

Landowners' Conservation Easement Guide

In 1998 local citizens created the **Montezuma Land Conservancy** (MLC) to address the growing loss of agricultural lands and open space in southwestern Colorado. MLC became the first not-for-profit **land trust** to focus solely on private land conservation in Montezuma and Dolores Counties.

Our mission is to *permanently protect important open lands—in partnership with willing landowners—to conserve agricultural and natural resources, and scenic open space*

Using voluntary, flexible, and incentive-based approaches, Montezuma Land Conservancy **partners with local people** who share a common vision to see their land protected for present and future generations. Montezuma Land Conservancy uses **conservation easements** to protect land. A conservation easement is a **voluntary** legal agreement between a landowner and a land trust that protects a property's conservation values by restricting development. Landowners retain all other private property rights, including the ability to sell or pass on their land as they wish. Lands remain in **private ownership** and they continue to generate property tax revenue for the county.

By limiting subdivision and development, local landowners bestow a great gift to the community by voluntarily preserving the very qualities that help make this place so special.

Conservation Easement Facts

What Is A Conservation Easement?

A conservation easement is a voluntary agreement made between a landowner and a qualified conservation organization such as the Montezuma Land Conservancy. The easement protects land with **conservation values** that are significant to the public—for example: agricultural land, significant wildlife and/or plant habitat, and scenic open space.

To understand how conservation easements work, think of owning land as owning a bundle of rights. A landowner can give away or sell the whole bundle or just one or two of those rights—the right, for example, to subdivide the land. Exactly what the landowner gives up, and what she or he keeps, is spelled out in the terms of each conservation easement. The landowner retains all other rights to the property and continues to own and use the land. Conservation easements are extremely flexible and tailored to the individual property and the landowner's wishes for the land. An easement can protect any or all of conservation values that the landowner chooses: farm and ranch land, water rights, wildlife or plant habitat, and scenic views. The conservation values are protected by limiting the subdivision and development rights on the land. In return, the landowner gets the satisfaction of having protected the land—and sometimes receives cash or important tax benefits as well.

What are the “Conservation Values” that qualify?

In order for a conservation easement to confer state and federal tax benefits to the landowner, it must meet the **conservation purposes test** as described in the Treasury Regulations. Specifically, a conservation easement must be designed to protect one or more of the following conservation purposes:

- 1) the preservation of open space, including farmland and forest land that a) provides for the scenic enjoyment of the general public, or b) is pursuant to a clearly delineated government conservation policy, provided, in each case, that such preservation will yield a significant public benefit;
- 2) the protection of a relatively natural habitat of fish, wildlife, plants or similar ecosystem;
- 3) the preservation of an historically important piece of land or a certified historic structure; or
- 4) the preservation of land for outdoor recreation by/or education of the general public. (only if the landowner chooses to allow public access, or the easement is on a public piece of property. Montezuma Land Conservancy does not require public access on its conservation easements, and this purpose is rarely used in conservation easements held by MLC).

Montezuma Land Conservancy applies the conservation purposes test to ensure that we accept easements only on lands with significant public value. Approving easements with questionable conservation values would not only violate the letter and intent of the law, but could jeopardize our tax exempt status.

According to Stephen J. Small, a former IRS lawyer and a leading expert on easements, “You will probably not qualify ... if there is nothing special or unusual about the land that you are protecting except that it does not have houses on it.”

An open space easement where “the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land...” would not qualify for a tax deduction. For example, a proposal allowing construction of several homes in a scenic meadow visible from a public road would not qualify.

How Restrictive Is A Conservation Easement?

An easement is as restrictive as the landowner wishes it to be, while ensuring that conservation values of public benefit are protected. Sometimes this totally prohibits new construction and sometimes it doesn't. If the goal is to protect farm or ranch land and keep it in productivity, an easement may restrict subdivision and development while allowing for structures and activities necessary for and compatible with the agricultural operation. If the goal is to preserve a pristine natural area, an easement may prohibit all construction outside of a pre-determined “building envelope” as well as any activities that would alter the land's present natural condition. However, even the most restrictive easements permit the continuation of historical uses of the land.

Does A Conservation Easement Allow Public Access?

A landowner who grants a conservation easement does NOT have to open the property to the public. Some landowners convey certain public access rights, such as fishing or hiking in specified locations. Others do not.

