THE CONSERVATION EASEMENT HANDBOOK

— Second Edition, revised and expanded —

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SAN FRANCISCO, CA
CONTENTS

Acknowledgements / v
Advisors / vii
Preface to the Second Edition / ix
Introduction / 1

PART ONE • Managing an Easement Program / 5

1. Conservation Easements: The Context / 7
2. Introduction to Conservation Easements / 14
3. Creating an Easement Program: Preparing for Projects / 26
4. The Easement Acquisition Process / 43
5. Designing the Easement Project / 69
6. Tax Benefits of Easement Donations / 80
7. Baseline Documentation / 100
8. Developing a Stewardship Program / 116
9. Monitoring: Ensuring Long-Term Protection / 143
10. Enforcement: Handling Easement Violations / 156
11. Easements with Third-Party Interests / 169
12. Dealing with Change: Amendments and Termination / 183
13. Special-Purpose Easements / 198
14. Easements That Protect the Built Environment / 219
15. Public Agency Use of Conservation Easements / 238
16. Easement Partnerships with Public Agencies / 262

PART TWO • The Conservation Easement Drafting Guide / 283

17. Introduction / 284
18. Conservation Easement Drafting Checklists / 300
20. Commentary to Sample Conservation Easement Provisions / 385
21. The Boilerplate Template Easement for a Nonprofit Holder / 476
APPENDICES

1. Internal Revenue Code §170(h)  
   Qualified Conservation Contribution / 491
2. Internal Revenue Service Treasury Regulations §1.170A-14,  
   Qualified Conservation Contributions / 494
3. A Guide to the Internal Revenue Service Tax-Deductibility Criteria / 510
4. Restatement of the Law Third, Property (Servitudes),  
   Sections 1.6, 8.5, and 7.11 / 518
5. Sample Documents on CD-ROM / In back pocket  
   See the accompanying CD-ROM for a wide variety of sample documents.  
   A complete list of the contents is on the CD-ROM.

Glossary / 531  
Resources / 540  
Index / 544
ACKNOWLEDGEMENTS

This publication is a joint effort of the Land Trust Alliance and the Trust for Public Land and reflects the decades of experience of those in the field, testing and refining conservation easements. We are eternally grateful to the conservation pioneers who have shaped this tool.

The new edition of The Conservation Easement Handbook reflects a true collaboration among the lead partner organizations, the writers Elizabeth Byers (part one) and Karin Marchetti Ponte (part two), and many others. The National Trust for Historic Preservation was a central partner in the first edition, and was integral to the revised handbook. National Trust staff Thompson Mayes and Julia Hatch Miller provided in-depth review of the entire manuscript and drafted the chapter on easements for historic buildings and culturally significant properties. Scenic America, a new partner, working with Matt Goebel, Chris Duerksen, and Carl Castillo at Clarion Associates, provided text on scenic easements for the chapter on special-purpose easements.

Thanks to Sandra Tassel, who conducted extensive research and co-wrote the new chapters on public agencies and partnerships. She and Karin Marchetti Ponte provided editing assistance on chapters 1 through 12. We are grateful to William Ginsberg for allowing us to reprint his material from the first edition. This publication would not have been possible without the 1988 edition of The Conservation Easement Handbook and the 1996 Model Conservation Easement and Historic Preservation Easement. The primary authors of these texts, Janet Diehl, Thomas Barrett, Richard J. Roddewig, Cheryl A. Inghram, and Stefan Nagel, contributed greatly to the field and built the foundation for this edition.

This book is a true reflection of the land conservation movement and the many people who gave their time in meetings and interviews, and responded to requests for information. We would like to offer special acknowledgement to those individuals who volunteered their time to review part one or part two in its entirety. These include: Andrew Dana, Gregory Hendrickson, Karen Fuerst, Camilla Herlevich, Larry Kueter, Stefan Nagel, Simon Sidamon-Eristoff, and Becky Thornton. We are also eternally grateful to James Wyse, who volunteered his time to edit in detail the legal portion of this publication.
We are especially thankful for the generous gifts that made the writing and production of this book possible.

National Fish and Wildlife Foundation, U.S. Fish and Wildlife Service
Doris Duke Charitable Foundation
David and Lucile Packard Foundation
Forest Service, U.S. Department of Agriculture
Wallace Genetic Foundation
California Coastal Conservancy
Altria Group
James M. Cox Foundation
Mary A. Crocker Trust
Furthermore: a program of the J. M. Kaplan Fund
MBNA Foundation
MARPAT Foundation
William T. Hutton
Law Office of Stephen J. Small, Esq., PC
Isaacson, Rosenbaum, Woods & Levy, PC
Martha Lennihan
Maine Coast Heritage Trust

Our sincere thanks to all of the above and to the thousands of land trusts, agency personnel, attorneys, landowners, and others working with conservation easements to preserve land across America.

