The Sun'll Come Out Tomorrow

A Study of Neglected and Orphaned Easements

Colorado Open Lands

- and -

Colorado Cattlemen's Agricultural Land Trust

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Executive Summary

In our world, we celebrate the spectacular accomplishment of 40 million conserved acres. We recognize the achievements of accredited land trusts and great community open space programs. We diligently address our craft to minimize the errors and elevate the bar moving forward. We promised perpetuity without a true understanding of what that meant, but we are determined to make good on the promise.

Neglected and orphaned conservation easements are not in that world. They travel below the radar. Our world is one of opportunities, challenges, setbacks and successes. It is a world of action. Neglected and orphaned easements are the opposite. They are the result of inaction, of apathy, of failure.

Neglected and orphaned easements happen away from the light. By the time they make noise, it may be too late. Survey after survey and study after study in the land trust community indicates that 40-50% of the organizations, controlling 75% of the conserved land, are engaged. They are engaged in accreditation, they are engaged in Terrafirma, they are engaging in industry discussions around resolving common issues.

Roughly, 35% of the land trust community does not hold conservation easements. That means about 20% of land trusts – and data shows they are the smaller organizations with smaller easements – do not participate.

Government is more perplexing. Government holds more easements and more acreage than land trusts. Nationally we do not have a count on the number of easement holding government agencies, but in Colorado, 54% of the easement holders are government entities. Sadly, and somewhat frightening, government reporting on conservation easement practices is virtually non-existent. Who holds easements, and what they are doing with them, is a black hole when it comes to the government.

Which brings us back to neglected and orphaned easements. There are an estimated 200,000 conservation easements in the United States, encumbering 40 million acres. There are roughly 1,000 easement holding land trusts, and an estimated 1,500 government holders. We have no idea the number of neglected or orphaned easements awaiting rescue. We will not identify the neglected easements with a methodical search through holders and their portfolios – there is too many and the light is too dim. If we are not looking for needles in haystacks, then we are looking for them in hay bales.

We need some light on the situation. Preferably, laser. We need to determine what gives us the key factors to identify neglected and orphaned, or potentially orphaned, easements. This would allow us to short cut the almost impossible task of searching for them easement by easement and holder by holder. Colorado has an opportunity, through voluntary action, certification, a registry, and other means, to find these problem easements and easement holders.

Once we have identified the neglected easements and their holders, we can evaluate the problem, determine a recovery plan, and start the repair.

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I. Project Overview

There has been growing concern within the national and Colorado land conservation community about the consequences of problem conservation easements, especially those that are neglected or about to become orphaned. Colorado Open Lands (COL) and Colorado Cattlemen's Agricultural Land Trust (CCALT) received a grant from the Great Outdoors Colorado Trust Fund and the Gates Family Foundation to undertake a study of how to handle these especially challenging easements and narrow the discussion to a manageable level.

A. Goals

Orphaned easements and their siblings, neglected easements, have been a growing topic of concern, speculation, and debate within the land conservation community, including at some level, funders and regulators. There has been little discussion however, of a basic approach to defining the issue and problems, determining feasible resolutions, and developing a process for evaluating potential problems. This study attempts to do that. There are three specific goals of this study:

Goal: Define and understand the range of issues for orphan or neglected easements;

Goal: Understand options available to easement holders and stakeholders; and

Goal: Develop a process for assessing potential orphan or neglected easements.

The intent of this study is not to examine individual conservation easements, or individual conservation easement holders, but rather to examine what the spectrum of issues are that constitute potential neglected or orphaned easements, and what range of alternatives exists to address those issues.

B. The Challenge

Colorado and America have embraced land conservation, and the industry has responded with impressive results. Those results however, are premised on a promise: we will preserve these lands forever. The promise of perpetuity markets conservation. Without perpetuity, the shelf life of land conservation is brief. A neglected or orphaned easement fails to honor the perpetuity promise. It is certainly a failure to those involved in the original intent – easement donors, organizational representatives, organization donors, neighbors and the surrounding community, and state and federal taxpayers that subsidized the transaction. However, it is also a failure for the future. Not only does it fail

to protect a real conservation resource, the failure to keep the perpetuity promise is a failure to the future of conservation. It creates doubt about conservation: A news reporter asks questions; a potential easement donor hesitates; a potential financial donor passes; a legislator votes no; the IRS audits. The failure to protect the promise is a failure, and it represents a major threat to the future of land conservation.