How Long Does A Conservation Easement Last?

Only permanent (perpetual) conservation easements can qualify a donor for federal and state income and estate tax benefits. A conservation easement runs with the land, binding not only the landowner who gives the easement, but all future owners as well. The easement is recorded in the county's land records, so that future owners and lenders will learn about the restrictions when they obtain title reports.

Who May Give, and Who May Accept A Conservation Easement?

Any landowner may give an easement, provided the property has conservation values that meet federal and state criteria for conservation purposes and public benefit. If the land is owned jointly or partially, all owners must consent to placing an easement on the land. If the property is mortgaged, the landowner may need to obtain an agreement from the lender to subordinate its interests to those of the easement holder. A conservation easement may be conveyed to a public agency or to a conservation organization that qualifies as a public charity under Internal Revenue Code 501c (3). The recipient organization is required to have adequate resources to enforce the terms of the easement in perpetuity.

What Does The Land Trust Do?

Montezuma Land Conservancy is here as a service organization to landowners. We visit with landowners to provide information and hear about their vision for their land. If landowners wish to, Montezuma Land Conservancy will assist the landowner will all phases of the conservation easement process and make sure that the easement is effective.

After a conservation easement is completed and recorded with the County Clerk, Montezuma Land Conservancy is responsible for monitoring and enforcing the development restrictions that the landowner chooses to place on the land. To do this, the land trust visits the easement property and meets with the landowner(s) at their convenience. The landowner and the land trust both check that the land remains in the condition prescribed by the easement. These regular visits with landowners provide an opportunity to discuss the land, the conservation easement, and any needs, concerns or difficulties that the landowner may have. This communication helps to avoid misunderstandings and keeps new landowners informed. If a visit reveals that the easement has been violated, the land trust works first to find a cooperative solution with the landowner to address the violation, but is ultimately responsible to stop the violation, and require that the property be restored to its original condition.

How Is The Value of A Conservation Easement Determined?

The value of a conservation easement is generally estimated as the difference between the market value of the property unencumbered ("before") and the market value of the property subject to

the easement restrictions (“after”), as determined by a qualified appraiser. For example, the “before” market value of a highly developable property is the amount a person would pay for the property with the intent of developing it under existing and/or likely market conditions. (Note that “before” value is not the sale price of the developed lots.) The “after” market value is the amount a person would pay for the property, knowing that it is permanently restricted from some or all development. There is usually (but not always) a substantial difference between the before and after values, and the difference is the value of the conservation easement.

How Can Giving an Easement Reduce Taxes?

To qualify for federal and state tax benefits, a conservation easement must be donated in perpetuity to a qualified conservation organization “exclusively for conservation purposes,” and satisfy the “conservation purposes test” described above. The value of a qualifying conservation easement can be deducted from federal income and used as a credit against Colorado income tax. The easement can also result in an estate tax reduction and estate tax exclusion. Conservation easements can reduce property taxes as well.

Federal Income Tax Deduction

The federal government allows taxpayers to claim a charitable gift deduction against federal income for the full value of a donated conservation easement. The deduction can be taken at the rate of 30% of the taxpayer’s Adjusted Gross Income (AGI) in the year of the donation, and may be carried forward at that rate for up to five additional years. Recognizing that existing limits on the use of the tax deduction may discourage lower income landowners from giving conservation easements, Congress made three changes to these rules for qualified conservation donations granted in 2008 and 2009:

- raised the percentage of AGI that can be deducted each year to 50%,
- allows qualifying farmers and ranchers to deduct up to 100% of AGI
- increased the carry forward period to 15 years

State Income Tax Credit

The Colorado Legislature has created a tax credit against Colorado income tax for the donation of a conservation easement on land in Colorado. The Tax Credit is equal to 50% of the value of the conservation easement, up to a maximum easement value of \$750,000 (or a maximum tax credit of \$375,000). The state income tax credit is available only to “resident individuals” or “domestic or foreign corporations subject to the provisions” of the Colorado income tax statutory provisions applicable to corporations. Conservation easement donors whose primary residence is not in Colorado should check with an experienced advisor to see if they can qualify for the credit.

These tax credits are transferable to another taxpayer, which can result in a cash payment to the donor of the conservation easement. Please refer to FYI 39 published by the Colorado Department of Revenue for more information about the Colorado conservation tax credit.