KATHY BLAHA, The Trust for Public Land
TAMMARA VAN RYN, Land Trust Alliance
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THIS PUBLICATION WOULD not have been possible without the advice, review, critiques, insights, sample documents, and photographs provided by practitioners across the country. The following individuals generously contributed their time and expertise to provide advice or to review all or portions of the draft handbook manuscripts.

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Jane Arbuckle, Maine Coast Heritage Trust
Sylvia Bates, SK Bates Conservation Consulting, New Hampshire
Robert Berner, Marin Agricultural Land Trust, California
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Please note that the above list includes the affiliations of individual advisors during
the drafting of this publication. Affiliations may have changed since that time.
IN 1988, THE Land Trust Alliance and the Trust for Public Land set out to revolutionize land conservation by publishing a book on the practical and technical aspects of managing a successful conservation easement program. The first edition of *The Conservation Easement Handbook* sold more than 15,000 copies and served as a critical source for information that led to the drafting of thousands of conservation easements, protecting millions of acres. Seventeen years later, the land conservation movement is thriving—creating a need for a revised version of the handbook that incorporates landmark court decisions and cutting-edge drafting language, and that also reflects the experience of using conservation easements as a land conservation tool.

Conservation easements will become an increasingly important conservation tool in the 21st century. During the last century, governments at all levels made important strides in protecting land for conservation and public recreation, creating an impressive system of national, state, and community parks, wildlife refuges, and forests. This work must continue. Increasingly, however, new conservation opportunities are arising on private land, where conservation easements are best suited to the conservation task. More and more landowners are choosing conservation easements to protect their lands. This is because with an easement, the land stays in private ownership but the easement’s restrictions ensure that the important conservation values are protected in perpetuity.

When the first *Conservation Easement Handbook* was published, easements were used to protect individual parcels, or “dots on the landscape.” Sprawling development has changed the landscape and the tactics of land trusts and public agency partners. For many communities, strategic land conservation is replacing a piecemeal approach, and easements are being used to shape and manage growth, protect working farms and forests, and help define community character.

The Land Trust Alliance and the Trust for Public Land have been partners for more than two decades. Together, the organizations have supported local land conservation with their contributions to refining real-estate tools, growing funding programs, and broadening training programs. Both organizations remain committed to the idea that conservation easements are powerful and
effective tools in any community’s toolbox—an equal partner with traditional regulatory and planning tools, and fee acquisition. This revised book reflects the commitment of both organizations to share and broaden the collective knowledge and experience of the land conservation community.

The new and updated information in this edition ensures that conservation easement donors, drafters, and holders will be well prepared to secure the permanent protection of land.

Will Rogers, The Trust for Public Land
Rand Wentworth, Land Trust Alliance
INTRODUCTION

The 1988 edition of The Conservation Easement Handbook was written less than a decade after agencies and nonprofit organizations commonly began to use conservation easements. At the time the book was published, the nation’s land trusts had protected 290,000 acres of land using conservation easements. Fifteen years later, by 2003, land trusts had used easements to preserve an astounding amount of land—5 million acres. Easements are now commonly used, and it is clear from these statistics that easement holders and their advisors have made tremendous strides in refining the conservation easement as a land-saving tool.

The 1988 edition of the handbook was written to help organizations and agencies start and run responsible easement programs, and to help attorneys draft good easements. The original handbook included a model conservation easement and commentary, which was updated in 1996. Since 1988, numerous books and articles have been published on conservation easements, all of which have been valuable references for this updated edition (some of these are listed in the “Resources” at the back). In addition, several regional studies have looked at the practices of easement holders and suggested improvements to easement programs. Many of the recent easement publications focus on specific aspects of conservation easements, such as stewardship, appraisals, or tax issues. These publications complement the handbook, which is a comprehensive source of information on all the basic issues related to easements—from developing project selection criteria, to acquiring the easement, to tax benefits, to stewardship.

Former Land Trust Alliance president Jean Hocker once wrote, “Conservation easements are wonderful tools for protecting privately owned lands. But using them well demands skill and attention.”1 The original edition of the handbook focused on introducing the use of conservation easements; this revised edition focuses on using the easement tool well. Now that easement practitioners have had an additional 17 years’ experience, the updated handbook reflects lessons learned and current practices. The collective work of easement holders has grown in complexity, and this book highlights the sophistication that has evolved with

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experience—showing how, with careful drafting, easements can meet multiple goals for land protection and management.

