

# THE BLUFFS

*A Case Study of and Guide to Transferring  
Neglected/Orphaned Easements*



Colorado Cattlemen's Agricultural Land Trust  
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## **Executive Summary**

This report serves as a case study of the Colorado Cattlemen’s Agricultural Land Trust’s (“CCALT”) work to transfer, amend, and consolidate 20 neglected conservation easements held by Colorado Natural Land Trust (“CNLT”). Neglected/Orphaned easements have been identified as one of the biggest issues facing land conservation in Colorado and across the country. It is estimated that Colorado has more than 700 neglected/orphaned easements and 100s more that are at risk of becoming neglected or orphaned at some point in the future. This report documents the first known successful transfer of easements from CNLT (a non-functioning land trust). CNLT is estimated to have 271 additional easements across Colorado that are not currently being monitored or stewarded. CCALT was able to take on this transaction thanks to a willing landowner and generous support from both Great Outdoors Colorado and the Gates Family Foundation.

The objective of this report is to provide guidance for land trusts who choose to tackle the transfer of neglected/orphaned easements particularly from non-functioning organizations. The report documents the analysis that CCALT utilized to guide its decision-making and the step-by-step process employed to complete a successful transfer, amendment, and consolidation. The report builds upon two studies completed in 2016 by Colorado Open Lands and CCALT – *The Sun’ll Come Out Tomorrow, a Study of Neglected and Orphaned Easements* and *Accepting Conservation Easement Assignments, Guidance for Land Trusts*. Specifically, the report documents how to: (1) apply the frameworks developed in the two previous studies to a real world project; (2) deal with nuances not anticipated by the frameworks; (3) analyze legal standing to potentially force a transfer; and, (4) appropriately budget for taking on transfers of neglected/orphaned easements from non-functioning organizations.

## **Introduction**

This report builds upon the frameworks established in (1) *The Sun'll Come Out Tomorrow, a Study of Neglected and Orphaned Easements* which was issued in March 2016 (the "Study"); and (2) *Accepting Conservation Easement Assignments, Guidance for Land Trusts* (the "Guidance") which was issued in February 2016 (the "Guidance"). For purposes of this report we will utilize the generic term *Problem Easements* to describe Neglected and Orphaned Easements. Neglected<sup>1</sup> and Orphaned<sup>2</sup> Easements have unique definitions, which were developed in the Study. Those defined terms will be used as defined in the Study throughout this report when appropriate. We will also use the term *Troubled Holder(s)* to describe the holder of Problem Easements. Conservation easements are also referred to as easements throughout this report. This report is broken into three sections, (1) background; (2) Analysis; and, (3) Implementation. This report is intended to be a practicable application of the frameworks described in the Study and the Guidance and to guide easement holders through the process of analyzing problem easements and implementing repair mechanisms. Because this was the first practical application of the established frameworks for analyzing and repairing problem easements, slight modifications to the frameworks were necessary to improve functionality. We have made every attempt to document those modifications for the readers of this report. It should be expected that the frameworks will continue to evolve over time as more is learned about resolving the issues of Problem Easements and Troubled Holders.

## **Background**

### *Problem Easements – Colorado (Characteristics)*

Problem easements threaten the conservation community and individual conservation organizations. They pose a huge risk to eroding the trust of landowners, funders, and the public by creating doubt about the legitimacy of the fundamental premise that private land conservation is built upon – perpetuity. The Study identified six (6) characteristics that can indicate Troubled Holders, (1) Lack of legal standing (holder is not a qualified holder under law); (2) Non-accredited, non-certified (holder has not obtained Accreditation from the Land Trust Accreditation Commission and/or certification from the Colorado Division of Real Estate); (3) Lack of financial capability (holder does not have the financial resources necessary to fulfill long-term stewardship obligations); (4) Non-conservation mission (holder is an organization whose primary mission is something other than land conservation); (5) Small portfolio (holder holds very few easements or holds easements that are small in terms of size – typically less than 100 acres; and, (6) Lack of due diligence/monitoring (holder has failed to monitor easements within its portfolio and/or has a lack of due diligence and capacity to carry out their stewardship obligations).

### *Types of Easements that are Typically Neglected*

The Study also identified two types of easements that are typically neglected, (1) easements that "drop off the radar" of the easement's holder; and, (2) easements that are consciously avoided. Easements may drop off the radar of an easement holder because they are small, isolated, have minimal conservation value or don't align with the mission of the easement holder. Easements can be consciously avoided when the easement holder has issues with a landowner, when there are violations,

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<sup>1</sup> The Study defines a Neglected Easement as, "a conservation easement for which the holder of record exists, but fails to address, in a substantive manner, its obligations to the easement."

<sup>2</sup> The Study defines an Orphaned Easement as, "a conservation easement for which the holder of record no longer exists."

or when the easement holder is challenged with organizational management issues. The Study also found a key indicator to identifying a neglected easement was completion of annual monitoring duties. Typically, neglected easements have not been monitored regularly.

#### *Scope of the Problem in Colorado*

According to the Study, as of March 2016, there were 64 charitable easement holders in Colorado. Six of the 64 either did not have 501(c)(3) status and/or good standing with the Colorado Secretary of State. These six organizations hold 303 conservation easements. An additional 28 were non-certified<sup>3</sup> charitable organizations. According to the Study, these 28 organizations hold an additional 494 conservation easements.

#### *The Bluffs*

The Bluffs is a 2,268.11-acre property located approximately nine miles north of Byers, Colorado. The property is primarily comprised of native prairie grassland and riparian areas along the East and West Bijou Creeks. Historically, the property has predominately been used for pasturing of livestock. In the early 2000s the MacLennan family introduced several species of upland game birds (i.e. pheasants, chucker, quail, etc.) and started a private hunting club on the property to diversify their income stream. Because of its location (45 minutes east of Denver International Airport), vegetative composition, and management, the Bluffs quickly became one of the most attractive and successful upland game bird clubs in Colorado.

By the mid-2000s, the MacLennan family was exploring options to pay down debt and to assist in transferring the property to the next generation of family members. A member of the Bluffs hunting club introduced them to the concept of a conservation easement and offered to assist them in exploring easements as a way to pay down debt, transition the property to the next generation, and at the same time ensure that the property would never be developed. The plan, developed by Denver attorney and Noah Land Conservation a/k/a Colorado Natural Land Trust (“NLC” or “CNLT”) founder, Rod Atherton, had the family convey the property in 20 separate parcels (the “Parcels”) to 20 separate individuals/entities. The agreement was that the individuals/entities would place each Parcel in a conservation easement and then lease the Parcel back to the Bluffs to continue to be operated as a hunting club. Under this arrangement the MacLennans would be able to pay off debt on the Bluffs and other ranch land they owned, continue operating the hunting club, and ensure that the property they loved would never be developed. The 20 individuals/entities that participated would receive lucrative tax incentives and membership in the Bluffs hunting club. David Migoya, *Conservation Tax Breaks Used to Fund Luxuries for Rich*, Denver Post, Dec. 6, 2007. On December 11, 2006, nineteen (19) separate individuals/entities conveyed conservation easements – ranging from 90 acres to 243 acres – to NLC. These 19 easements encumbered 2,067 acres of the Bluffs. A subsequent easement was conveyed to NLC on December 28, 2007, conserving all 20 Parcels and bringing the total land conserved to 2,268.11 acres.

Subsequently, the Internal Revenue Service (IRS) and the Colorado Division of Real Estate (DRE) opened investigations into the transactions to determine whether appraisals of the values of the conservation

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<sup>3</sup> The Colorado Department of Regulatory Agencies, through the Division of Real Estate and the Conservation Easement Oversight Commission certify conservation easement holders. Only easements held by certified holders can qualify for a conservation easement tax credit.

easements on the Parcels were inflated. Margaret Jackson, *Easement Deals Lead to Inquiry*, Denver Post, Nov. 24, 2007. The result of the investigations led to the suspension of Rod Atherton's law license for one year; the appraiser's (William Milenski) license being revoked; Colorado tax credits earned on the donations being rejected; and, a settlement, which reduced the appraised value of the conservation easements, with the IRS. *Id.* All of the Parcels were subsequently reconveyed to the MacLennan family.