C. Criteria

Study approach: Our study will look at the orphan easement from two perspectives – that of the easement itself, and that of the easement holder. The problems and solutions to the orphan easement issue may lie with either or both.

Criteria: To achieve the study goals requires a framework of basic criteria from which to examine the issues. In some cases the criteria is relatively clear and specific (i.e., "must be protected in perpetuity"), while in other cases the criteria is at least somewhat subjective (i.e., "must yield a significant public benefit").

There are several potential sources for guidance in determining the criteria to use as a basis for analysis. Federal law and regulation; State law, regulation and rules; case law; IRS policy; legal guidance; and land trust industry standards and practices, can all be used to develop criteria. These sources offer a wealth of guidance – in fact; they likely offer too much guidance. At this point, our challenge lies in creating sidebars and general processes for identifying and dealing with potential orphan easements. Fine-tuning will come with addressing specific problem easements and specific problem easement holders.

There is also a lack of industry consensus on some fundamental forms of guidance. Division over the interpretation of federal regulations as well as the application of contract law versus charitable trust law directly affects amendment and termination alternatives for orphan easements. As attorney, Rob Levin noted, "the issue of amendment and termination is one of the most important and controversial topics in today's land conservation legal community. Over the past several years a stimulating and healthy debate has emerged over whether, when and how easements can and should be amended and terminated." [1] Indeed, while we may question whether conservation easements can be maintained in perpetuity, there is little doubt of the perpetual nature of the legal debate.

Consequently, we have elected to adhere to basic law and regulation – both federal and state – for our principle guidance. We will look to law and regulation to develop the main criteria for consideration of conservation easements and conservation easement holders. Other direction – industry practices, legal guidance, IRS guidance and state administrative rules – can and will be helpful in examining alternative approaches.

D. Definitions

Problem Easements: In recent years, many terms have been used more or less interchangeably to address our topic. Problem easements, troubled easements, neglected easements, homeless easements, abandoned easements, orphaned easements, and, as we described them for a while, "the good, the bad, and the ugly." A few general attempts have been made to define orphan easements:

"An orphan conservation easement situation can arise when an easement holder abandons its responsibility to monitor the easement or when a land trust organization dissolves without transferring its easements to another party for monitoring and enforcement." [2]

> "If a land trust folds up its tents, leaving no functioning holder or no persons who are accountable for stewardship or enforcement or both, the easements may be considered "orphaned." [3]

There is a fundamental difference if the holder of the easement exists or does not exist. We will explore this distinction in the study. If an "orphan" is without a parent, than an "orphan easement" should be defined as an easement without a holder. It may be in some cases if the holder of record vanishes, a successor holder, identified either in the easement or by default, exists. However, for purposes of defining our problem, we define an "orphan easement" as:

> ***Orphan Easement:*** **A conservation easement for which the holder of record no longer exists.**

Easements in which the holder exists but has difficulty with the easement, either because of the nature of the easement or the condition of the holder, or both, and consequently neglects dealing with easement problems, we have defined as a "neglected easement:"

Neglected Easement: **A conservation easement for which the holder of record exists, but fails to address, in a substantive manner, its obligations to the easement.**

The difference between neglected and orphaned easements, as defined, is key. Far more alternatives and remedies are available in dealing with neglected easements than with orphaned ones. The most effective means of avoiding orphan easements is to resolve neglected ones.

E. Tiering

Although the potential for orphan, and certainly neglected easements, has been a growing concern within the industry, few direct analyses exist. However, the industry has benefitted from numerous analyses of related issues. Substantial work on the meaning of laws and regulations, case law, various state statutes, amendments, terminations, stewardship practices, and other topics are available.