The new Conservation Easement Handbook has been reorganized. It focuses more on the easement tool and less on broader organizational issues, such as, for example, marketing an easement program. The book has a greater emphasis on stewardship: it stresses the need for evaluating stewardship issues at the very beginning of the project and for the easement holder to maintain a good ongoing relationship with the landowner. Project evaluation and design, including drafting considerations, are also given more attention. In addition, because special-purpose easements are commonly used—such as working-forest, agricultural, and historic preservation easements—separate sections address specific issues related to these easements.

Today, public agencies are using easements to conserve land to a degree that was not imagined when the first edition of the handbook was published. A chapter is devoted to special considerations for public agencies; it provides information for staff who design easement programs that guide state and local land protection efforts. Another chapter covers experiences and best practices of public–private partnerships, highlighting the growing trend of land trusts and public agencies working collaboratively to accomplish resource protection.

The information in the handbook is intended to go hand-in-hand with Land Trust Standards and Practices, the ethical and technical guidelines for land trusts. In 1989 the Land Trust Alliance issued the Statement of Land Trusts Standards and Practices—and in 1993 it published the companion Standards and Practices Guidebook (updated in 1997), which provides detailed information on how to fully implement Land Trust Standards and Practices. Land Trust Standards and Practices was comprehensively revised in 2004 to reflect the state-of-the-art in land trust and conservation practice. Ensuring that all conservation easement projects are carried out according to these practices helps secure strong and lasting conservation easements that protect conservation values over time, and maintain the credibility of the land conservation community.

Several chapters of this updated handbook—on tax benefits, stewardship programs, monitoring, and enforcement—incorporate edited versions of chapters from The Standards and Practices Guidebook. Like the guidebook, this handbook provides examples of forms, procedures, and policies that the easement holder can tailor for its own easement program. Many of these sample documents can be found on the CD-ROM at the back of the book. Additionally, many sections of the original guidebook have been incorporated into this edition.
This book’s conservation easement drafting guidelines and samples provide an extensive resource for attorneys and practitioners. Instead of a “model” easement, chapter 19 offers sample easement provisions to encourage the drafter to be responsive to the unique property, landowner, easement holder goals, and desired future condition of the land. The book offers extensive sample language since conservation easements are being used to protect diverse resources, such as agricultural lands, forest preserves, working forests, historic sites, water quality, and trails. The commentary in chapter 20 has also been revised to reflect current thinking and recent developments in the field of easement law, and offers advice on how to choose the best language to protect a property’s conservation values. Chapter 21 offers guidance on creating a template easement and offers one example of an adaptable template.

The information in this handbook comes from the people who are crafting, acquiring, and stewarding easements every day. Today, many easement holders have decades of experience, and seasoned easement program administrators and attorneys who practice easement and conservation law served as reviewers of the text. The intent of this handbook is to present a comprehensive overview of the best practices in the field.

For the sake of clarity, the term conservation easement is used generically throughout this handbook to include all essentially similar restrictions on land use—historic preservation easements, agricultural preservation easements, scenic easements, open-space easements, forever-wild easements, working-forest easements, conservation restrictions, and so on. The term conservation easement, as used here, should be understood to include all easements granted for a conservation purpose.

Conservation easement stewardship is referred to throughout the book. The book defines conservation easement stewardship broadly to include all aspects of managing a conservation easement after its acquisition: monitoring, landowner relations, recordkeeping, processing amendments and landowner notices and requests for approval, managing stewardship funds, and enforcement and defense.

This handbook is not a substitute for legal counsel. Every landowner and potential holder contemplating or engaging in decisions affecting the ownership and use of property should do so only under the guidance of their own legal counsel. Laws and policies frequently change. Only attorneys can keep landowners and easement holders up to date. This handbook can provide important guidance and instruction, however, to all those involved in easement projects who are working to protect the land and its resources.
Part One

Managing an Easement Program

Photo by David Shields, courtesy of the Brandywine Conservancy.
I

CONSERVATION EASEMENTS: THE CONTEXT

The great conservation opportunities of the next century will be on privately owned land, and conservation easements are the most effective way to protect those lands. Landowners like conservation easements because they are a refreshing alternative to government regulation: they are voluntary, local, and respect private property rights. For the many people who love their land, it is the best way to ensure that it will be preserved for all time.

