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CONSERVATION EASEMENTS AND LAND TRUSTS FOR REALTORS

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GENERAL COMMENTS

It is the objective of this presentation to provide to realtors the basic tools to understand and discuss intelligently issues concerning Conservation Easements. At the conclusion of this presentation it is our hope that you will have a working understanding of how Conservation Easements are created, the tax benefits that make Conservation Easements attractive to certain landowners, how Conservation Easements can be used in estate planning, and recent developments involving fraudulent appraisals with discussion as to how such are impacting the current landscape pertaining to Conservation Easements. As always, this is not in any fashion intended to substitute the use of other professionals including, but not limited to, attorneys, accountants, appraisers and financial planners.

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WHAT IS A CONSERVATION EASEMENT?

First and foremost, a Conservation Easement is merely a special category of easement. An Easement has been generally defined as a right, privilege or interest limited to a specific use or control of real property for the purpose of which one party has in the land of another party, runs with the land and is not a personal right of an individual. The most common type of easement is, of course, an access easement which allows one to travel over the property of another so as to access a benefited property. The Easement is said to be the dominant estate, the burdened land is the subservient or junior estate.

A Conservation Easement is, thus, a specific type of easement. More specifically, a Conservation Easement establishes a legally binding land preservation agreement between a land owner and a qualified third party. Typically a municipality or a qualified land trust with the purpose of conserving the nature of the real property in question for its historic use, often agriculture, is the qualified third party. A restriction involved in the placement of land in a Conservation Easement is the curtailing, if not outright elimination, of real estate development as well as commercial or industrial use. As one rancher correctly summarized: “If money is the only or deciding factor, then the landowner is better off to just sell their land outright. That would be the better economic decision.”

The Conservation Easement is always created in writing. Conservation Easements cannot be done orally or such spoken agreement violates the statute of frauds. Often people tend not to think of Conservation Easements as a type of contract arrangement, however, this is the essence of the Conservation Easement, which is as much contractual in nature than it is statutory or

regulatory. Accordingly, the decision to place any property in a Conservation Easement is absolutely voluntary in nature. The Conservation Easement cannot be created judicially or by condemnation. Typically, Conservation Easements are created at the time of sale to third parties or by donation. The terms and conditions of the Conservation Easement are restrictive in nature and in the vocabulary of lawyers “run with the land” making the terms of the Conservation Easement binding on all land owners, existing and in the future. These terms and conditions are perpetual in nature and are usually irrevocable. The contract in question creating the Conservation Easement is drafted between the donor, on the one hand, and the qualified conservation agent (typically a Land trust) on the other. These contractual restrictions are set forth in laborious detail in a legal document referred to as a Conservation Easement, which is ultimately recorded with the Clerk and Recorder so that the restrictions on the land become part of the public record as well as part of the chain of title.

There typically exists a primary purpose in the creation of a Conservation Easement. Often, but not only, it is the protection of agricultural land with its historic density and use while maintaining open space. However, this is not to say that Conservation Easements cannot be created to preserve timber resources, wildlife habitats, open waters, scenic views, or other types of property endowments.

Typically, the incentive for the land owner to contractually enter into a Conservation Easement and forfeiting valuable development rights is a trade off between continuing to utilize the property in a historic fashion and managing the property along those historic lines, but also receiving significant state and federal tax advantages for having foregone development

opportunities when creating the Conservation Easement. Thus, while it may be the case that a Conservation Easement is created when one party purchases real estate from another party, it is more often the case that an owner retains the property in question, but agrees to have the Conservation Easement placed on his property. Above and beyond tax benefits, land owners often contribute real property to a Conservation Easement because of a sense of preserving a public benefit including the perpetuation of values associated with the property for the benefit of future generations.

Even in a circumstance where a land owner continues to own the property in question, it is important to appreciate it is not the land owner, but the qualified Easement holder that thereafter possesses the responsibility to ensure that use of the land is consistent with the terms and conditions of the Conservation Easement and to enforce the terms and condition as they exist. It is because of this dynamic that the donor can become a “hostage” to his own Conservation Easement. He continues to own the land, but can use it only consistent with the Conservation Easement.