The National Conservation Easement Database (NCED) is explained in detail in Section II (A Note on Documentation). While the NCED is not complete, it offers a valuable insight into the diversity of conservation easements across America. Several different products from the Land Trust Alliance have been extremely useful, including their analysis of state conservation easement enabling legislation; relevant conservation easement case law, information from LTA's Accreditation Commission and Terrafirma, their spin-off conservation easement defense insurer. Their survey work, including their 2010 Land Trust Census, and their 2014 Easement Modification and Termination Study were equally valuable.

We have relied on findings in "Easement Revitalization," published by Solid Ground Consulting in September 2012. This is an excellent analysis of "troubled" easements, and we have adopted several concepts from the study. In particular, the Solid Ground study is an applicable examination of the conditions affecting the creation of neglected and orphaned easements, as well as the analysis of several potential remedies. The term "Problem" easement is used in "Easement Revitalization," and the study is useful in defining three basic categories of "Problem" easements, plus a fourth aggravating factor:

Conservation value problems: ***Easements that have no or minimal conservation value.***

Drafting problems: ***Easements that may have undefined, confusing, conflicting or obsolete terms; inadequate, inflexible, or unenforceable restrictions; or other drafting problems.***

Transactional problems: ***Lack of adequate documentation, title, etc.***

Complicating Matters: ***Issues that complicate a holder's ability to deal with problem easements.***

In addition, we will also use these definitions from the Solid Ground study:

> ***Sequestration:*** **placing an easement in an organization that exists or is formed to "sequester" or hold problem easements.**
>
> ***Reformation:*** **a process requiring court approval that changes the deed or other writing to be consistent with the actual agreement originally made by the parties.**

Several papers on conservation easement amendments, including Darby Bradley's authorship of the Land Trust Alliance's "Amending Conservation Easements: Evolving Practices and Legal Principles" and "Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements" by Paul Doscher, Terry Knowles, and Nancy McLaughlin are useful for setting forth principals and definitions of amendments. Indeed, both of these sources use the same seven principles a holder should consider when contemplating an easement amendment:

1. Clearly serve the public interest and be consistent with the land trust's mission.

2. Comply with all applicable federal, state and local laws.

3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.

4. Not result in private inurement or confer impermissible private benefit.

5. Be consistent with the conservation purpose(s) and intent of the easement.

6. Be consistent with the documented intent of the donor, grantor and any direct funding source.

7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

These principals provide for characterizations of potential conservation easement amendments later in this Study.

F. Summary

Potential neglected or orphaned easements are in many ways the consequence of our success. Perhaps they are the result of a demand the industry could not keep up with. Perhaps if we had moved slower, been deliberative, been more cautious, we would have perceived their possibility. We would have studied the viability of protecting conservation purposes more thoroughly. We would have drafted documents more thoughtfully. We would have understood landowners and communities better. We would have better grasped the organizational obligations of perpetuity.

Perhaps.

We face challenges. These challenges are the result of success, not recklessness. Could we have done it differently? Of course. However, an estimated 40 million acres of America are preserved by conservation easements. If we had moved slower, been deliberative, been more cautious, we might be better prepared for the challenges of easements and perpetuity. However, those 40 million acres would certainly be something less.

Perpetuity is a mystery. Our charge is to preserve things as they are, and perpetuity's only guarantee is that things will change. That is a reality we, our rhetoric, our overseers, and our law and practices have yet to fully acknowledge. However, that does not excuse us from the obligation we have willingly accepted. We have identified impediments – neglected and orphaned easements – to our promise of perpetuity. Hopefully this Study will contribute to a constructive industry response to the challenge.

II. Background

As of March 2016, The National Conservation Easement Database recorded 113,041 conservation easements nationally, totaling 24,149,000 acres. The NCED estimates this represents approximately 60% of all easements, indicating conservation easements encumber close to 40 million acres.

Colorado ranks 14th nationally in the number of conservation easements, but 4th in acreage under easement. Sources indicate the number of non-federal easements in Colorado at nearly 6,000, encumbering over 2 million acres of land.

Needless to say, the impact of conservation easements is significant.

