on the use of the land in accordance with the terms of the conservation easement. Monitoring visits are always coordinated with the landowner and the landowner typically accompanies the monitor on the visit.

**1.4 Does a conservation easement require public access?** No. Public access is not a requirement for conveying a conservation easement.

**1.5 Why would I want to give up any of my property rights?** One of the most cited reasons for pursuing a conservation easement is the landowner’s desire to protect the condition and uses of his or her land long into the future. For instance, by granting a conservation easement the owner of a family farm or ranch ensures that the property remains available for agriculture. In addition, there are a variety of financial incentives and tax benefits available for landowners who convey conservation easements.

**1.6 Who owns the land after a conservation easement is conveyed?** The landowner retains ownership of the property after a conservation easement is conveyed.

**1.7 Do I have to grant a conservation easement over all of my land?** In general, a conservation easement does not have to encompass an entire parcel of land and can include provisions allowing landowners to reserve portions of the property as future building sites free from development restrictions. This type of structure will impact the conservation easement's value and oftentimes reduce the value of the conservation easement. It is also important to note that CCALT prefers to work on entire parcels and has established minimum standards for conservation easements including minimum acreage standards.

**1.8 Who chooses the designated land trust?** The landowner will choose the land trust that best suits their goals, objectives, and interests and will negotiate the specific terms of the deed of conservation easement.

**1.9 How long does it take to convey a conservation easement?** The conveyance of a donated conservation easement typically takes between 9 to 18 months to complete after it is approved by the Board of CCALT. However, purchased easements can take as long as 3 to 5 years, due to the amount of time it takes to secure funding and the various funding entities' approval processes.

## **Section 2. The Financial Incentives**

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**2.1 How is a conservation easement valued?** Conservation easements are valued through a conservation easement appraisal. A conservation easement appraisal is basically two appraisals of the property – an appraisal of the property in its current (unencumbered) state and an appraisal of the property in a hypothetical restricted state. The hypothetical restricted state assumes that a deed of conservation easement encumbers the property. The difference between the two appraisal values is the conservation easement value and is the basis for which the landowner is compensated through tax incentives.

**2.2 What affect does a conservation easement have on the value of the property?** A conservation easement will typically reduce the value of a property between 25% and 60% depending on the restrictiveness of the deed of conservation easement, location, and type of property. **NOTE:** the value of the property will continue to appreciate after the conveyance of the conservation easement. However, the appreciation of the value of the property will be on the reduced value of the property as encumbered.

**2.3 How much does it cost to convey a conservation easement?** Typically, the conveyance of a conservation easement requires the following reports to be produced in support of the conveyance, (1) a baseline inventory report documenting the current condition of the property; (2) an appraisal to determine the value of the conservation easement; (3) a mineral remoteness assessment to determine the likelihood of mineral extraction; (4) title work; and occasionally, (5) an environmental assessment. There are other fees associated with the conveyance of a conservation easement including a project coordination fee, stewardship endowment and legal defense fund contribution, state tax credit application fees, and various legal fees. Together, these fees typically range from \$74,400 to \$157,150

depending on the complexity of the transaction. Bargain sale transactions tend to be more expensive due to the increased complexity involved.

#### **2.4 What are the differences between a donated conservation easement and a bargain sale easement?**

Donated conservation easements occur when landowners donate the full appraised value of the conservation easement to the land trust and in return they are compensated through the federal and state tax incentives described in detail below. A bargain sale conservation easement occurs when a land trust pays for a portion of the value of the development rights. Landowners are paid in cash for the purchased portion (typically 50% or less of the overall value of the conservation easement) and compensated through the tax incentives described below for the donated portion. Due to limited financial resources, purchased conservation easements are less common than donated conservation easements and are frequently subject to additional restrictions.

**2.5 What financial incentives can I expect to receive from granting a conservation easement?** There are five types of financial benefits that can accompany a conservation easement, (1) federal tax deductions; (2) estate tax benefits; (3) Colorado state tax credits; (4) property tax benefits; and occasionally, (5) cash. We will explore each in detail below.

##### *2.5(a) Federal Deduction*

A conservation easement may be treated as a charitable gift, making the value of the easement tax deductible. In order to qualify for the federal tax deduction, the easement must be: (1) perpetual; (2) held by a "qualified conservation organization"; and (3) serve a valid "conservation purpose," which includes (a) the preservation of land areas for outdoor recreation by, or education of, the general public; (b) the protection of a relatively natural habitat of fish, wildlife, plants, or similar ecosystem; (c) the preservation of open space (including farmland or forest land); and/or (d) the preservation of a historically important land area or certified historic structure. In addition, the value of the conservation easement must be determined by a "qualified appraisal". The federal charitable tax deduction for the donation of a conservation easement is reduced by the value of any state tax credits received. After that reduction, you are allowed to deduct the donated amount up to 50% of your adjusted gross income, with a fifteen (15) year carry-forward period. Qualified farmers and ranchers are allowed to deduct the easement's value up to one hundred percent (100%) of their adjusted gross income, with a fifteen (15) year carry-forward period. If you receive tax credits for 90% of the donated value of the conservation easement, the federal charitable deduction may only be the remaining 10% of donated value.