The MacLennans approached CCALT in 2012 about the possibility of transferring the 20 conservation easements held by NLC – which by this time had changed its name to Colorado Natural Land Trust (“CNLT”). CCALT's Board denied the initial transfer request in 2012 due to ongoing civil litigation surrounding the original transactions. The CCALT Board did indicate that they would be willing to entertain the transfer once all legal issues had been resolved. The legal issues were finally resolved in 2014; and, the CCALT Board approved a subsequent transfer request with conditions in January of 2015. The conditions placed on the approval were that staff complete a feasibility study to determine if it would be practical to transfer the conservation easements to CCALT, if it would be possible to unite the 20 conservation easements into a single conservation easement, and what the cost of doing so would be. The feasibility study was funded by grants from Great Outdoors Colorado (“GOCO”) and the Gates Family Foundation (“Gates”).

### **Analysis – Assessment and Feasibility**

The initial assessment and feasibility study was completed in March of 2015. The assessment was broken into two components, (1) Discovery, and (2) Analysis of Possible Repair Mechanisms. The term “Discovery” is intentionally used in this report whereas the Study uses the term “Identification” for this phase of the analysis. The slight modification was made because CNLT had previously been identified as a problem easement holder. In this instance, Discovery appears to be a better descriptor for this phase of the assessment.

#### ***Discovery***

There were three elements to discovery:

1. Original Grantor(s) and Current Landowner(s) interview(s). An interview with the original grantor of the conservation easement is important to determine the original intent and purpose of the conservation easement and its terms. It should be noted that it may not be possible to interview the original grantor, but every effort should be made.
2. Site visit(s). The initial site visit can be completed prior to obtaining the deed of conservation easement or the supporting due diligence. Conducting a site visit prior to obtaining or reviewing the easement or supporting due diligence can help avoid unnecessary costs. Goals of the initial site visit are (1) determine if the property has conservation value; (2) determine if the property and its conservation values align with the mission and values of the organization considering the transfer; and (3) determine if there are any industrial or obviously inconsistent uses of the property that might conflict with § 170(h) and create challenges for ongoing stewardship and enforcement. Additional site visits will be necessary following the review of the deed(s) of conservation easement, supporting due diligence and any easement stewardship files that may be obtained.
3. Document acquisition. Acquiring the deed(s) of conservation easement, supporting due diligence and easement stewardship files.

CCALT conducted multiple interviews with Russell MacLennan during the discovery phase. Russell is the current landowner of the Bluffs and while he was technically not the original grantor of the conservation

easements encumbering the Parcels, he was the individual largely responsible for the development of the terms and the person who best understood the purposes and original intent of the easements. In the case of the Bluffs, the original grantors were largely pawns of an easement promoter who took advantage of Colorado's unregulated conservation easement tax credit program for personal gain. Interviews with Mr. MacLennan clearly pointed to the fact that he was similarly taken advantage of by the same easement promoter. The interviews also helped CCALT determine that Mr. MacLennan's intent to conserve the property was authentic and his commitment to the conservation of the property was legitimate. Further, the interviews confirmed that CNLT was not fulfilling its obligations to steward and enforce the easements. Mr. MacLennan confirmed that no monitoring visits had been conducted by CNLT since the easements were originally conveyed in 2006 and 2007. Document acquisition further validated CNLT's failures to perform the duties of a conservation easement holder. No due diligence reports or stewardship files were ever provided to the landowner. CNLT also was unable to produce any of the supporting documents. Deeds of conservation easement were obtained through the Adams County Clerk and Recorder's office. Multiple site visits to the property by CCALT confirmed conservation value, consistency with CCALT's mission and values, and that there were no obvious major violations occurring.

### ***Analysis of Possible Repair Mechanisms***

The Study outlines four possible repair mechanisms for troubled easements, (1) Improve the holder; (2) Amendment; (3) Transfer; and (4) Extinguishment. There are additional options under each of the four main mechanisms, and the main mechanisms may also be combined. Because the landowner approached CCALT with a transfer request; and, CCALT's Discovery concluded that the easements had conservation value, were in alignment with the mission of CCALT, and had no obvious major ongoing violations, CCALT did not consider options for improving CNLT or extinguishment. CCALT did analyze the following repair mechanisms. It should be noted that CCALT analyzed the three repair mechanisms below both from a situation of a voluntary transfer from CNLT to CCALT and an involuntary transfer that required a court of competent jurisdiction to transfer the easements from CNLT to CCALT.

1. Transfer the easements to CCALT without amendment;
2. Transfer the easements to CCALT followed by an amendment to clarify vague terms and more closely align the easement with CCALT's current easement template<sup>4</sup>; and
3. Transfer the easements to CCALT followed by an amendment to consolidate the easements into a single easement that more closely aligned with CCALT's current easement template.

Of the possible repair mechanisms, CCALT rated each by difficulty. A voluntary transfer without amendment was determined to be the least difficult and least expensive option while an involuntary transfer with consolidation was determined to be the most difficult, most expensive, and riskiest. CCALT also rated each of the repair mechanisms by desirability. Desirability was defined as all things being equal what would be the most desirable outcome. Using this rating system, the voluntary transfer and consolidation was rated as the most desirable option. Finding the right balance between complexity, risk, expense, and desirability was a critical component to CCALT's analysis. CCALT determined that the most appropriate outcome was a transfer and consolidation of easements either in a voluntary or involuntary form. The other alternatives were determined not to be suitable for CCALT or the property. This conclusion was based on three factors, (1) the characteristics of the property; (2) the landowner's

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<sup>4</sup> Amending a deed of conservation easement into a new deed of conservation easement template is inherently challenging. The drafter must preserve the original intent and purpose of the original deed of conservation easement and weave any special terms into the new template.

intent for the property and reasoning for conserving the property; and (3) CCALT's internal board approved project criteria. At the time of this analysis, CCALT's minimum acreage standards for properties without irrigation was 640 acres. The Bluffs is a 2,268 acre property located in eastern Colorado that is used primarily for hunting and livestock grazing. These uses both require larger contiguous acre tracts than the current configuration of 90 to 220-acre parcels. The landowner's intent was always to conserve the property and ensure that it would remain available for agriculture and hunting. Consequently, it was evident that the easements needed to be consolidated to conserve the property's conservation values, achieve the landowner's goals, and comply with CCALT's policies.

#### *Easement Analysis*

CCALT's analysis utilized the methodology provided in the Guidance. CCALT analyzed all 20 conservation easements that encumbered the Bluffs. For the most part each easement was identical in terms with only slight modifications to account for existing structures and the unique characteristics of each parcel. Interestingly, the deeds were drafted using an easement template very similar to an older version of CCALT's easement template. Specifically, CCALT concluded that:

1. For the most part, the deeds of conservation easement adequately protected the conservation values of the Parcels if the conservation easements were enforced;
  - a. The terms contained in the deeds of conservation easement were for the most part clear and enforceable;
  - b. The conservation values would largely remain intact if the reserved rights were exercised and the protection of the Parcels would meet CCALT's mission;
2. The deeds of conservation easement did not contain terms that conflicted with the mission of CCALT;
3. The deeds of conservation easement did not contain terms that were difficult or costly to monitor, steward or enforce; and
4. Each deed of conservation easement contained a term addressing transfers and amendment.

After reviewing the deeds and conducting another site visit, CCALT concluded that there were no violations of the deeds of conservation easement.

#### *Consolidation Analysis*

Consolidation was not a tool specifically discussed in the Study but should be a tool that is considered in the instance where a single owner owns multiple contiguous parcels encumbered by Problem Easements. Consolidation can increase conservation value and stewardship efficiency while maintaining the original stated purpose and intent of the easements. In certain instances it may also further reduce the value of a conserved property, generating donative value which could qualify for additional tax incentives. Consolidation is a process of amendment so the principles and procedures of amending conservation easements outlined in the Study, the Guidance, as well as the organization's internal amendment policy should be followed.

At the assessment and feasibility stage, CCALT identified the following issues that would need to be addressed to facilitate consolidation of the 20 deeds of conservation easement:

- Landowner willingness;
- Existing holder willingness;
- Ability to amend the deeds of conservation easement and consolidate them into a single easement;
- Structure of the transaction;

- Due diligence needs; and
- Costs.