Federal Estate Tax Deduction and Exclusion

Because a conservation easement limits future uses of land, it also limits the value that can be assigned to property for estate tax purposes. This estate tax “deduction” can lower estate taxes significantly, and can help heirs to keep family land rather than sell it to pay the estate tax. The federal Taxpayer Relief Act of 1997 created additional estate tax benefits for donors of conservation easements, including:

- An exclusion from estate tax of up to 40% of the value of land subject to a qualified conservation easement, up to \$500,000. The exclusion can be taken in addition to the estate tax deduction described above, and it can be taken by each succeeding generation of heirs of the original easement donor as long as the land remains in the family. It can also be taken in addition to the estate tax exclusion for family-owned businesses.
- A post mortem election whereby the heirs or executor of an estate may grant a conservation easement following the death of the landowner, in order to take advantage of the estate tax deduction.

State Property Tax Benefit

In Colorado agricultural land that is taken out of production is reclassified as “vacant land,” causing property taxes to increase astronomically. High property taxes on vacant land have forced many landowners to sell their land for development. In 1995 the Colorado Legislature passed House Bill 1268, modifying property tax law to encourage land conservation. HB 1268 allows farmers and ranchers who have protected their land from development with a permanent conservation easement to take their land out of production without losing their favorable agricultural property tax classification. To qualify for the agricultural property tax benefit, the subject property must be 80 acres or larger (smaller if there are no structural improvements) and must be classified as agricultural at the time of the gift of easement.

The law does not encourage cessation of agriculture. Instead, it enables the preservation of precious farm and ranch land by giving farmers and ranchers an option they did not previously have – the option to retire or to suspend an operation due to market, natural, or other conditions. The law does not adversely take land off the tax rolls or reduce tax revenue from affected lands. Nonagricultural lands protected by conservation easement may qualify for reduced property taxes as well, since the easement restrictions generally reduce land value. This is not always the case, however, and an easement donor’s tax bill will ultimately depend upon the local tax assessor’s judgment of the diminution in value caused by the easement restrictions.

Steps for Giving a Conservation Easement

- **Determine whether the land has qualifying conservation values.** A property must meet the “conservation purposes” requirement to qualify for a conservation easement.
- **Talk with qualified conservation organizations.** Determine whether a conservation easement is the best way to protect the specific property. Then choose a qualified land trust to draft, hold, and steward the conservation easement.
- **Discuss the conservation easement with an attorney and/or tax advisor who is**

experienced in conservation easements. A conservation easement is legally binding and restricts the use of land forever. A landowner should make sure his anticipated easement will effectively protect his land and anticipate future needs. Additionally, a landowner should make sure his anticipated easement is structured properly so that he can qualify for and maximize tax benefits. You may need professional financial advice if you have complex estate or income tax issues. MLC strongly recommends you seek a professional familiar with the state and federal tax laws pertaining to conservation easements.

- **Determine which conservation values to protect.** Most easement-restricted properties have more than one conservation value. While it is important to protect as many conservation values as possible, sometimes the protection of one value jeopardizes another. For example, certain agricultural operations may compromise wildlife habitat, but certain restrictions to protect habitat may hinder agricultural operations. For this reason, it is desirable to prioritize the property's conservation values and design the conservation easement accordingly.

- **Work with the land trust to draft the conservation easement document.** MLC uses a model conservation easement that can be modified to protect specific conservation values and to meet the needs of individual landowners.

- **Obtain a qualified appraisal.** A "qualified" conservation easement appraisal, completed by a "qualified" appraiser, is required in order to claim income tax deductions and credits. In addition, the appraisal must be performed by Certified General Appraiser to qualify for the state tax credit. MLC plays no role in determining the value of the easement a landowner donates. It is up to the landowner to justify that value to the IRS for tax purposes. A conservation easement appraisal is more complicated than an ordinary real estate appraisal, and it is very important to choose an experienced appraiser who understands and works in accordance with the regulations for conservation easement appraisals, as stated in Section 1.170A of the federal regulations. Poorly structured appraisal reports and/or overstated estimates of value can result in both rejection of tax benefit claims and penalties. When selecting an appraiser the landowner should ask about the appraiser's experience in appraising conservation easements, his or her experience appraising easements locally and on similar properties, and his or her experience, if any, with the Internal Revenue Service in defending easement appraisals. While MLC does not recommend one appraiser over another, it can provide contact information for independent, experienced conservation easement appraisers in southwest Colorado. Appraisals are costly; make sure you discuss fees in advance. MLC recommends you contact an appraiser early in the process if you are seriously considering an easement. They often have waiting lists.