##### *2.5(b) Estate Tax Incentive*

Another important tax benefit is the reduction of estate taxes. Because estate taxes are based on the highest economic use of the parcel, these taxes can be substantial. This can put considerable financial strain on heirs and in many circumstances may force them to sell all or part of the land in order to pay estate taxes. Conservation easements can help prevent this and aid in the intergenerational transfers of intact properties. By granting away development rights the value of the land is decreased, which lowers the value for estate tax purposes, and can provide a significant reduction in the estate tax burden on

family members. In addition to this decrease, qualified conservation easements can earn an additional \$500,000 estate tax exemption.

#### *2.5(c) Colorado State Tax Credits*

Donors of conservation easements may be eligible for conservation easement tax credits under Colorado law. To be eligible to receive a State Income Tax Credit, you must file a Colorado income tax return. The credits received may be used against Colorado state income taxes owed. Conservation easement tax credits may be used over a 20 year period, transferred to other Colorado taxpayers, or, in years of budget surplus, refunded by the State to the donor. Donors of conservation easements can receive tax credits at the rate of up to 90% of the donated conservation easement value up to a total credit amount of not more than \$1.5 million per calendar year and a total transaction cap of \$5 million. For example, a \$2,000,000 donation will yield \$1,800,000 in state income tax credits. The maximum credit allowed per calendar year is \$1.5 million, which is generated by a donation of \$1,666,666.67 or more. In this example, as the donor generated more than \$1.5 million of state income tax credits, they would receive \$1.5 million in credits for the year of the donation and the remaining \$300,000 in credits for the following year. Credits can be sold to individuals or businesses with state tax liabilities and typically sell for \$0.85 per dollar. There is an overall \$45 million dollar cap per year for the tax credits. If the cap is exceeded, the landowner will receive a tax credit for a future year. Typically, tax credits are received 4 months after a complete application is submitted to the Division of Conservation, which is usually 5-6 months after the easement is recorded. **NOTE:** Landowners should sell conservation easement tax credits through a reputable tax credit broker. Brokers work throughout the year to identify buyers and match them with sellers. The State of Colorado must certify all conservation easement tax credits prior to issuing the credits. Transfers of the credits are required to be reported to the State. For properties owned by individuals, as opposed to an entity like an LLC, each owner must be a Colorado resident to be eligible to receive the tax credit.

#### *2.5(d) Property Tax Benefits*

Under Colorado law, for properties which are classified as agricultural at the time of easement, the conservation easement will lock in the property tax valuation at its agricultural value. Granting a conservation easement WILL NOT eliminate property tax burdens and the property will remain on the tax rolls, and the landowner retains responsibility for any property tax liabilities.

#### *2.5(e) Cash Payments*

Occasionally, CCALT is able to raise money from public and private funding sources to purchase a portion of a conservation easement with cash. The cash is received by the landowner at closing. This is known as a bargain sale conservation easement conveyance. Typically, 50% of the value of the easement is purchased in a bargain sale transaction. The remaining 50% is treated as a donation and compensated through the various tax benefits described above. Bargain sale transactions come with additional restrictions required by funding sources that are putting money towards the purchase of the conservation easement. Bargain sale transactions also typically take longer to complete.

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### **Section 3. The Specifics (Water, Minerals, Renewables, Condemnation, etc.)**

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**3.1 What is the relationship between my water rights and a conservation easement?** CCALT requires that any and all water rights beneficially used on the property be permanently tied to the land by the terms of the conservation easement.

**3.2 What is the relationship between mineral rights and a conservation easement?** The nature of the relationship between mineral rights and conservation easements depends on who owns the mineral rights and the type of mining involved.

*Surface Mining:*

Due to the incompatibility of surface mining and conservation easements, the tax code prohibits surface mining. It is important to note that the definition of surface mining **does not** include oil and gas extraction.

If the mineral estate is split or severed (all or a portion of the mineral rights and surface rights are owned by different parties), the owner of the mineral estate will usually have the right to reasonably use the surface to extract the minerals underneath. In some instances involving a split estate, the surface owner may not be eligible for the tax deduction unless they can show that the probability of surface mining on their land is “so remote as to be negligible.” This determination must be made by a certified geologist, who will complete a mineral remoteness assessment (commonly called a mineral report), which will document the existence and commercial viability of any minerals present on or under the property. CCALT recommends obtaining a mineral report even if the mineral estate is whole if federal or state patents contain language allowing a proprietor to follow a vein or lode, even though this right is not a mineral severance.