CCALT's analysis concluded: (1) that the landowner was willing to consolidate the easements; (2) CNLT would likely be eager to assign the easements; (3) the deeds of conservation easement included an amendment clause and could be amended into a single easement while maintaining the original intent of the deeds of conservation easement, remaining consistent with the purposes of the deeds of conservation easement, complying with § 170(h) of the United States Internal Revenue Code, the Treasury Regulations and Colorado Revised Statutes §§ 38-30.5-101, et seq.; and (4) that attempting to seek additional tax credits for consolidating the easements and effectively eliminating additional division rights was not worth the added complexity or expense; and (5) most of the due diligence would need to be recreated.

### *Transfer Analysis*

The first component of the transfer analysis was to review CCALT's transfer policy. The second component was to analyze the status of the litigation related to the original structure of the transaction. The third and final component sought to determine if the transfer would be voluntary or involuntary. Research and previous efforts to contact CNLT showed that CNLT was not in good standing with the Colorado Secretary of State and was generally unresponsive. Further, the analysis looked at the question of, if an involuntary transfer were necessary would a court determine that there were equitable grounds to remove and replace CNLT as the holder of the conservation easement and would CCALT and/or the landowner have standing to request a transfer by a court? A more detailed summary of these issues is provided below.

### CCALT's Transfer Policy

A review of CCALT's Transfer Policy concluded that the CCALT Board would need to make certain exceptions to the policy or amend the policy to pursue the transfer. CCALT's Board decided to amend its transfer policy to pursue this transfer. The decision to amend the policy was made after a lengthy discussion and a review of the feasibility study that is discussed later in this report. The amendment that was made to the Transfer Policy was to remove a prohibition against accepting transfers/assignments from entities that were not certified easement holders as certified by the Colorado Division of Real Estate. A copy of CCALT's revised Transfer Policy is attached as Appendix A.

### Litigation Status

CCALT conducted an inquiry to determine that there was no ongoing litigation or audits and that the likelihood of potential future litigation or audits stemming from the original transactions was extremely low. Undertaking any transaction that is undergoing litigation/audit or is under the threat of litigation/audit is not prudent. CCALT's inquiry included discussions with the landowner, landowner's attorney, and the landowner's financial and tax advisors. The landowner also warranted that all litigation/audit matters stemming from the original easement transactions had been resolved.

### Voluntary or Involuntary Transfer

In order to complete a voluntary transfer on which CCALT could obtain a title policy, CNLT was required to remedy its delinquent status with the Secretary of State and pass a resolution of its Board of Directors to approve the transfer of the easements to CCALT. Having drafted an assignment and amended and restated deed of conservation easement, CCALT and the landowner reached out to CNLT in September of 2015 to discuss assigning the easements to CCALT. During that meeting, CNLT representatives stated that they were not willing to voluntarily transfer the 20 easements encumbering the Bluffs unless CCALT

agreed to accept an assignment of all of CNLT's easement holdings. They provided two reasons: (1) they contended that the CNLT Board of Directors had voted to dissolve; and, (2) they believed that by transferring only the 20 Bluffs easements that they would violate their 501(c)(3) status by providing preference to one landowner over the other landowners whose easements they held. Following that meeting, CCALT hired Ed Ramey, a partner at Tierney Lawrence, LLP, to develop a litigation strategy for an involuntary transfer. Mr. Ramey's analysis focused on two principle questions: (1) were there equitable grounds for asking a court to remove and replace CNLT as the holder of the easements?; and (2) did the landowner, CCALT or some other party have standing to make the request of the court to transfer the easements?.

Mr. Ramey concluded that there were likely equitable grounds to ask a court to remove and replace CNLT as the holder of the easements. His opinion was based on § 37 of the Restatement 3d of Trusts that states that a court may remove a trustee of a trust upon petition of a beneficiary or "other interested party" for a variety of reasons (unfitness, dishonesty, indifference, incurable breakdown of communications with beneficiaries, etc.) and § 93 of the Restatement 3d of Trusts, which states that a trustee's failure to adequately further the trust's charitable purpose would constitute a "breach of trust" in the context of a charitable trust. Mr. Ramey believed that in an instance where the trustee/grantee (in this case CNLT) was unlikely to fight the petition (which it was assumed would be the case given CNLT's lack of resources and strong desire to avoid additional bad press) and the trustee/grantee had a less than commendable track record in fulfilling their obligations to the trust (which CCALT and the landowner could support through affidavits testifying to that fact) that a good case could be made for requesting a transfer.

The more challenging question was determining whether or not CCALT and/or the landowner had standing to request that a court transfer the 20 conservation easements. Assessing standing was a crucial question in determining the feasibility of an involuntary transfer of the conservation easements. Without standing any potential case would be dismissed on procedural grounds before the merits of the case were considered, and CCALT and/or the landowner would be unable to request that a court transfer the conservation easements. Over the years, case law has established that the constitutional minimum for standing has three elements: (1) injury in fact, (2) a causal relationship between the injury and an action or planned action, and (3) a likelihood that the injury can be remedied by a court. Lujan v. Defenders of Wildlife, 504 US 555, 560-561 (1992). The injury in fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citing Sierra Club v. Morton, 405 U.S. 727, 740-741, n.16 (1972) and Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). To demonstrate a causal connection "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)). And finally, the chance that a court can redress the injury with a favorable decision must be likely as opposed to "merely 'speculative'". *Id.* at 561. The party invoking jurisdiction must demonstrate these three elements to the court. *Id.* Former Supreme Court Justice Antonin Scalia argued that the limits on injury in fact were established as a core element of the separation of powers that prevented the "overjudicialization of the processes of self-governance." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, XVII Suffolk U. L. Rev. 881, 882-84 (1983) (discussing the elements of standing). To determine standing in this instance, CCALT and Mr. Ramey turned to Colorado's easement enabling statute and § 94 of the Restatement 3d of Trusts.

The legal question of standing was particularly challenging in this situation because in the context of a “charitable trust”, standing to make a request such as removing and replacing a trustee/grantee is typically the responsibility of the Attorney General, the grantor of the conservation easement, or “another person who has special interest in the enforcement of the trust.” Restatement (Third) of Trusts § 94. Colorado’s easement enabling statute provided some clarity related to standing for Mr. MacLennan. The enabling statute allows for court actions to protect the interests represented by a conservation easement to be brought by “the grantor or the owner of the easement.” (Emphasis added). Colorado Revised Statutes § 38-30.5-108(2). Since Mr. MacLennan only granted one of the 20 conservation easements (the easement on Parcel 4), he could not gain standing as the grantor for the remaining 19 conservation easements. It was unlikely that CCALT could get all 19 other original grantors to file a petition to transfer the easements so the question of standing largely focused on the special interest standing theory and Colorado’s conservation easement enabling statute both of which appeared to provide Mr. MacLennan standing as owner of the property encumbered by the easements.

The more challenging standing questions that CCALT – through Mr. Ramey – analyzed included: (1) could CCALT as a member of the conservation community claim a special interest in the enforcement of the easements since CNLT’s failure to enforce its easements could have negative impacts on CCALT and the broader conservation movement?; (2) could the Colorado Coalition of Land Trusts (CCLT) make a special interest standing case given its representation of member land trusts and government open space programs?; (3) could neighboring landowners gain standing through the special interest standing theory; and/or (4) does the grantor or its successor have standing to enforce the conservation easement? The question of whether CCALT or another land trust would have special interest standing is unlikely based on the limitations on injury in fact. Specifically, the difficulty in proving that an injury was more than conjectural or hypothetical. Whether special interest standing could be afforded to neighboring landowners has not been addressed by a Colorado court. In Maine in Woodworth v. Chebeague & Cumberland Land Trust, 2015 Me. Super. LEXIS 84, the Maine Superior Court sharply circumscribes who has standing to enforce conservation easements in Maine strongly implying that Maine’s conservation easement enabling act does not confer standing on neighbors or the public at large. The Maine easement enabling act has several critical distinctions. The Uniform Conservation Easement Act explicitly allows an action affecting a conservation easement to be brought by grantors, grantees, persons with third-party enforcement rights, and any person authorized by other law. Any person authorized by other law is generally interpreted as including at least the Attorney General and special interest standing under common law. However, when Maine adopted the Uniform Conservation Easement Act, the phrase “a person authorized by other law” was omitted and replaced with a reference to the Attorney General; and the trial court held that this modification eliminated special interest standing in Maine for enforcement of conservation easements. In Colorado, it would be easier to argue that the enabling act was not intended to be exclusive, an interpretation that would eliminate all forms of common law standing potentially including the Attorney General’s, but no court decisions have addressed this question in Colorado. A court could question whether Colorado’s statute, like Maine’s, allows for special interest standing at all. However, Colorado’s statute pre-dates the Uniform Conservation Easement Act, while Maine specifically adopted the Uniform Conservation Easement Act and modified its language suggesting to the court that there was legislative intent to eliminate special interest standing. Further, as demonstrated by the differences between Colorado and Maine, it will be critical for a land trust assessing its potential to claim standing to pay careful attention to the appropriate state statute and existing case law as standing will likely vary across jurisdictions.