A conservation easement is an interest in real property conveyed by a landowner to a third party – primarily a nonprofit organization or a government agency – that restricts certain uses on the land subject to the easement in order to protect the property's conservation purposes. The landowner retains the ownership and restricted use of the property, and the third party easement holder bears the obligation of enforcing the terms of the easement.

Although conservation easements, considered "partial interests in real estate" under common law date back to 1891, easements relevant to this study are products of an amendment to the Tax Reform Act of 1976, two subsequent amendments, and the implementing regulations published January 14, 1986 (1.170A-14.). Conservation easements were first formally authorized in Colorado in 1976, with the enactment of CRS § 38-30.5-101 through 110. Case law has provided additional interpretation of the federal regulations, and the Colorado statutes have been amended several times since the initial enabling act.

Conservation easements are an interest in real property, and represent a property right conveyed by a deed of conservation easement. Because property law is primarily the domain of state law, these property rights may vary greatly across the country, and often did prior to 1976. Before the 1976 federal law, the general rule was that a donation of a partial interest in real property, such as a conservation easement, was not eligible for a federal charitable tax deduction.

The 1976 law set forth requirements for the donation of partial interest properties to qualify for charitable tax deductions. This law then, and the subsequent implementing regulations, created parameters for which conservation easements would qualify for federal charitable deductions. Non-

complying conservation easements can still be legal, although not federally deductible, and some do occur (for example, a current U. S. Department of Agriculture easement purchase program requires easement provisions that make them non-deductible under 170A). All states subsequently adopted conservation easement enabling legislation at the state level. The origins of many of the various states enabling legislation, although often with significant variation, lies in the uniform Conservation Easement Act (UCEA). Many state enabling laws are also tiered to the federal regulations.

Over time, the federal regulations have served as the general, and sometimes very specific, requirements for the vast majority of conservation easements. We should not ignore, however, the valid existence of conservation easements not in compliance with the regulations.

A. A History of Conservation Easements

The term "conservation easement" appears to have been coined by William Whyte in his 1959 paper *Open Space for Urban America: Conservation Easements*.[4] Although the term was new, the concept of protecting partial interests in land for conservation purposes was not.

Throughout much of the history of America, land conservation has been a fee-ownership proposition. The vast majority of public domain lands are lands never conveyed by the government, despite periods of aggressive land grant programs. Over time, a variety of Executive and Congressional reservations and designations set aside or otherwise reserved these lands for identified purposes, including conservation. These lands, often subject to a host of leasing or other federal grant programs, are owned in fee by the federal government.

The bulk of state lands in the thirteen western states were conveyed by the federal government to the individual states at statehood. The western states have followed different paths for the disposal, retention or management of these lands. Again, these lands were at least originally owned in fee by the respective states, often subject to federal retention of mineral rights and other prior claims against the federal estate.

Local governments as well have a long history of reserving fee land for a wide variety of public purposes, beginning with the Boston Common, publicly purchased in 1634[5] and formerly designated a public park in the 1820's.

The Boston Common proved historic from several aspects of the land conservation movement. In response in part to the creation of New York's Central Park in the late 1850's, the Boston Park

Commission retained Frederick Law Olmstead to develop a park scheme for Boston. Using The Common as an anchor, Olmstead created a plan for an "Emerald Necklace" connecting multiple Boston amenities through a series of public parkways. By 1890, many components of the Necklace had been acquired.[6]

Enter Charles Eliot, a landscape architect employed by Olmsted's firm. As the Emerald Necklace neared completion, Eliot and a local journalist, Sylvester Baxter, began to envision an open space preservation scheme extending beyond Boston, to an area within a 10-mile radius of Boston and including over twenty local communities. Eliot and Baxter's campaign led to state legislation in 1891 authorizing the charter for the Trustees of Public Reservations (later, the Trustees of Reservations), arguably the nation's first land trust.