USE OF CONSERVATION EASEMENTS AS AN ESTATE PLANNING TOOL

Conservation Easements allow a land owner to preserve land in its historical usage while potentially creating significant tax benefits. It is important for a real estate professionals to realize that Colorado, unlike many states, provide for tax credits against state income tax liability. It is important to emphasize state taxes, not federal taxes. This state tax credit can be a very powerful estate planning tool in managing federal estate taxes with older, larger estates,

particularly those federal estate tax expenses that result as a consequence where there exists an exceedingly low basis in property because of the period of time in which the property was purchased and a now significantly greater fair market value through land appreciation through decades of ownership. Twenty thousand dollars bought a significant amount of ranch property in the 1950's.

The Conservation Easement is said to be an easement in gross. It is classified as an interest in real property that is freely transferable. Hence, the property subject to the Conservation Easement can be sold, as too can the right to use the Conservation Easement. It is typically of perpetual existence, although the instrument creating the Conservation Easement can specify otherwise (as we will see this will eliminate the tax benefit). A Conservation Easement is created by the record owner of the property in question executing a deed or other similar written instrument of conveyance specifically stating the intent of the owner to create a Conservation Easement while establishing the terms and conditions of that Conservation Easement. That instrument must then be recorded with the Clerk and Recorder's Office and must further designate a specific grantee being either a governmental entity or any other charitable organization exempt under Section 501(c)(3) of the Internal Revenue Code which has to have been in existence at least two (2) years prior to the conveyance. Accordingly, the Conservation Easement is not created under circumstances where a land owner simply deeds the property over to himself, a family member or a trusted friend.

Land Trusts, the typical recipient of the responsibilities of enforcing the Conservation Easement, can be both private and non-profit corporations. An example of the same is Great Outdoors

Colorado (“GOCO”). This is the entity created for the utilization of lottery proceeds which, among other things, spends money set aside from lottery proceeds specifically for the public benefit including Conservation Easements. GOCO was created to assist local governments, state agencies and non-profit land conservation organizations in focusing on the preservation of land for open space, parks and wildlife habitat so as to provide financial assistance. The financial assistance includes the issuance of bonds, which are ultimately repaid from lottery monies. Locally there is the Yampa Valley Land Trust. Some of their literature is attached to the paper at the end.

Conservation Easements are also a tool that is available after the death of the owner and can be created by a Personal Representative of the estate of the land owner. See CRS §15-1-804(2)(h). Thus, a Conservation Easement can be created using real properties of a deceased both through direct instruction in a Will or despite no mention in a Will after obtaining an appropriate Order of the Court by a Personal Representative under circumstances where there exists no request to set aside a Conservation Easement by the deceased prior to death. Of course, such does not prevent heirs or other beneficiaries from objecting to the placement of real property in a Conservation Easement.

The real property subject to the Conservation Easement continues to be subject to property taxes. Thus, even though it is a tax management tool a Conservation Easement does not eliminate property tax. However, because of the restrictions on the land the taxable value of the property in question almost always decreases marketability. Particularly in circumstances where property is valued based upon highest and best use; large acreage typically utilized for agriculture might

have considerably higher value for development. The creation of a Conservation Easement not only defeats valuation based upon highest and best value, but can decrease the value of the property from even its agricultural use. Our office assisted a 4th generation resident of Routt County with this process where her property west of town lent itself to significant residential development. The property had little basis and was being assessed for taxes not based on historical use, but based upon adjacent land sold for development.

CATEGORIES OF TAX BENEFITS

The motivation for placing a property in a Conservation Easement almost always includes tax relief. While certainly there can be a multitude of reasons as to why an individual or Personal Representative wishes to place a property in a Land Trust, at least one of the reasons always involves those related to minimizing taxes. Accordingly, it is important to have an understanding as to the types of tax benefits that are available by the placement of property in a Conservation Easement.

1. INCOME TAX DEDUCTION

The gift of a permanent Conservation Easement to a qualified organization or governmental agency results in a charitable contribution of the value of the Easement. This deduction is typically calculated by the difference in the value of the property subject to the easement before the placement of the easement and immediately after. This difference in value may be deducted from the donor's income for the purposes of calculating federal income tax and, in many states including Colorado, state income tax.

Hence if a property is worth \$1.0 million before the Conservation Easement and \$400,000 after, a \$600,000 gift is made and can be used as a charitable deduction on state and federal tax returns.