Colorado's statute allows for actions to be brought by the grantor or owner of the easement. In Colorado, a landowner should be able to take the position that they are a successor in interest to the original grantor and they should have standing to bring an action against the grantee, or their successor with regard to compliance with the terms of a conservation easement. More specifically the Bluffs Deed of Conservation Easements all included a provision that if "Grantee ever ceases to exist or no longer qualifies under federal or state law, a court with jurisdiction shall transfer the Conservation Easement" to another organization. A credible case can be made that a charitable organization that does not monitor its conservation easements for a period of ten years, and has no staff and no budget and several hundred conservation easements, is no longer a "qualified organization" under the Treasury Regulations, which require a commitment and the resources to enforce its conservation easements.

A word of caution is necessary here to encourage land trusts, particularly in Colorado, that are analyzing the costs and benefits of applying the charitable trust doctrine and claiming special interest standing to think about the consequences (both intended and unintended) of not just the particular involuntary transfer but of the broader precedent that could be established through application of the charitable trust doctrine. Allowing third parties standing to enforce conservation easements could open up land trusts to an increased risk of lawsuits over the stewardship of conservation easements. An application of the charitable trust doctrine could expand beyond transfers of Problem Easements held by Troubled Holders to amendments that could require easement holders to seek approval from the Attorney General for any amendment.

### **Feasibility**

CCALT's assessment concluded that a voluntary transfer and consolidation of the 20 deeds of conservation easement with CNLT's cooperation and an involuntary transfer and consolidation of the deeds of conservation easement were both feasible.

### **Implementation**

#### *CCALT Board Approval*

A crucial first step in the implementation process was CCALT's Board approval for moving from feasibility into implementation. CCALT presented the findings of the feasibility study and its analysis to its Board, who reviewed the study and approved moving into the implementation phase. CCALT staff and legal counsel provided analysis for both a voluntary and involuntary transfer. Both approaches were addressed with the Board to facilitate more efficient management of the transaction. Once the Board approved proceeding with the transfer, CCALT drafted an option contract between the landowner and CCALT that outlined the structure of the transaction and required certain performance measures. CCALT required the option as a safeguard to ensure the transaction would proceed according to the CCALT Board of Directors' direction and that the 20 conservation easements would be consolidated once they were assigned.

#### *CNLT Cooperation*

CCALT reached out to CNLT a second time and offered to provide funding and support to get them back in good standing with the Secretary of State. It was determined that paying for the costs of reforming

CNLT would likely be cheaper and more efficient than going to court and attempting to compel a transfer. Between the first meeting in September of 2015 and our second discussion in early 2016, CNLT obtained legal counsel. CNLT's legal counsel, Mr. John Zakhem, was willing to work with CCALT to transfer the 20 easements encumbering the Parcels. Mr. Zakhem spent considerable time and effort reforming CNLT and recruited an entirely new board of directors for the organization. With the approval of the CCALT Board, an option in place, and a cooperative CNLT, CCALT moved into the due diligence phase of the implementation.

#### *Due Diligence*

CNLT was unable to produce any of the original due diligence so all new documents had to be created including a mineral remoteness assessment and a baseline/present conditions report. Updated title was obtained and extensively reviewed. CCALT project staff and legal counsel worked with the title company to determine what needed to occur in order for CCALT to receive an adequate title policy that insured that Russell MacLennan was the owner of the property with the ability to grant the Amended and Restated Deed of Conservation Easement and that CCALT was receiving valid conservation easement interests from CNLT. CCALT and the title company discussed having two title commitments and two title policies- one insuring Russell's ownership and one insuring the validity of the conservation easements. Ultimately, this was determined to be unnecessary and the title company issued a single title commitment and title policy. During the feasibility stage, CCALT consulted with Mr. Kevin Shea of Shea Appraisal Company about the merits of completing an updated appraisal to consolidate the 20 conservation easements into a single conservation easement and using any tax credits earned to reduce the costs of the transfer and consolidation to Mr. MacLennan. While Mr. Shea indicated that there would likely be value created by the consolidation, he felt that the hassle, expense and complexity of the assignment was not worth any potential gain from tax credits generated from the transaction. Letter from Kevin Shea, President, Shea Appraisal Company, to Chris West, Executive Director, Colorado Cattlemen's Agricultural Land Trust (Mar. 15, 2015) (on file with the Colorado Cattlemen's Agricultural Land Trust).

#### *Assignment and Easement Negotiation and Drafting*

While working on recreating the due diligence, CCALT staff also began working on drafting the assignment and the amended and restated deed of conservation easement that would consolidate the 20 deeds of conservation easement. Mr. MacLennan engaged Bill Silberstein from Kaplan Kirsch and Rockwell to represent his interests in this matter. CCALT felt that it was important that Mr. MacLennan be represented by a trusted landowner advocate who had experience in conservation easements and tax law. Mr. Silberstein worked closely with CCALT staff to develop a consolidated easement that, (1) preserved the original intent of the 20 existing easements; (2) did not provide the landowner with any impermissible private benefit; and (3) brought additional clarity to terms necessary to protect the identified conservation values. CCALT relied heavily on its amendment policy (attached as appendix B) to draft the consolidated easement. Drafting the assignment was a relatively simple drafting exercise and largely followed CCALT's model assignment (attached as appendix C). Drafts were shared with CNLT and Mr. Zakhem for their review throughout the process.

#### *Closing Process*

CCALT structured the closing so that the transfer of the 20 conservation easements from CNLT to CCALT would occur immediately prior to the consolidation of the easements through an amendment and

restatement. The title company (Land Title) required that the CNLT Board of Directors adopt a resolution agreeing to the transfer. With the help of Mr. Zakhem, the CNLT Board was reconstituted and adopted the resolution to assign the 20 Bluffs easements to CCALT in October of 2016 (attached as appendix D). A review of title indicated that several loans had to be released or subordinated prior to the consolidation. CCALT staff worked with the landowner and the various lenders to obtain the necessary releases, and a consent and subordination.

#### Costs

CCALT estimated the total cost of completing the transfer and consolidation of the 20 easements that encumbered the Bluffs to be somewhere between \$100,000 and \$150,000 if CNLT agreed to cooperate. If CNLT did not cooperate and CCALT forced an involuntary transfer, CCALT estimated that the total cost would be somewhere between \$200,000 and \$300,000. Please note that these costs assumed that CCALT covered all costs of the transaction including all of the landowner's costs and all of CNLT's costs including attorneys' fees and stewardship endowments. While CCALT was willing to cover all of the landowner's costs in this instance in order to develop a process for the assignment and rehabilitation of these easements, covering a landowner's costs is likely to be the exception rather than the rule going forward.