Subsequently, Eliot and Baxter's initiatives lead to the Massachusetts legislature passing the Park Act in 1892. The Park Act created a thirty-six community Parks Commission with authority and funding for regional park acquisitions, essentially, the country's first metropolitan open space program. Section 4 of the Act authorized the Commission to "acquire . . . open spaces . . . in fee or *otherwise*. . . lands and *rights in land* for public open spaces . . ."[7] (emphasis added).

Although virtually impossible for this author to verify, Julie Ann Gustanski, in the 2000 book Protecting the Land: Conserving Easements Past, Present, and Future, credits the first conservation easement (in kind, not name) as occurring in the Emerald Necklace.[8] Other sources agree, without much enthusiasm. Federico Cheever and Nancy McLaughlin state, "Frederick Law Olmsted employed an antecedent to the conservation easement to protect land along parkways as early as the 1880s. Such interests were held by the government and were invalidated on technical grounds in the 1920s." [9] Circumstantially, it appears the first easement may indeed have been in the Emerald Necklace, and may or may not exist today. The uncertainty is fitting for a study of neglected and orphan easements.

Subsequent use of partial interests, or less than fee interests, appears slow in coming. The next most commonly recognized use of conservation easement interests was in the 1930's by the National Park Service to protect land along the Blue Ridge and Nachez Trace Parkways[10] and the U. S. Fish and Wildlife Service to protect refuge and flow easements in Minnesota and the Dakotas.[11] The State of Wisconsin Highway Department used less-than-fee interests to protect the scenic corridor along the Mississippi River during the 1950's. In 1965, the Federal Highway Beautification Act allowed 3% of a

state's appropriated highway construction funds to be used in part for "scenic enhancement," including conservation easements.[12]

Critical common law questions surrounded the use of pre-conservation easements, however. The notion of a negative interest in land was not common and was disfavored as a matter of law. Neither was the concept of an easement "in gross" – i.e., a personal easement interest, or an easement interest not attached to another property. Finally, the idea of a perpetual restriction ran contrary to common law. Beginning in the 1960's several states passed legislation enabling different forms of conservation easements.

The amendment of the 1976 Tax Reform Act to recognize the charitable deductibility of qualified partial interests in land was not a particularly well known event at the time. Attorney Steve Small, primary drafter of the subsequent Regulations, calls the provision "obscure." Only a couple of national conservation organizations participated in the process. Developing and adopting the implementing regulations for Section 170(h) took another ten years, although with more input. Seventeen state and federal land trusts, including Colorado Open Lands, met in November of 1983 at the Feathered Pipe Conference, to provide input on the proposed regulations. Many of the Conference's extensive comments were included in the final regulations.

By the late 1970's, because of inconsistencies between various state laws, and a growing interest in more states in adopting enabling legislation for conservation easements, the National Conference of Commissioners on Uniform State Laws crafted the Uniform Conservation Easement Act, and in 1981 recommended the Act for adoption by the states. One of the stated purposes of the UCEA was to remove common law barriers on perpetuity, negative easements, and easements in gross. Twenty-eight States have adopted the UCEA in some form, although often with variations. [13]

It is easy then to see why there is significant variation between respective State enabling legislation regarding conservation easements. Some states, beginning with Massachusetts in 1965, created legislation to address a growing interest in utilization of partial interest land protection. Federal legislation establishing the conditions for qualified donations of partial interests passed in 1976. The Uniform guidelines for conservation easements were not adopted and recommended until 1981, and the implementing regulations for the federal statute were not adopted until 1986. In that 17-year interim between enactment of the act and implementation of the regulations, in which varying notions about partial interests reigned, thirty-four states enacted their own conservation easement enabling legislation.