The donation of a qualifying Conservation Easement creates a charitable income tax deduction on the donor's federal and state income tax returns. There is a cap on this deduction of 30% of the tax payer's adjustable gross income if the subject property has been held by the taxpayer for one year or more. This deduction may be used in the taxable year of the donation or it can be carried forward for 5 consecutive years. To qualify for this tax deduction, the Conservation Easement in question must include a contribution of a qualifying real estate property interest and made to a qualified organization created exclusively for conservation purposes. This is important because not all properties will be attractive to a qualified organization. That quarter acre lot in Craig littered with abandoned vehicles is not going to be attractive to any qualified organization. Further, the easement in question must be one in perpetuity and not of limited duration.

2. STATE INCOME TAX CREDIT

In Colorado, Conservation Easements generate credits against state income tax liability. Tax credits, as opposed to tax deductions, are more powerful tax management tools because, unlike deductions which merely reduce the taxable income, tax credits directly offset the tax due. By way of an example, presuming an income of \$100,000 and an effective tax rate of 33%, a \$10,000 tax deduction would result in a tax paid of \$30,000

$(\$100,000 - \$10,000 \text{ deduction} = \$90,000; \$90,000 \times 33\% \text{ effective tax rate} = \$30,000)$.

On the other hand, a \$10,000 tax credit results in a \$23,000 tax obligation ($\$100,000 \times 33\% = \$33,000 - \$10,000 = \$23,000$). Hence, under this example the difference between a \$10,000 tax credit and a \$10,000 tax deduction is \$6,700.

3. REDUCTION IN TAXABLE ESTATE

The estate of a deceased is valued at time of death. The restrictions imposed by the terms and conditions of the Conservation Easement will reduce the value of real property subject to federal estate taxes where a Conservation Easement have been placed on a property. Needless to say, a reduction in the value of the property of the deceased's estate results in tax savings. It can also be the difference in the property being held in the family or the property having to be sold to pay outstanding estate taxes.

4. EXCLUSION FROM TAXABLE ESTATE

Pursuant to §2031(c) of the Internal Revenue Code, the executor of a decedent's estate may exclude 40% of the restricted value of land subject to a qualified Conservation Easement (more specifically, the value of the property after subtracting the value of the easement). Under the Internal Revenue Code, a maximum amount that may be excluded under this provision is \$500,000 per estate. An example is helpful. If a property that is subject to a Conservation Easement has a value of \$1,000,000 the value of that property for the purpose of determining its value for Federal Estate Tax purposes is \$600,000. Where the effective Federal Estate Tax rate can in some examples be as high as 55%, the advantage is very significant.

5. REDUCED REAL ESTATE TAX ASSESSMENT

Because the land subject to a Conservation Easement is less valuable, there will be a lower tax assessment levied against the property in question. This can result in substantially less real estate taxes. Thus, if a property is assessed at \$3.5 million prior to a Conservation Easement and \$1.5 million after, the real property tax will be based on the lower figure once the Conservation Easement is estimated.

QUALIFYING CONSERVATION PROPERTY

To satisfy the requirements of a qualified organization, that organization must meet the definition as set forth in Internal Revenue Code §170(b)(1)(A)(v) or must be an organization created pursuant to Internal Revenue Code §501(c)(3).

A qualifying conservation purpose for which a Conservation Easement can be used includes:

- a) the preservation of land areas for outdoor recreation by, or the education of, the general public;
 - b) the protection of the natural habitat of fish, wildlife, plants, or similar ecosystems;
 - c) the preservation of open space where such preservation is for the scenic enjoyment of the general public or pursuant to a government conservation policy (so you can pretty much forget that property overlooking the landfill in Milner);
- or

- d) the preservation of a historically important land area or a certified historic structure.

Each of these qualifying conservation purposes are fairly narrow in definition and stringently tested all scrutinized under Section 170 of the Internal Revenue Code. Generally speaking, the qualified organization will be well aware of the specific criteria used to satisfy the Internal Revenue Code and will be of great assistance pertaining to moving forward with any Conservation Easement. In reality, if a property is not going to comply with the test of the Internal Revenue Code, no qualified organization will spend much time or energy pursuing the project. It simply will not be worth their time saving your time.