The total cost of this transaction was: **\$133,705**. Costs broke down in the following manner:

#### Legal Costs:

CCALT:	\$25,070
Landowner:	\$12,294
CNLT:	\$50,000 <sup>5</sup>
Due Diligence Production:	\$4,969
Staff Time (included transactional contractor):	\$18,282
Closing and Other Expenses:	\$3,090
Stewardship Endowment:	\$20,000

#### Lesson learned

CCALT identified the following lessons learned from this transaction:

1. Put together the right team to complete the project. Having the right team was critical to the success of this transaction. CCALT hired experienced outside contractors and legal experts to assist with this transaction. Having experienced legal experts for both the land trust and landowner as well as an experienced transaction manager is highly recommended for these types of transactions given their complexity. A good title company is also critical. The core team that completed the Bluffs transfer and consolidation was comprised of the following:
  - Marty Zeller, Conservation Partners, Inc. (Contractor)
  - Bill Silberstein, Kaplan Kirsch and Rockwell (Landowner's attorney)
  - Larry Kueter, The Law Office of Lawrence R. Kueter (CCALT attorney - transactions)
  - Ed Ramey, Tierney Lawrence, LLP (CCALT attorney – litigation)
  - Molly Fales, CCALT Director of Conservation Transactions

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<sup>5</sup> This figure reflects several one-time expenses that were incurred to bring CNLT back into operation. Legal fees for transactions where the entity is in good standing with the Secretary of State and has a functioning board would likely be much lower. Additionally, legal fees for future transactions with CNLT will likely be much less.

- Chris West, Former CCALT Executive Director
  - Erik Glenn, CCALT Executive Director
  - Megan Knott, CCALT Stewardship Director
  - Kevin Shea, Shea Appraisal Company
  - Land Title Guarantee Company
2. Engage with the Troubled Holder early on in the process to gauge how willing to cooperate they will be and don't expect that they will be cooperative even if they are non-functioning. While CCALT expected that CNLT might be non-responsive, it was a complete surprise that they were initially not willing to cooperate.
  3. Be willing to spend money to assist the holder. This transaction was completed because CCALT was willing (thanks to the funding partners) to cover the costs of reforming CNLT so that they could participate in the transfer and litigation could be avoided. Budgeting for a transaction similar to the Bluffs should include costs for assisting the holder. While this may seem like an unnecessary expense, it is likely to cost significantly less than litigation.
  4. Be flexible and creative. Like any transaction, you will encounter bumps along the way. It is essential to remain flexible and be creative when looking for solutions. A good example of flexibility is when CCALT staff drove to a mortgage holder's home and then drove the mortgage holder to a notary in order to obtain a release the week before closing.
  5. Be Empathetic. Remember that the landowners probably do not know the terms of their easements, they will likely never have been through a monitoring visit, and they will likely have undergone an audit from the IRS and a review by the Colorado Department of Revenue.

### **Acknowledgments**

CCALT would like to acknowledge the following individuals and organizations that came together to make this project a success.

- Marty Zeller, Conservation Partners, Inc.
- Bill Silberstein, Kaplan Kirsch and Rockwell
- Larry Kueter, The Law Office of Lawrence R. Kueter
- Ed Ramey, Tierney Lawrence, LLP
- Molly Fales, CCALT Director of Conservation Transactions
- Chris West, Former CCALT Executive Director
- Erik Glenn, CCALT Executive Director
- Megan Knott, CCALT Stewardship Director
- Kevin Shea, Shea Appraisal Company
- Land Title Guarantee Company
- John Zakhem, Zakhem Law, LLC
- Russell MacLennan
- Ashton Lamb
- Brad Corey
- Don Graham, Headwaters Exploration
- Great Outdoors Colorado
- The Gates Family Foundation

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## **Appendix A – CCALT’s Transfer Policy (as of December 2016)**

### **I. Purpose Statement:**

The Colorado Cattlemen’s Agricultural Land Trust (“CCALT”) is a qualified organization under Section 107(h) of the Internal Revenue Code of 1986, as amended, and is authorized to acquire and hold conservation easements under Colorado law. CCALT is also a state certified nonprofit conservation easement holder, having been certified by the Colorado Division of Real Estate.

The primary objective of CCALT’s conservation easement work is the acquisition of permanent conservation easements that protect viable agricultural properties that are not encumbered by a deed of conservation easement. It is anticipated that from time to time CCALT will be presented with the question of whether to acquire permanent conservation easements that protect viable agricultural lands through assignments from other entities. It is also anticipated that there may be instances where it is prudent for CCALT to assign conservation easements to other qualified and state certified entities that hold conservation easements. This policy has been developed to outline procedures and considerations for the assignment of conservation easements from CCALT to other qualified organizations that are state certified<sup>6</sup> entities, to affirmatively state CCALT’s criteria for considering the assignment of permanent conservation easements held by other entities, and to outline the procedures for possible acquisition through assignment.

### **II. Policy:**

#### **A. Criteria for Considering Assignments (Disposition<sup>7</sup>):**

CCALT may consider assigning a conservation easement to another qualified organization that is a state certified conservation easement holding entity under one or more of the following circumstances. Prior to undertaking any formal action related to an assignment of a conservation easement interest held by CCALT, CCALT shall take all reasonable measures to acquire the written consent of the current landowner of the property encumbered by the conservation easement that is being considered for assignment. Objection to an assignment by the current landowner shall not be a prohibition on assigning a conservation easement under this policy, but shall be a factor to be weighed heavily by CCALT. Furthermore, in no instance shall CCALT sell, assign, transfer or otherwise convey any interest in a conservation easement to a governmental entity without the written consent of the landowner. This policy must be read along with the terms of the deed of conservation easement and must be applied in a matter that is consistent with the terms of the deed of conservation easement. In instances of conflict, the terms of the deed of conservation easement, as they pertain to assignment, shall control.

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<sup>6</sup> It is acknowledged that not all states that border Colorado require certification of conservation easement holders. It is further acknowledged that in rare circumstances CCALT holds conservation easements in bordering states. The state certification requirement is waived if the conservation easement that is being assigned is located in a neighboring state and that conservation easement is being assigned to an entity that operates in that state and that state does not require certification of conservation easement holders.

<sup>7</sup> CCALT shall maintain accurate stewardship files in accordance with CCALT’s Conservation Easement Stewardship, Monitoring, and Enforcement Policy and shall manage the Stewardship Endowment Fund and Legal Defense Fund in accordance with CCALT’s Distribution and Investment Policies to ensure that an assignment of a conservation easement to another qualified organization can be completed in accordance with this policy.

1. *Criteria*

- a. Due to an unanticipated change in circumstances, the property no longer meets the conservation goals of CCALT, and there is a more appropriate conservation easement holding entity willing to assume the perpetual obligations associated with the conservation easement.
- b. The conservation easement was acquired with the intent to assign to another qualified and state certified entity.
- c. The property provides a link with conservation land held by another entity, or another entity has property that links more closely with the property and the other entity is willing to assume the perpetual obligations associated with the conservation easement and the other entity is a qualified and state certified (where required) conservation easement holder.
- d. There is a more appropriate conservation easement holding entity willing to assume the perpetual obligations associated with the conservation easement.
- e. The landowner requests an assignment.

**B. Criteria for Considering Assignments (Acquisition<sup>8</sup>):**

Assignments of permanent conservation easements may be considered by CCALT, if and only if, the following criteria are met. In its sole and absolute discretion, the CCALT Board of Directors (the “Board”) may waive certain criteria for considering assignments of permanent conservation easements when such waiver is determined to further the mission of CCALT. This Policy must be read in conjunction with CCALT’s Criteria for Reviewing Land Protection Projects Policy (“CRLPP”).

1. *Criteria*

- a. Protection of the property furthers the mission of CCALT
- b. The property satisfies the criteria set forth in the CRLPP (as of the date of the assignment request).
- c. The conservation easement encumbering the property adequately protects the property’s conservation values as enumerated in the deed of conservation easement and documented in the baseline inventory report
- d. No violations (current or potential) of the terms of deed of conservation easement exist. Any past violations will be researched and assessed for future stewardship risks to CCALT.
- e. No lawsuits involving the conservation easement or the property that may have any potential to affect CCALT’s ability to enforce the conservation easement or which could have financial or political ramifications for CCALT in the future exist.