Rand Wentworth, president, Land Trust Alliance

A CONSERVATION EASEMENT is a legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values.1 Across America, thousands of landowners who care about their land have partnered with easement holders—nonprofit organizations and public agencies—to ensure the land’s protection in perpetuity. Dutchess County, New York, landowner George W. Perkins, Jr., has expressed sentiments about his land that are similar to those of other landowners across the country: “I placed an easement on Walbridge Farm because 52 years ago I found it to be a beautiful piece of property and wanted it to remain so forever.” He granted an easement on 550 acres to the Dutchess Land Conservancy in 2002.

The Growth in the Use of Easements

Today, easements have been used in every state and protect millions of acres of land. Conservation easements are often the conservation tool of choice for the nation’s 1,537 land trusts—local and regional nonprofit organizations that conserve land by acquiring easements or fee title to property or assisting

1 Although some easements have been structured as term agreements, this book focuses on perpetual easements.
governmental agencies with their conservation land transactions. Land trusts
either purchase or accept donations of land or conservation easements; in the Land
Trust Alliance’s 2003 nationwide census, state and local land trusts had protected
almost twice as many acres through conservation easements than they had
through outright ownership of land. The census found that these land trusts held
more than 17,847 conservation easements, protecting more than 5 million acres.2
Impressive as this number is, the census does not include the millions of acres
protected by national land conservation organizations. For example, as of July
2003 The Nature Conservancy alone held easements over 1,820,722 acres in the
United States.

Hundreds of public agencies across the country also hold conservation easements. The total number of easements held by federal, state, and local agencies
has not been documented, although a 2004 survey by American Farmland Trust
counted 9,453 easements on nearly 1.5 million acres of farmland, held primarily
by state and local agencies.3 As of 2004, the National Park Service, just one of
the federal easement-holding agencies, held easements on 253,348 acres. And in
Colorado, nine public agencies that participated in a 2001 easement survey—

2 2003 Land Trust Census. Note that the Land Trust Alliance periodically updates the census.
Check the LTA Web site for the latest census data at www.lta.org.
3 American Farmland Trust: Farmland Information Center, Status of State PACE Programs Fact Sheet,
representing just 60 percent of the agencies in the state with active easement programs—held 588 easements over 149,888 acres.⁴

Over the last decade, more and more public agencies have established easement purchase programs and have funded the programs through a variety of financing mechanisms. In 2003 alone, voters nationwide approved 100 measures on local or state ballots that dedicated funds to land conservation projects. These funding measures, approved in 23 states, generated $1.8 billion in local and state funding for land protection.⁵

Between 1988 and 2003, the amount of acreage that land trusts protected using easements increased by an amazing 1,624 percent. In the same 15-year period, the number of land trusts more than doubled, from 743 to 1,537. New England has the greatest concentration of land trusts, although the number of land trusts in the West, Southeast, and Mid-Atlantic increased significantly over this 15-year period.

The Land Trust Alliance’s census showed that Maine’s state and local land trusts have protected the most acres with conservation easements—1,125,859. The other five states in which land trusts have protected in excess of 200,000 acres with easements are Colorado, Montana, Virginia, Vermont, and California. The states with the most easements (more than 1,000) held by land trusts are Virginia, Maryland, Pennsylvania, New York, Massachusetts, New Hampshire, Vermont, and Colorado. According to the census, 56 percent of the land trusts responding to the survey held at least one conservation easement.

Although most public agencies purchase conservation easements, an earlier land trust census from 1998 showed that most of the easements held by land trusts were donated. This survey showed that the conservation values most commonly protected by land trust easements were forests and timberland, followed by wetlands, scenic areas, farmland, and ranches.

The Appeal of Conservation Easements

Conservation easements occupy an appealing niche in the array of land protection techniques. An easement keeps property in private hands and on the tax rolls, and it protects the specific conservation values of a property according to the wishes of the individual landowner and easement holder. Easements are acquired from landowners who either donate some or all of the


value of the easement, or receive market-rate compensation for the property interest. Purchasing easements generally costs less than purchasing lands outright. However, studies have not been completed to compare the long-term costs of easement management, monitoring, and enforcement to the costs of fee ownership, making it difficult to compare the overall costs of acquiring and owning land against those of easements. Because public agencies do not have the funds to purchase all lands that need to be protected, purchasing easements can be a cost-effective acquisition alternative, and over the long term, innovative partnerships may help reduce agencies’ easement stewardship costs (see chapter 16).

For lands and historic properties whose long-term protection is important, but for which private ownership and management is the best approach to continue traditional land use, easements are often the right tool. Easements can help protect all types of resources: a 500-acre ranch that has been in a family for generations and lies at the gateway to a national park; a 200-year-old stone house in the middle of a city’s financial district; a corridor of private property along a wild and scenic river used by thousands for recreation; or a half-acre community garden in the midst of a senior-citizen housing complex. Easements are a popular conservation tool because of their flexibility and their applicability to a wide variety of situations.