MINERAL LEASES

It is also important to closely examine issues pertaining to mineral rights as the IRS Code greatly limits income tax deductions by significant restrictions on surface mining. Simply put, the federal government is not interested in permitting significant tax relief under circumstances where there is no general benefit to the public because of a subsequent use of the property inconsistent with open space and historic use. Typically, the Federal tax deduction is not allowed if a third party is entitled to remove minerals by mining. Hence, properties where the surface rights and mineral rights have been previously severed whereby the mineral interests are not owned by the surface owner are typically excluded from the process of consideration for a Conservation Easement almost at its inception. It is important to appreciate that merely because the mineral rights are severed from the surface rights does not immediately exclude property from a Conservation Easement. If the probability of actual extraction of oil, gas or minerals is so

remote as to be said to be negligible in nature, mere severance is not necessarily an impediment. Such is often the case in areas immediately adjacent to Steamboat Springs. For instance, even if the minerals are severed from the surface ownership rights on a property near Lake Catamount, the likelihood of ever seeing any oil and gas drilling or development in that area is so remote that it would be hard to see such severance creating a problem as to the creation of Conservation Easements. A property West of Hayden would be looked at much differently.

To the extent that the reader is interested in securing additional information concerning the precise requirements so as to receive the benefit of a charitable deduction resulting from the creation of a Conservation Easement, Treasury Regulations Section 1-170A-14 provides such information.

VALUATION

As previously mentioned, the value of the contribution which determines the amount of the charitable deduction in the case of a Conservation Easement is generally defined as the fair market value of the restriction at the time of the contribution. Typically, this would be determined by taking the value of the property at the time immediately before the creation of the Conservation Easement and then subtracting the value after the creation of a Conservation Easement. That difference defines the value of the restriction. Not only is this value as to the Conservation Easement the type of activity that is pursued by a licensed appraiser, but is best accomplished by an appraiser that specializes or at a bare minimum has significant experience in this specific task. There is a preference on the part of the Internal Revenue Service to determine

fair market value based upon the sale prices of comparable easements. However, a comparable is always in the “eye of the beholder” and whether or not two easements, even those very close to each other in a geographical sense, are “comparable” is hard to say. Part of the art of appraisal is the skill at identifying comparables. Accordingly, because often there are no comparable Conservation Easements, the general rule of thumb is that the fair market value of the easement is equal to the difference between the fair market value prior to the encumbrance versus the fair market value afterward. As we shall see, this valuation process has created a multitude of audits by revenue agents.

It is essential to secure the services of a qualified appraiser prior to making any final decisions as to the placement of real property in a Conservation Easement. It is necessary not only to have a property that would be of interest to a qualified easement holder, but at the same time a property that will generate the tax benefits of a significant nature or else the creation of the Conservation Easement will not be attractive to the donor.

ESTATE TAX BENEFITS

The creation of a Conservation Easement lends itself to two different types of Estate Tax Benefits. Initially, the Conservation Easement typically reduces the value of the real property subject to the estate tax thereby reducing the estate tax then due. Secondly, a portion of the land that has already been reduced in assessed value may be excluded from the taxable estate pursuant to Internal Revenue Code §2013(c). Internal Revenue Code §2013(c) allows that a taxpayer estate may exclude up to 40% of the value of the land determined after taking into consideration

applicable restrictions. Subsequent to 2002, the exclusion is limited to \$500,000. Hence, we can provide a hypothetical where a property is worth 2.3 million dollars. Pursuing the creation of a Conservation Easement reduces the assessed value of the same property to 1.0 million dollars, IRS §2013(c) reduces the value of the property subject to tax to \$600,000 dollars when providing an inventory of Estate Assets. So as to secure the benefit of the one time deduction, the Personal Representative of the estate (remember the donor has passed away hence the Personal Representative) must make an affirmative election to utilize this deduction and timely file federal estate tax returns. Once this election is selected, it is irrevocable in nature. So as to avail oneself to such election, the real property must satisfy each of the following:

1. The real property in question must be located in the United States or any possession of the United States (i.e. a territory like American Samoa or Puerto Rico);
2. The real property must have been owned by the decedent or a family member at all times during the three year period of time ending on the date of death;
3. The Easement must categorically and absolutely prohibit anything more than *de minimis* use for commercial recreational activity (for example, hunting); and
4. The Conservation Easement must be created by the decedent, a member of the decedent's family, or the Personal Representative of the decedent or the Trustee of the Trust and, the Corpus of the estate (i.e. the property owned by the deceased at time of death) must include the land subject to the easement. Accordingly one cannot claim the benefit under circumstances where the Conservation Easement was not created by either the deceased or a family member or the property was purchased immediately after death.