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<sup>8</sup> An amendment to the terms of the existing deed of conservation easement which encumbers a property considered for acquisition through assignment may be contemplated when (1) CCALT has determined through an analysis of (a) the property; (b) the existing conservation easement; and (c) the supporting documents that the existing deed of conservation easement no longer adequately protects the property’s conservation values as enumerated in the deed of conservation easement and documented in the baseline inventory report; (2) CCALT has determined that the terms of the deed of conservation easement either (a) conflict with; or (b) may at some point in the future conflict with the criteria for conservation projects set forth in the CRLPP; or (3) CCALT has determined that there is the opportunity for greater protection of the property’s conservation values through an amendment. Any amendments must be completed in compliance with CCALT’s Conservation Easement Amendment Policy and the Land Trust Alliance’s Standards and Practices for amending conservation easements.

- f. The property encumbered by the deed of conservation easement is not involved in any ongoing condemnation proceeding. Any potential threat of condemnation will be researched and assessed for future risks to CCALT's perpetual stewardship obligations.
- g. The deed of conservation easement and all due diligence related to the conservation easement transaction, monitoring reports, and copies of all memos, interpretations, or communications between the holder of the Conservation Easement and the landowner regarding stewardship of the Conservation Easement or any violation of the terms of the Conservation Easement shall be provided to CCALT for review. Due diligence reports shall include at a minimum the following: surveys (if available), existing title work and policy, environmental reports (if available), baseline documentation and present condition reports, and mineral remoteness assessment reports (if available). CCALT may require a current title commitment and/or title policy as a condition of assignment. CCALT may require other documents related to the conservation easement transaction be provided for review.
- h. An agreement outlining the terms and conditions of the assignment, including obligations to pay certain expenses incurred by CCALT and other third party contractors, shall be executed between CCALT and the individual/entity seeking the assignment. Specific expenses that will be required to be paid to CCALT include, but are not limited to, (1) a stewardship endowment contribution in an amount necessary to carry out the perpetual stewardship obligations of the property; (2) a legal defense fund contribution; (3) a project coordination fee; (4) legal expenses; and (5) additional due diligence reports required by CCALT. The specific amount of the required fees shall be determined by CCALT in its sole and absolute discretion.
- i. Written consent to the assignment of the current landowner, holder, and any funding entities (if funding was used to purchase the conservation easement) is provided to CCALT.
- j. The assignment to CCALT conforms to the original purpose of the deed of conservation easement.

**C. Procedures for Disposition through Assignment<sup>9</sup>:**

CCALT has established the following procedures for transferring conservation easements through assignment.

1. Upon receiving a request for assignment<sup>10</sup> or upon determination by CCALT staff ("Staff") that assignment is prudent, Staff will, (1) determine the reason(s) for the

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<sup>9</sup> CCALT will file all relevant forms required by state and/or federal law related to the assignment of a conservation easement.

<sup>10</sup> If the assignment request is initiated by the landowner, CCALT expects that all of its fees, including but not limited to, project coordination fees, legal fees and transfer fees will be paid by the landowner or the entity requesting the assignment.

assignment request; (2) identify a qualified organization that is a state certified entity that is willing to assume the perpetual stewardship obligations associated with the conservation easement; (3) notify any and all third parties that have an interest in the conservation easement; (4) prepare an assignment request for the Lands Committee of the Board of Directors; and (5) prepare an analysis of the benefits, costs, and risks of the assignment (the "Assignment Report"). The analysis shall specifically include a consideration of the capacity of the Staff to complete the assignment.

2. Staff shall present an assignment request and the Assignment Report along with a recommendation on whether or not it is prudent to complete the assignment to the Lands Committee for consideration.
3. The Lands Committee shall consider the analysis and recommendation from Staff and make a formal recommendation on the assignment request to the Board.
4. The Board shall consider the findings of the Staff and the Lands Committee and formally direct Staff (through a two-thirds (2/3) vote) on whether or not to proceed with the assignment.
5. If the Board determines that it is prudent to assign a conservation easement to another qualified organization that is a state certified conservation easement holder, the Staff shall prepare and execute an agreement (the "Disposition Agreement") with the landowner, required third parties, and the qualified and state certified conservation easement holder that will accept the perpetual stewardship obligation associated with the conservation easement. The Disposition Agreement shall outline and detail all costs associated with the assignment and the obligations and expectations of each party to the assignment.
6. Upon Board approval of an assignment, the assignment shall be executed and consented to by all necessary parties and recorded in the records of the county/ies where the property is located and CCALT shall transfer (1) the full stewardship endowment paid as part of the original conservation transaction (2) the full legal defense fund contribution paid as part of the original conservation transaction (less any funds expended on the defense of the conservation easement); and (3) all files associated with the property and the conservation easement including but not limited to, a copy of the permanent file, all monitoring reports, the baseline, and any other documents requested by the qualified and state certified conservation holding entity that received the conservation easement. CCALT shall also keep a copy of all files associated with the property and the conservation easement including all files related to the assignment.

**D. Procedures for Acquisition through Assignment:**

CCALT has established the following procedures for acquiring conservation easements through assignment.

1. Upon receiving a request for assignment<sup>11</sup>, Staff shall evaluate the request using this policy and the CRLPP and make a determination whether or not to formally consider the assignment. Formal consideration of the assignment request must be approved by the Board.
  - a. Upon determination by the Staff that an assignment request should be formally considered the Staff shall request authority from the Board to conduct a thorough analysis of the assignment. The request from Staff shall initially be considered by the Lands Committee. The Lands Committee shall make a recommendation on Staff's request to the Board. The Board (through a formal vote) shall direct Staff whether or not to conduct a thorough analysis of the assignment using the procedures outlined in this policy.
  - b. Should the Board determine that the assignment request does not warrant further analysis the Board shall, through a formal vote, deny the assignment request.
  - c. Should the Board determine that the assignment request does warrant further analysis the Board shall, through a formal vote, authorize the Staff to (1) enter into an agreement with the individual/entity requesting the assignment outlining the process and procedures CCALT will utilize to evaluate the assignment request and the costs and the party responsible for assuming any costs associated with evaluating and completing the assignment request; and (2) expend the resources necessary to conduct a thorough analysis of the assignment using the procedures outlined in this policy.
2. Upon receiving Board granted authority to conduct a thorough analysis of the assignment, Staff shall prepare and execute an agreement (the "Assignment Agreement") with the landowner and/or holder of the conservation easement and any required third parties outlining and detailing all costs associated with the assignment and the obligations and expectations of each party to the assignment. A Project Coordination Fee may be required to be paid upon execution of the Assignment Agreement. The amount and timing of the Project Coordination Fee shall be determined by CCALT in its sole and absolute discretion.
3. Upon execution of the Assignment Agreement and payment of the Project Coordination Fee, Staff shall proceed with conducting a thorough analysis of the assignment request. The analysis shall be based on evaluating the project with the Criteria for considering Assignments (Acquisition) detailed above and shall include a site visit to the property and an interview(s) with the landowner(s) and the current easement holding entity (if such interviews are possible). The analysis

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<sup>11</sup> If the assignment request is initiated by a landowner whose easement is currently held by a "functioning conservation organization", the holder of the conservation easement must consent in writing to the initial assignment request. For purposes of this policy, a functioning conservation organization shall be defined as a qualified and state certified conservation easement holding entity.

shall evaluate benefits, costs, risks, organizational capacity, and any other factors the Board or Staff determine to be relevant to the analysis.

4. The completed analysis shall be presented to the Lands Committee along with a recommendation from Staff on whether or not to accept the assignment. Should Staff recommend accepting the assignment, Staff shall prepare a formal Assignment of Interest and submit said Assignment of Interest to the Lands Committee for review.
5. The Lands Committee shall consider the analysis and recommendation from Staff and prepare a formal recommendation to the Board.
6. The Board shall consider the findings of the Staff and the Lands Committee and formally direct the Staff (through a vote) on whether or not to accept the assignment. The Board's decision shall be based on the findings of the Staff and the Lands Committee, this policy, the CRLPP and any other information the Board determines to be relevant to its decision-making process.
7. Upon Board approval of an assignment, the assignment shall be executed and consented to by all necessary parties and recorded in the records of the county/ies where the property is located and all fees outlined in the Assignment Agreement shall be paid to CCALT.

## **Appendix B – CCALT’s Amendment Policy (as of December 2016)**

### **I. Purpose Statement:**

The Colorado Cattlemen's Agricultural Land Trust (“CCALT”) acquires and holds conservation easements on properties in order to protect, in perpetuity, agricultural, wildlife, scenic, and open space values for the benefit of present and future generations.