Colorado's conservation easement enabling legislation (1976) pre-dates both the UCEA and the Federal regulations, and as such tiers more closely to the federal statute. Awareness of the need for state enabling legislation had grown with the introduction nationally of the amendment to the Tax Reform Act. Six states passed conservation easement enabling legislation in 1976 and 1977. In Colorado, The Nature Conservancy and Glen Tiedt, an attorney with the Office of the Regional Solicitor for the U.S. Department of Interior, took the lead in drafting the legislation. The only opposition to the legislation came from county assessors, who feared conservation easements would result in the reduction of the property tax base. In response, the legislation was drafted to provide that there would be no net reduction in tax:

> The valuation for assessment of a conservation easement, which is subject to assessment and taxation, plus the valuation for assessment of lands subject to such easement, shall equal the valuation for assessment, which would have been determined as to such lands if there were no conservation easement.[14]

One other change added in legislative committee was a requirement unique to the Colorado statute, requiring that an organization qualified to hold an easement must exist at least two years prior to the conveyance.[15]

The authors know of no conservation easements or conservation restrictions in Colorado that pre-date the 1976 legislation. The first conservation easements in gross in Colorado created under the legislation were the Skyline Ranch in Telluride, held by The Nature Conservancy, and on mining claims around the town of Lenado, acquired by the Trust for Public Land and held by the Aspen Valley Land Trust. The growth of the use of conservation easements in Colorado was somewhat similar to the national experience, starting slowly but expanding rapidly in the 1990's with the corresponding growth in the number of holders.

B. A History of Conservation Easement Holders

The first conservation easement in America was likely held by a local government in the Boston Metropolitan area. For several decades after that, it appears easement holders were primarily the Federal and state governments. The National Conservation Easement Database has recorded just 34 conservation restrictions as of 1950, and 472 nationwide at the time of the 1976 Tax Reform Act. Charitable

organizations as easement holders expanded significantly with the Tax Reform Act and the passage of numerous state enabling laws, and the use of easements grew accordingly:

Decade	National CEs	Colorado CEs
Pre-1980	927	28
1980-1989	4,372	44
1990-1999	14,795	396
2000-2010	34,312	1,431

From the National Conservation Easement Database

The 1976 Tax Reform Act amendment identified qualified holders of conservation easements as a unit of government or a charitable 501(c)(3) organization. Additional requirements of the Act or the subsequent regulations do not distinguish between government agencies and charitable organizations. Nevertheless, by their nature, government agencies and charitable organizations are very different, and their respective practices around conservation easements have evolved differently. Both sectors hold a large number of conservation easements, and both sectors hold potentially troubled easements. Government agencies are more likely to hold easements in danger of neglect, as we have defined it, then they are potential orphaned easements, although it is not impossible to imagine an orphaned government easement.

1. Charitable Holders. Land trusts are charitable organizations that have as all or part of their mission, the conservation of land. Cheever and McLaughlin described the history of the land trust movement as "long, involved, and maddeningly diffuse." [16] Much like the first origins of conservation easements, the first land trusts did not always resemble today's version. Although Boston's Trustees for Reservations was both created to be, and is today, a land trust, other early land protection entities were not. The Laurel Hill Association, the oldest existing village improvement society in the United States, located across the state in Stockbridge, Massachusetts, was founded in 1853, and purchased their first park property – the six acres of Laurel Hill – that same year.[17] Early advocacy groups, museums, mountain clubs, and colleges all protected land for conservation purposes. The Appalachian Mountain Club, founded in 1876, advocated for government protection of land, but also owned land itself. Audubon chapters acquired sanctuaries. The Sempervirens Club, a predecessor of the Save-the-Redwoods League,

was founded in 1900 and accepted donations of land. Around the turn of the century, the Cincinnati Museum of Natural History set land aside as a reserve.

After the Trustees for Reservations, the first land trust still in existence today was probably the Society for the Protection of New Hampshire Forests, founded in 1904. In 1905, the Highlands Improvement Society, now the Highlands Land Trust, was formed to buy the top of Satulah Mountain, North Carolina. However, generally, the creation of land trusts was slow. Author Richard Brewer estimates that as of 1940 there were probably only 19 land trusts operational in America.[18]

The Nature Conservancy was founded as the Ecologist Union in 1946; twenty-five land trusts were formed in the 1950's, and the post war era began to see a growth in land trusts. Rachel Carson wrote Silent Spring; Earth Day was created; Congress passed the Clear Air and the Clean Water Act; and by the 1970's America was experiencing a new environmental consciousness. By 1981, the year the UCEA was proposed, there were an estimated 370 land trusts in America.[19] In that year, the Land Trust Alliance (aka The Land Trust Exchange) and Colorado Open Lands were both founded.