THE COLORADO INCOME TAX CREDIT

There exists in Colorado an income tax credit pertaining to the donation of a perpetual Conservation Easement upon real property that the taxpayer owns under circumstance where a Conservation Easement is created and a trust then operated administratively by either a governmental entity or a qualifying conservation organization. It is important to note that the taxpayer must be either a resident of the State of Colorado (if an individual) or if a domestic or foreign corporation file tax returns in Colorado to obtain the credit.

The available credit is currently capped at \$375,000 whereby the taxpayer will receive a dollar for dollar credit equal to the value of the credit of the easement. The maximum credit that can be recaptured in a year is \$260,000. The dollar for dollar credit commences at a taxable amount of 0 - \$100,000. Thereafter, the taxpayer may utilize the additional credits for that year upward to \$160,000 for 40% of the fair market value of donated easements in excess of the same. Any unused portion of credit may be used forward for twenty (20) consecutive taxable years. The credit cannot be used so that more than \$20,000 of state tax refund is paid in a given year.

An example will help. Presume a \$200,000 dollar tax credit exists. If one has state income tax owed of \$160,000 (the tax credit does not apply to federal taxes) in a given year, the taxpayer could use \$140,000 of tax credit. This is calculated by adding \$100,000 of tax credit for the first \$100,000 of taxes owed and then \$40,000 of tax credit for the amount owed over \$100,000, but is less than \$200,000. To the extent \$60,000 of tax credit is not used in the year of the creation

of the Conservation Easement, any remaining credit can be used in following years up to \$50,000 per year so long as Colorado has a budget surplus in that year. Otherwise, such credit can be carried forward until exhausted. Hence, \$140,000 would be used in tax year 1, \$50,000 in tax year 2, and \$10,000 in tax year 3. All of this is set forth in great detail in C.R.S. § 39-22-522.

It is noteworthy that a taxpayer may claim only one tax credit per year. The mechanics can be a little cumbersome, but if a tax deduction is claimed on the taxpayers federal income tax return for any contribution upon which the state tax credit is also claimed, the amount deducted from the federal taxable income must be added back to determine the Colorado taxable income of the tax payer. This prevents the taxpayer from receiving a double benefit from the property in question by claiming a deduction to reduce the Adjusted Gross Income and then a tax credit to reduce the amount payable.

TRANSFER OF CREDIT

The attractive nature of these tax credits is further enhanced by the ability of the taxpayer to transfer, i.e sell, credits to a third party. This creates a market for these credits. This is important because tax credits are valuable only to those that have significant tax liability. More specifically, CRS §39-22-522(7) provides that a taxpayer may transfer an unused portion of his or her tax credit to a third party.

In fact, the non-profit Conservation Resource Center (“CRC”) facilitates the sale of these Conservation Easements by maintaining a database of taxpayers interested in selling these

credits. Buyers who intend to purchase such tax credits must provide a statement of intent to purchase no later than December 1. In reliance upon this Statement of Intent, the CRC then matches buyers and sellers and establishes a closing date. Generally speaking, the seller will receive 80% of the value of the tax credit in cash (\$8,000 for a \$10,000 credit) and the buyer will pay 90% of the value of the tax credit (\$9,000 for a \$10,000 credit). The 10% “difference” is remitted to the CRC for services rendered and acting as an intermediary. The CRC provides sample forms that can be used in these types of exchanges, but the buyer must acquire the tax credits in the taxable years for which the credit will be utilized. Hence, one wishing to utilize 2007 tax credits for a tax year 2007 return has already missed the deadline. Hence, the deadline of the Statement of Intent to purchase by December 1st. They buyer then can use the \$10,000 tax credit on his Colorado state tax returns.

The sale of tax credits will then result in income to the party selling the same. This will have the negative effect of at least in part offsetting the federal charitable deduction which the taxpayer would have been entitled. Simply put, the sale of the tax credits results in additional income. Additional income partially defeats some of the tax management benefit of in the transaction. However, the individual buying the tax credit would appear to be able to deduct the full amount of the protected tax credit on their federal tax returns while utilizing the tax credit on their state returns.