Because CCALT's acquisitions are achieved through voluntary agreements with landowners, the success of the program depends upon the confidence of these landowners and the general public that CCALT will meet its obligation to monitor and enforce the agreements. This confidence would be seriously eroded if CCALT were to allow indiscriminate modification of its conservation easements.

Furthermore, amendments to conservation easements can raise serious problems with the U.S. Internal Revenue Service and the State of Colorado. CCALT's tax-exempt status as an organization is jeopardized if easements are amended gratuitously. An easement donor who has claimed a charitable deduction for a gift of an easement may lose that deduction if the easement is amended. Any amendment which results in an increase in property value or other benefit to the landowner or other private party may create "private inurement," which is forbidden by the U.S. tax code.

Therefore, it is the policy of CCALT to hold and enforce its conservation easements as written. CCALT will permit amendments to conservation easements only in exceptional circumstances. Any request for an amendment will be individually reviewed according to the procedures set forth in this Policy Statement, and will be acted upon by the Board of Directors (the “Board”).

Any conservation easement amendment shall meet the following requirements.

1. The Amendment will not change the terms of the conservation easement in a manner that provides a private inurement or impermissible private benefit as those terms are defined under law.
2. The Amendment will result in either a positive or net neutral conservation outcome and those outcomes shall be clearly documented in materials provided to the Board prior to approval.
3. The requested modification is consistent with CCALT’s mission, the conservation purpose(s) of the original conservation easement and the intent of the original Grantor; shall serve the public interest; shall be fair and consistent and shall not set an undesired precedent; shall comply with all federal state, and local laws; and shall not jeopardize CCALT’s tax exempt status or status as a charitable organization.
4. If the conservation easement to be amended has requirements provided by funders, the easement amendment complies with, and if necessary is approved by those funders.
5. Finally any conservation easement amendment approved by the Board shall be warranted under one or more of the purposes set forth below; shall represent the minimum change necessary to satisfy the stated purposes; and it shall not erode the confidence of CCALT's supporters. In instances where further guidance is needed to determine whether an amendment request

meets the purposes outlined below and is in accordance with the legal principles governing conservation easements, CCALT may refer to the Land Trust Alliance's most current publications on the evolving practices and legal principles of amending conservation easements and other available resources.

**II. Purposes of Amendment Requests:**

**A.** CCALT will consider amending conservation easements only under the following circumstances:

**1. Opportunity for Greater Protection**

CCALT may authorize an amendment to add additional acreage or afford greater protection of the conservation values on a subject property. For example, these opportunities may include the addition of more land to be subject to an easement; or an exchange of restrictions within the property (i.e., the owner can add accessory structures in area "a" in exchange for relinquishing the right to a permitted homesite in area "b" which has greater conservation value); or changing the location of a building envelope if the new location has lower impact on the conservation values. This can also take the form of a landowner giving up additional rights that were retained in the original conservation easement.

**2. Prior Agreement**

In a few cases, a conservation easement has included a specific provision allowing modification of the restrictions at a future date under certain specified circumstances. Such agreements must be set forth in the conservation easement document or in a separate document signed by both parties at the time the original conservation easement is executed. The amendment must be consistent with the terms and conservation intent of the original agreement.

**3. Correct an Error**

CCALT may authorize an amendment to correct an error made at the time the conservation easement was executed. This may include correction of a legal description, a survey description, a mapped building envelope, or other Scrivener's errors.

**4. Clarify Vague Language**

CCALT may authorize an amendment to permit activities consistent with the intent of the original parties and with the conservation purposes beyond those expressly stated in the easement. For example, an easement may be amended to map the specific location of a floating building envelope; it may replace qualitative language (i.e., one small guest house) with specific limitations (i.e., one guest house not exceeding a certain square footage limit). CCALT may also authorize an amendment to change the language in the conservation easement and update it so that it is consistent with CCALT's most recent easement form, so long as such update does not change the original intent of the conservation easement or provide the landowner with any impermissible private benefit or private inurement.

#### **5. Settle Condemnation Proceedings**

Conservation easements and other property interests that CCALT holds are subject to condemnation for public purposes, such as highways, schools, etc. Where it appears that the condemnation power will be properly exercised, CCALT may enter into a settlement agreement with the condemning authority in order to avoid the expense of litigation. In reaching such an agreement, CCALT shall attempt to preserve the intent of the original conservation agreement to the greatest extent possible and offset any damages done to the conservation values.

#### **6. Remedy Adverse or Unforeseen Use**

CCALT may authorize an amendment to provide flexibility for the owner without increasing the intensity of use to address an unforeseen land use consequence created by the easement. For example, through an amendment, CCALT may allow a landowner to aggregate the allowable square footage of accessory residential space to house farm workers, thus accommodating farm operations; or allow large lot housing to be redistributed into a clustered pattern (i.e., family compound) thus preserving more contiguous open space.

#### **7. Alleviate Unnecessary Hardship**

CCALT may authorize an amendment when the original terms prove impossible to enforce or when specific reserved rights are unable to be exercised due to Acts of God. For example, through an amendment, CCALT may allow a change to a building envelope location to a more appropriate site if engineering constraints proved it impossible to site permitted structures within the original envelope.

#### **8. Dispute Resolution**

CCALT may authorize an amendment to resolve a good faith dispute over the meaning of the terms of an easement. No such amendment shall compromise the conservation values of the property.

### **B. Procedures for Requesting an Amendment:**

1. Any landowner seeking a modification to an existing conservation easement must present to CCALT a request in writing, stating what change is being sought and the specific reasons why it is needed or warranted. The request shall be accompanied by all appropriate maps and other documentation necessary for CCALT to properly analyze the request. Conversely, an amendment request may also originate from CCALT staff.

2. The CCALT staff shall review all requests and, where appropriate, conduct or oversee a site visit(s). Evaluation of all requests may include reasonable efforts to contact the principal parties to the original transaction, including the landowner who donated/sold the restrictions or his/her heirs; and any parties, public or private, who significantly supported the acquisition with financial gifts, pledges of charitable credit, community leadership, etc. Any potential conflict of interest shall also be analyzed and managed in accordance with CCALT's Conflict of Interest Policy. Amending a

conservation easement shall not be treated as a simple solution to complex problems and staff shall analyze whether there are alternatives to amending the conservation easement, such as through a letter of interpretation of the easement terms.

3. Once step two is completed, staff shall evaluate whether any due diligence, as required in CCALT's Procedures for Developing Land Protection Projects Policy, is necessary to complete in order to ensure the proposed amendment is enforceable by CCALT. If it is not clear whether private inurement or an impermissible private benefit will be created by the proposed amendment, an appraisal may be required to evaluate the effects of the amendment and whether or not it would create an impermissible private benefit or private inurement.

4. CCALT staff shall make every effort to cover its costs associated with completing an amendment and instances where the request is initiated by the landowner, and shall require the landowner to pay all costs. Where an amendment may have an impact on the stewardship obligations of CCALT, the Board may require an additional contribution to the stewardship endowment fund. Where an amendment will benefit CCALT by reducing CCALT's stewardship burden, such as in a correction or clarification of terms, CCALT may waive some or all of the expenses associated with the correction.

5. The CCALT staff shall present all of the information related to the proposed amendment to the Stewardship Committee of the Board. The Stewardship Committee shall analyze amendment requests in accordance with this policy and make a recommendation of approval, denial or approval with modifications to the Board. The Board may approve, reject, or approve with modifications the Stewardship Committee's recommendation. Approval shall require a simple majority vote of the Board.

6. CCALT Legal Counsel shall review the final amendment and all exhibits prior to recording.

7. The final amendment shall state the purpose for the amendment in the document itself and shall state that the amendment will result in either a positive or net neutral conservation outcome

8. Once the amendment is approved, CCALT staff may proceed to record the amendment so long as no substantive changes are made to the final language of the amendment before recording. If substantive changes arise, the Board may defer to the Stewardship Committee for review of any substantive changes. In delegating approval of the final language to the Stewardship Committee, the Board expects the Stewardship Committee to use its reasonable judgment and discretion in determining whether additional issues have arisen that are a material change and which would necessitate an additional review and final approval by the full Board.