If the landowner owns the minerals rights, the conservation easement donation will be eligible for tax benefits if the conservation easement contains a provision explicitly prohibiting surface mining. **NOTE:** If a landowner wishes to retain rights to certain mineral extraction such as sand, gravel, rock, or soil for personal and non-commercial use, it is important that the scope and location of the activity is limited and does not impact the conservation values of the property.

*Subsurface mining:*

Oil and gas development is considered subsurface mining. Oil and gas development can be compatible with conservation easements if the development is “limited, localized and not irremediably destructive of the conservation values”. CCALT will work with landowners to negotiate leases and surface use agreements to ensure that any oil and gas development occurs in a manner that is consistent with federal and state law.

**3.3 What is the relationship between conservation easements and my renewable energy development rights?** Given increased public and commercial interest in renewable energy, it is important to consider the impact that a conservation easement will have on the ability to develop renewable energy on protected land. Currently, commercial scale renewable energy projects (i.e. wind farms, solar farms, etc.) are **not** considered to be compatible with conservation easements. However, limited small scale

renewable energy projects that are done primarily for the generation of energy for “on farm/ranch” purposes are considered to be compatible with conservation easements.

**3.4 Can I sell my property if I encumber it with a conservation easement?** Yes. Landowners retain ownership of the property and all other rights that are not conveyed in the deed of conservation easement. However, a conservation easement can extend the period of time it takes to sell a property and it will likely reduce the overall price for which the property can be sold. A small transfer fee is also due to the land trust at the time of sale.

**3.5 Will a conservation easement prevent condemnation?** No. However, a conservation easement will make condemnation more difficult. In any condemnation proceeding, the condemning entity must pay the full fair market value of the property as if there were no conservation easement in place. The condemnation award will be split between the landowner and the land trust based on the conservation easement appraisal.

**3.6 Will a conservation easement tie the hands of my heirs?** A conservation easement is intended to restrict certain activities from occurring. These restrictions are in perpetuity and will therefore continue to tie the hands of future owners. It is essential that the landowner and land trust give a great deal of thought to the restrictions that are contained in the conservation easement. Furthermore, CCALT encourages landowners to include their families in the process to ensure that the restrictions that are negotiated are understood and agreed upon.

**3.7 Do banks offer loans on land encumbered with a conservation easement?** Because conservation easements reduce the value of the property, the size of a loan available for mortgaging a property will be reduced, but banks will continue to offer loans that are collateralized by property encumbered by a conservation easement. As conservation easements typically prohibit the subdivision of the property, a mortgage will likely have to encumber the entire property. Conservation easements can also be placed on property that is currently mortgaged; however, doing so requires a subordination of the mortgage by the lender prior to conveyance of the conservation easement.

**3.8 Do I have to fear an IRS audit if I put an easement on my property?** Although there is no way to predict the actions of the Internal Revenue Service, the vast majority of conservation easement transactions completed over the last 30 years have not received undue scrutiny. As with any charitable donation, following the IRS regulations and the national Land Trust Alliance’s Standards and Practices will make it easier for a landowner to defend themselves in the event of an IRS audit. With all that being said, in the past decade there have been a number of Colorado easements that have been audited. Prudent advice to a landowner is to thoroughly investigate the land trust you intend to partner with and choose the contractors that complete the due diligence requirements wisely. A reputable land trust will assist a landowner in the selection of these contractors and will work with the landowner and the contractors to ensure that all aspects of the transaction satisfy the requirements of the Treasury Regulations and IRS code.

## **Section 4. Conservation Easement Monitoring**

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**4.1 How does CCALT approach its relationship with landowners who have conservation easements on their property?** CCALT's stewardship philosophy promotes private land stewardship and ensures the defense of every CCALT-held conservation easement. Landowner relationships represent the foundation of our stewardship program. CCALT believes that personal, honest, and open relationships with each of our landowners is the best way to ensure that our perpetual stewardship obligations are met. Because the agricultural community differs in significant ways from the larger landowning community, CCALT intentionally employs a unique approach to stewardship with its landowners. This concept is based upon, (1) a deep understanding of the agricultural community in which we operate; and, (2) a great respect for privacy and recognition of a landowner's ability to make individually responsible management decisions related to the day to day activities on protected properties. CCALT monitors each conservation easement annually and works diligently with landowners to resolve stewardship related issues quickly and efficiently.

**4.2 How do monitoring visits work?** The purpose of monitoring visits is twofold, (1) to ensure that the terms of the easement are being adhered to by the landowner and, (2) to continue building the relationship with the landowner. Typically, monitoring visits occur once each year. CCALT contacts landowners in advance to determine a mutually agreeable date and time to conduct the monitoring visit and landowners typically accompany CCALT staff on monitoring visits.