The Maine Coast Heritage Trust is an example of an easement holder that protects all types of landscapes with conservation easements—scenic coastlines, islands, commercial forests, and agricultural lands. As of 2003, the 33-year-old land trust had protected 74,508 acres using conservation easements. The land trust’s president, Jay Espy, comments, “Conservation easements are the best tool we have to protect the scenic, natural, and recreation values of the land and still retain some of its economic value.”

A History of Conservation Easements

Historically in the United States and England, under common law, easements were used primarily to benefit adjacent property. Called appurtenant easements, they typically provided rights of access and protection of views. Today’s conservation easements differ because they benefit the public at large and give an outside entity (not the neighboring landowner) the ability to protect the terms of the easement, usually in perpetuity. These types of easements must be authorized by state law.

The first conservation easements in the United States were reportedly written in the late 1880s to protect parkways designed by Frederick Law Olmsted in the Boston area. Several decades later, in the 1930s, the federal gov-
Montana’s land conservation organizations have protected hundreds of thousands of acres with conservation easements. The Montana Land Reliance holds a 600-acre easement on this family homestead in the Swan Valley. Photo by Candace Durran, courtesy of the Montana Land Reliance.

6 Available from the National Conference of Commissioners on Uniform State Laws at 645 North Michigan Street, Chicago, Illinois 60611.
many states, and other states revised their existing laws to adopt some of its concepts. As of 2003, 23 states had enacted conservation easement enabling legislation based on the UCEA, and 26 states had drafted and enacted their own laws. Wyoming is the only state that has not enacted a statute defining conservation easements. 

Although easements are governed by state law, a landowner who seeks tax benefits for an easement donation must also adhere to the federal tax law that governs the deductibility of charitable gifts of easements. The Tax Reform Act of 1976 was the first federal legislation explicitly to recognize conservation easements as deductible charitable gifts. Since 1976, other federal tax legislation has been passed to improve and clarify the prior law, and provide additional tax incentives for donating conservation easements.

Looking to the Future

Given the trends in the creation of conservation easements, it is likely that their use across the country will continue to increase at a rapid pace. Additionally, larger and larger properties are being protected by easements: in an informal 1999 survey conducted by the Vermont Land Trust, 28 easements across the country protected vast landscapes that ranged in size from 10,000 acres to more than 200,000. Since this survey, easements have been acquired over even larger land areas.

Not only will the number of acres protected with conservation easements increase in the years ahead, but trends indicate a corresponding increase in the sophistication of conservation easement documents and easement holders as well. Easements are becoming increasingly complex, allowing for the protection and management of multiple conservation values on a single site, such as historic, natural, farm, and forest resources. Many of these easements with multiple purposes require management plans or review and approval of future actions by the holder. With such increasing complexity, and requirements for review and approval, comes the need for the holder to have professional expertise in drafting and stewarding the easement.

Stewardship, once an afterthought to easement drafting, will be at center stage for the easements of the future. It is essential that holders have formal sys-

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7 Stephen Outlaw, “Links to Statewide Conservation Easement Enabling Legislation,” Land Trust Alliance Fact Sheet, February 15, 2002. North Dakota was not included on this list because its easement enabling act limits the term of easements to 99 years, making the easements ineligible for federal tax benefits.

tems to document monitoring, and that they build their organizational capacity to partner with changing easement owners, ensuring that easement terms are upheld. In addition to stewardship of the easement, holders are increasingly involved in working with landowners on stewardship of the land itself—sometimes within the confines of the easement restrictions, but often on broader issues that are handled through separate agreements outside the easement agreement.

Even with strong stewardship, individual land trusts and agencies and the easement holder community as a whole must be prepared to defend and enforce conservation easements. Holders must act now to build the resources and skills within their own organizations, and in their states and regions, to uphold easements in the future. There is a growing awareness that the failure of one easement holder reflects on the credibility of the entire easement holder community. Ensuring the promise of conservation easements requires that all holders act to maintain not only the integrity of their organizations, but also the integrity of the land conservation movement as a whole. Partnerships among holding organizations, government agencies, and other nonprofits will be key to the future of land conservation. Partnership arrangements can help address enforcement challenges and bring diverse financial resources and skills to a transaction.

Much of the large-scale land conservation of the 20th century resulted in the federal ownership of national parks, forests, and wildlife refuges. Local governments are now buying land in greater numbers than ever before, but one of the great opportunities of this century will be to protect privately held lands. In the years to come, the conservation easement will be the primary legal tool for protecting these private lands that define America’s landscape.