9. Any decision to reject an amendment request shall be final, unless the landowner presents a written request for review by the Board, specifying reasons why there should be further review of the request.

**Appendix C – CCALT’s Model Assignment**

**ASSIGNMENT OF INTEREST IN  
DEED OF CONSERVATION EASEMENT  
FOR THE \_\_\_\_\_ RANCH**

THIS ASSIGNMENT OF INTEREST IN DEED OF CONSERVATION EASEMENT (the "Assignment") is entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between:

- (i) **ASSIGNING ORGANIZATION**, a \_\_\_\_\_ nonprofit corporation having its address at \_\_\_\_\_ ("Assignor"), which is the Grantee under the Conservation Easement described herein;
- (ii) **ACCEPTING ORGANIZATION** a \_\_\_\_\_ nonprofit corporation, having a legal mailing address of \_\_\_\_\_ ("Assignee") and;
- (iii) **PROPERTY OWNER** ("Grantor"), having a legal mailing address of \_\_\_\_\_ which has executed this Assignment for the purpose of acknowledging its consent to the Assignment.

**RECITALS**

A. Owner is the sole owner in fee simple of the \_\_\_\_ acre \_\_\_\_ Ranch (the "Property"), more particularly described in **Exhibit A**, attached hereto and incorporated herein.

B. The Property is encumbered by a Deed of Conservation Easement granted by \_\_\_\_\_ to Assignor and recorded on \_\_\_\_\_, \_\_\_\_\_ at Reception Number \_\_\_\_\_ in the records of the Clerk and Recorder of \_\_\_\_\_ County, Colorado (the "Conservation Easement"). **[ADD ANY AMENDMENT DETAILS IF NECESSARY]**

C. **[IF APPLICABLE ADD ANY OWNERSHIP TRANSFERS]** Ownership of the Property was subsequently transferred from the \_\_\_\_\_ to D \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_ via a \_\_\_\_\_ deed recorded at reception number \_\_\_\_\_ in the land records of \_\_\_\_\_ County, Colorado.

D. Paragraph \_\_\_\_ of the Conservation Easement permits assignment of Assignor’s interest as Grantee to another "qualified organization" as that term is defined under Section 170(h) of the Internal Revenue Code of 1986, as amended.

E. Assignee is a qualified organization under Section 170(h) of the Internal Revenue Code of 1986, as amended, and is authorized to acquire and hold conservation easements under Colorado law. Grantee is a state-certified nonprofit conservation easement holder, having been certified by the Colorado Division of Real Estate as license number \_\_\_\_\_.

F. Assignee has executed this Assignment as Assignee of the interest of Assignor under the Conservation Easement and, by this Assignment, accepts assignment of the interests of Assignor in the Conservation Easement and accepts the responsibility of enforcing the terms of the Conservation Easement and upholding its conservation purposes forever.

## AGREEMENT

NOW, THEREFORE, in consideration of Ten Dollars (\$10.00), the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Assignment. Assignor hereby assigns all of its rights and obligations as Grantee under the Conservation Easement to Assignee, as permitted by the Conservation Easement.

2. Acceptance of Assignment. Assignee hereby accepts the assignment of the rights and obligations of Assignor as Grantee under the Conservation Easement. Assignee and Assignor agree that a condition of this Assignment is that Assignee, as Grantee, shall continue to carry out the conservation purposes that the Conservation Easement was originally intended to advance. Specifically, Assignee will assume any and all responsibilities and liabilities associated with the Conservation Easement, including the responsibilities associated with monitoring and enforcement.

3. Representation by Assignor. Assignor represents to Assignee that to the best of Assignor's knowledge, there are no outstanding violations of the Conservation Easement as of the date of this Assignment. Assignee has inspected the Property, is satisfied that Grantor is in compliance with the terms of the Conservation Easement, and accepts the Conservation Easement encumbering the Property in its current condition.

4. Release of Original Grantee. Assignee and Assignor jointly acknowledge that as of the date of this document, there are no unresolved stewardship issues associated with the Conservation Easement. Assignor is hereby released from any and all obligations and liability as Grantee under the Conservation Easement, other than obligations and liability related to matters as to which Assignor has actual knowledge as of the date of this Assignment. Assignor has provided all documentation of Assignor related to the Property to Assignee to its satisfaction.

5. Owner Consent. By its signature below on the Consent and Approval of Assignment, Owner hereby consents to this Assignment, agrees to its terms, waives any notice requirements, if any, in the Conservation Easement, and makes the representations herein.

*[Remainder of Page Intentionally Left Blank – Signature Page Follows]*

**CONSENT AND APPROVAL OF ASSIGNMENT**

\_\_\_\_\_, a \_\_\_\_\_, ("Owner") hereby consents to the Assignment of the Conservation Easement by and between \_\_\_\_\_, a \_\_\_\_\_ nonprofit corporation ("Assignee") and \_\_\_\_\_, a \_\_\_\_\_ nonprofit corporation ("Assignor"), pertaining to the transfer of the Deed of Conservation Easement for the \_\_\_\_\_ Ranch, recorded on \_\_\_\_\_, \_\_\_\_\_ at Reception Number \_\_\_\_\_ in the records of the Clerk and Recorder of \_\_\_\_\_ County, Colorado. Owner hereby releases Assignor from any and all claims, obligations and liability as Grantee under the terms of the Conservation Easement. Owner hereby releases Assignee from any and all claims, obligations and liability as Grantee under the terms of the Conservation Easement for events arising prior to the date of this Assignment. Owner hereby represents to Assignee that Owner, as the role of Grantor in the Conservation Easement, is in full compliance with the terms and conditions of the Conservation Easement and that there are no violations of the Conservation Easement that exist as of the date of this Assignment.

OWNER:

OWNER:

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

## Appendix D – CNLT’s Board Resolution Approving the Transfer

### UNANIMOUS WRITTEN CONSENT OF THE BOARD OF DIRECTORS

OF

### COLORADO NATURAL LAND TRUST

Pursuant to Sections 7-107-104 and 7-108-204, Colorado Revised Statutes, the undersigned and directors of Colorado Natural Land Trust, a Colorado nonprofit corporation (the “Company”), acting without notice or a meeting, hereby waive notice and the holding of such meeting and consent to the adoption of following resolutions:

WHEREAS, the prior board of directors resigned due to lack of funds in the Company;

WHEREAS, the Executive Director recruited new members to the Board of Directors and the following individuals volunteer and accept their appointment to the Board of Directors: Jason Burr, Jason Cretti and Sam Zakhem;

WHEREAS, the new Board of Directors have reviewed the financials of the Company, discussed the current business of the Company with the Executive Director and have come to the conclusion that there are no funds to meet the purpose of the Company, monitoring conservation easement donations;

WHEREAS, as such the Board of Directors have determined that it is in the best interest of the Company, the donors of the conservation easements, and purpose of the laws that create conservation easements, that the Company donate the easements to a qualified land trust;

WHEREAS, the Board of Directors has identified the Colorado Cattlemen’s Agricultural Land Trust, having a legal mailing address of 8833 Ralston Road, Arvada, Colorado 80002, as a qualified land trust under applicable state law, willing to receive, accept and administer the obligations of maintaining and monitoring the conservation easements located on the 2,268.11 acre Bluffs Ranch currently held by the Company;

WHEREAS, the Board of Directors, with the advice and assistance of legal counsel, have prepared the attached Assignment of Interest in Deeds of Conservation Easement for the Bluffs Ranch (“Assignment” - Exhibit 1) for the purpose of assigning the Company’s interest in the conservation easements on the Bluffs Ranch.

NOW THEREFORE IT BE RESOLVED, that the Board of Directors and Executive Director hereby authorize the conveyance of the Bluffs Ranch conservation easements to the Colorado Cattlemen's Agricultural Land Trust; and in connection therewith, authorize the execution of the Assignment by the Executive Director on behalf of the Company; and

FURTHER RESOLVED, that this unanimous written consent shall be filed in the minute book of the Company and shall become a part of the records of the Company.

The undersigned hereby execute this Unanimous Written Consent of the Board of Directors of Colorado National Land Trust effective October, 2016.

**PAUL GEER, EXECUTIVE DIRECTOR**



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