The specifics pertaining to the Colorado credit against tax are all set forth in CRS § 39-22-522 (see attached). A copy of the entirety of that statute is included. For the purposes of this presentation, the most significant part of this statute is CRS §39-22-522(3.5)(II) which includes:

For a conservation easement in gross created in accordance with article [30.5](#) of this title [38](#), C.R.S., that is donated on or after April 1, 2007, to a governmental entity or a charitable organization described in section [38-30.5-104](#) (2), C.R.S., the credit provided for in subsection (2) of this section shall be an amount equal to fifty percent of the fair market value of the donated portion of such conservation easement in gross when created; except that in no case shall the credit exceed three hundred seventy-five thousand dollars per donation.

RECENT SCRUTINY BY COLORADO DEPARTMENT OF REVENUE AND IRS

Commencing in approximately the Fall of 2007, Conservation Easements encumbering ranches began to attract the scrutiny of Colorado Division of Real Estate, the Colorado Department of Revenue and the Internal Revenue Service because of allegedly inflated appraised prices.

Of the 400 tax returns including Conservation Easements that the Internal Revenue Service was investigating as of November, 2007, some 290 of these were located in Colorado. Of these 290 audits, 60 were initiated as a result of a request by the Colorado Department of Revenue, the rest by the IRS. The target of the Conservation Easement dispute is not the land owners or even the trusts entrusted in administering with these Conservation Easements, but rather the licensed appraisers. In one case out of Walsenberg, a 35 acre Conservation Easement was challenged because the appraised value of the property was based upon development potential, when the property had no

development value at all. The State of Colorado concluded that this one transaction alone resulted in a \$260,000 tax shortfall to the state. This raises not only tax audit issues, but possible felony ramifications.

Historically, the number of Conservation Easements escalated dramatically commencing in 2003 when the State of Colorado began providing the state tax credits, a methodology used by very few states throughout the United States. As set forth above, in exchange for the donation to a qualified easement holder, the land owner received a transferable income tax credit for 50% of the fair market value of the Conservation Easement up to the maximum of \$375,000.

Studies show that since 2001, approximately \$275,000,000 worth of Conservation Easement tax credits have been claimed based upon approximately 1500 donated properties. Accordingly, the appraised value of the real properties placed in Conservation Easements since that time in Colorado alone approaches \$550,000,000.

The Colorado Coalition of Land Trusts is attempting to encourage the examination of these transactions by the Internal Revenue Service prior to their moving to formal audit. Currently, there is little “middle ground.” Approximately 1.2 million acres of privately held property in the State of Colorado are part of Conservation Easements. There are approximately 66.6 million acres of property in the state privately owned. The concern is that the threat of federal and state tax audits resulting from inflated appraisals will create

a cooling effect upon those that otherwise would seriously consider the donation of real property to a Conservation Easement.

Ultimately, these investigations by taxing authorities pit the objectives of Departments of Revenue to secure the payment of taxes, on the one hand, against the desire of other governmental entities to create and preserve open space. Currently some 1,500 Conservation Easements protect more than 1.2 million acres in Colorado. The first year state tax credits were available approximately \$2.1 million of tax credits were allocated. So far for tax year 2006 (the last year full year statistics are available), approximately \$85.1 million of tax credits have been sought.

GENERAL QUESTIONS ABOUT CONVSERVATION EASEMENTS

Are all properties candidates for Conservation Easements?

Easement offers are evaluated on a case by case basis. Whether a governmental entity or a qualified easement holder, staff is available to visit potential easement sites and meet with interested land owners. The final decision is NOT made by one offering the property for the purpose of Conservation Easement, but the accepting entity. Unless a property does not even remotely meet any guidelines, a different land Trust better suited for the property in question will be recommended. However, not all properties are fit for the placement in a conservation easement.

Can a Conservation Easement be created for less than Perpetuity?

A Conservation Easement can be placed in Trust for less than perpetuity, but such will result in the property not being able to eligible for the tax credits.

What are the disadvantages of donating a Conservation Easement?

The biggest disadvantage is that the owner is losing control of their property.

Once created, the use of the property subject to a Conservation Easement is only those permitted pursuant to the Conservation Easement itself.

What other issues should be considered prior to donating a property to a Conservation Easement?