- **Obtain Title Report, Mineral Remoteness Letter and Survey if Needed**

Evidence of title, including encumbrances and exceptions, is always required. Tax credit brokers generally require a new title commitment. If you do not own 100% of the minerals underlying your property it will be necessary to get a geology report analyzing the potential for the development of those minerals. If the geologist concludes, "the potential for the development of those minerals by any surface mining method is so remote as to be negligible," the property is still eligible for a qualified conservation easement. Surveys may be necessary if there are boundary uncertainties or disputes. MLC will help you determine if a survey is necessary. Again, discuss fees in advance and ask what additional charges might occur.

- **Obtain Mortgage Subordination.** Because foreclosure on a mortgaged property may extinguish a conservation easement, it is necessary that the lender subordinate, by legal agreement, its rights in the property to the rights of the easement holder. A fee may be associated with this process.

- **Document the conservation values and condition of the property.** A baseline study is

required to accompany every conservation easement. This study documents the condition of the property at the time of the easement, and is critical to protecting the grantee's interests in perpetuity. Costs associated with developing baseline documentation include aerial photos, travel, inspection of the property, photography, mapping, and preparation time. The cost for baseline documentation can range from one to several thousand dollars depending on the complexity of the easement.

- **Sign and record the conservation easement.** The landowner (“Grantor”) signs the easement document to convey the easement, and the land trust (“Grantee”) signs to accept it. The document is then recorded in the official county real estate records.

Summary of the Costs of Completing a Conservation Easement

- **Legal/Financial Advice.** It is recommended that a landowner obtain legal and financial advice from independent, experienced professionals to ensure proper structuring of the easement for land protection and tax purposes.

- **Title Report, Mineral Remoteness Letter and Survey.** A title commitment is always required and can cost from \$300 and up. A mineral remoteness report is required when the landowner does not own the underlying mineral rights and can cost from \$360 and up. A survey is sometimes, but not always, required to determine the exact boundaries of a conservation easement and/or to determine the boundaries of building areas within an easement.

- **Baseline Documentation.** IRS regulations require that the landowner provide baseline documentation for “qualified Conservation contributions.” The cost for baseline documentation can range from one to several thousand dollars depending on the complexity of the easement

- **Conservation Easement Appraisal.** An appraisal by a qualified conservation easement appraiser is required in order to claim federal and state income tax benefits for a gift of conservation easement. Appraisal costs vary, but an easement appraisal costs more than an ordinary real estate appraisal because it requires appraisal of both the “before” and “after” values.

- **Other Costs.** If there is a mortgage on the land, there may be a fee associated with subordinating the mortgage to the conservation easement. All conservation easements deeds must be recorded with the County Clerk. The fee for this is by the page and usually totals just over \$100. Montezuma Land Conservancy charges a processing fee of \$500 per donated conservation to cover a portion of the costs associated with drafting conservation easements, site review and travel, document review and overhead. MLC covers the bulk of these costs with other grant and membership revenue.

- **Deductibility.** The above costs, if incurred in conjunction with a charitable donation of land or a conservation easement, are deductible for income tax purposes.

- **Stewardship Endowment.** After an easement is signed the Montezuma Land Conservancy takes on the perpetual obligation to uphold the terms of the easement. To support this on-going, long-term monitoring and enforcement, MLC requests a donation to the stewardship endowment. This policy also satisfies IRS requirements that easement holders “must have the resources to enforce the restrictions” of the easement. Endowment donations are used only to generate income for monitoring easements. MLC's Stewardship Donation Policy describes how the requested amount is calculated based on the location, size and complexity of the easement.

The landowner’s costs of completing a conservation easement are usually more than offset by the tax benefits resulting from the gift. In cases where important land is at risk because the landowner cannot afford the costs of the transaction, MLC may be able to assist with funds from

its Landowner Assistance Fund.

If I Want to Donate an Easement in Montezuma or Dolores Counties, Who Should I Contact?

Call the Montezuma Land Conservancy at (970) 565-1664 or email them at: info@montezumalandconservancy.org. MLC can assist you in all phases of the easement process.