The complication involving the decision to create a Conservation Easement is often the expectations of the respective generations. Sometimes the existing generation places value upon property based upon historic use and maintaining the property for future use consistent with that historic utilization. Unfortunately, it is very often the case that the generation that will be inheriting the property has less interest in the property itself than their parents and instead focus on the monetary value of the property at sale. This problem is acute in Routt County today where far fewer of the children that graduate from Hayden High School, Steamboat Springs High School or South Routt County High School remain in Routt County as adults. Because it is the nature of the Conservation Easement that the fair market value of the property is dramatically decreased because of the restrictions on use, it is important that to the extent the Conservation Easement is being suggested as an estate planning tool that there is a candid discussion between the generation that currently owns the property and the generation that

will benefit from the estate of the deceased subsequent to death. These are not simple questions and need to be fully explored.

Does the creation of a Conservation Easement mean that there is now public access to my property?

Unless the Conservation Easement specifically grants public access, which is not typically the case, the public benefits as a result of Conservations Easements only by diminished density, maintenance of scenic views and view quarters, and the like.

Who actually owns the property after the creation of a Conservation Easement and can such actually be sold?

The land owner (donor) continues to own the property, but the Conservation Easement becomes the dominant estate. Like any other easement, the land owner is now in possession of the subservient or junior estate. The property can be freely sold or otherwise conveyed, but will remain subject to the terms and conditions of the Conservation Easement. Accordingly, the Conservation Easement is said to “run the land” and the restrictions will apply to all future owners who always take subject to the Conservation Easement itself thereafter.

Can property owners continue to live and use the property after the creation of the Conservation Easement?

Typically, when property is placed in a Conservation Easement the language granting Conservation Easement allows for reasonable continued use and development consistent with historic use of the property in perpetuity. For instance, suppose the property in question is being used as a ranch. The owner of the property even after establishing a Conservation Easement will continue to be

allowed to construct and repair farm buildings and other types of improvements that are normal and customary with agricultural practice. Future owners can also ranch the property. Along those lines the drafting of the Conservation Easement itself must be well crafted and thought through thoroughly. However, the type of growth that will be permitted on the Conservation Easement will be very restricted so as to maintain the existing nature of the property itself.

Is it worth involving oneself in a Conservation Easement?

The answer to this question is both subjective and objective. Objectively, an Appraisal can be produced in advance of the execution of any Conservation Easement documents so that financial benefit can be quantitatively analyzed. The empirical cost benefit analysis is fairly easy. However, the Conservation Easement also has much more than a mere tax benefit component. Many, but certainly not all, want to make sure that their property is being used in the future as it has in the past. To those that place high value upon future use of the property consistent with historic use, the Conservation Easement can be a very effective tool. On the other hand, there are many people that have no interest whatsoever in controlling their property “from the grave” and feel very strongly that market forces should be allowed to determine the highest and best use of the property. These decisions need to be made on a case by case basis. The significance of making these decisions, particularly as the owners of property get older also involve a rational overview of all the financial issues involving the current owners. It is necessary to take into account not merely tax benefits, but issues pertaining to making sure that there are adequate monies available for the

long term health needs of the owners and all the types of issues one would expect to address involving the elderly. The most important part of the decision is to make sure these decisions are made while the living generation is competent in their decisions.

Is there a deadline pertaining to the donation of a property with purposes of a Conservation Easement?

There is no per se deadline, however, depending on when you begin the process such may determine the tax year in which the benefits will be first available.

Depending upon income and many other issues involving the donor, the timing of the transaction ought to be considered. Your attorney, accountant and appraiser will help here.

Is this the type of transaction that I discuss with other professionals?

Absolutely. Those that are considering a Conservation Easement should make sure that they discuss all these matters with an Attorney who understands the Conservation Easement process, an Accountant that also understands both the state and federal tax ramifications of the same, an Appraiser as to valuation related issues and a realtor to the extent that ultimately, this property may be conveyed. It might also be wise to sit down with a financial consultant as well. Whether or not a property may be held in a Conservation Easement does not determine whether or not heirs or the next generation will own the property. It determines the use and value. Good decisions tend to be the result of better information. The decision to place a property in a Conservation Easement is a significant decision. Like any important decision, the involvement of

professionals early on to assist in the evaluation of the same is critical in making wise decisions concerning the Conservation Easement.