As with conservation easements, growth of land trusts has been nearly exponential since then. By 2000, the Land Trust Alliance registered 1,262 land trusts nationally, and today counts approximately 1,700.[20]

2. Government Holders. As maddeningly diffuse as Cheever and McLaughlin found the land trust history to be, the history of government easement holders may be more so. Indeed, the history is longer – that first easement in Boston was undoubtedly held by either a nearby town or the Metropolitan Parks Commission – followed by easements held by the National Park Service, the Fish and Wildlife Service, and the Wisconsin Highway Department. According to the NCED data, 60% of all conservation easements, as well as the majority of easement acreage, is held by government agencies. This includes every form of government, from special districts, towns, counties, Indian tribes, states and the federal government. Growth of government easement holders has been nearly as rapid as with charitable organizations. In Colorado, there are 75 government holders of conservation easements, twenty-seven of which hold only one easement, and fifty-two of which hold fewer than ten. Of course, the size, mission, governance and resources of government easement holders could easily be considered maddeningly diffuse.

C. A Note on Documentation

The notion of what a land trust is, and what a conservation easement is, is relatively clear. That was not always the case (and may in fact not *always* be the case today). As mentioned, prior to William Whyte's application of the term in 1959, what we call a conservation easement went by other terms. Indeed, the language of the Tax Reform Act of 1976 does not use the term conservation easement, but rather a "qualified real property interest." Likewise, the final regulations refer to a "perpetual conservation restriction" as a qualified real property interest, and then proceed to state, "the terms "easement," "conservation restriction," and "perpetual conservation restriction" have the same meaning."[21]

So what today we consider a conservation easement was in fact prior to 1959 termed a "conservation restriction," a "restrictive covenant," an "equitable servitude," "a partial interest" or some other description. Likewise, terms accepted today as necessary, may not have been prior to 1976. Therefore, searching for the "first" conservation easement at Boston's Emerald Necklace may in reality be somewhat of an arbitrary exercise. It was not called a conservation easement, was likely silent on its perpetual nature, and may or may not have been in Boston.

We have a somewhat similar situation with easement holders. The Federal Regulations state that a "qualified conservation contribution" is one made to a "qualified organization." The Regulations further define a "qualified organization" as (i) a governmental unit, or (ii) a charitable organization under section 501(c)(3) of the regulation.[22] So organizations not considered a land trust, such as noted earlier - advocacy groups, museums, and colleges, may hold conservation easements, provided they are 501(c)(3) charitable organizations. On the government side, non-conservation government agencies may hold easements as well. Non-traditional entities such as school districts and Indian tribes also currently hold conservation easements.

The National Conservation Easement Database was created in June of 2009. It is the most significant attempt to identify the conservation easements in the United States. Virtually all states require an easement be recorded in the local public records. Historically, however, there has been no systematic way to tract conservation easements. Hence, the "first" conservation easement at the Emerald Necklace may in fact be the fifteenth. If earlier "conservation restrictions," or "partial interests" in real estate were recorded in Maine, or Pennsylvania, or Colorado, there is no simple way to make that determination short of a county-by-county, or town-by-town record search.

The National Conservation Easement Database (NCED) is making significant headway. At this point, however, participation in the NCED is voluntary, and the idea that someday all conservation easements will be easily traceable is still a ways off. While the NCED estimates there are 40 million acres of conservation easements in the U.S., as of March 2016, they have mapped 24 million, or 60% of the estimated total.

So the notation of how many and where conservation easements are is not a simple one. Who may constitute the spectrum of holders of conservation easements is also not simple. There is no ready source for that information. Not easily tracking easements or holders potentially represents a complicating factor in addressing the issue of orphaned or neglected easements.

Some help is available at the state level. Almost all conservation easements are recorded in some form of local public records. Across the country, these records are increasingly being reproduced and accepted electronically. In many cases, databases and mapping functions are making information such as conservation easements more readily available at the local level. More and more states are also creating specific information databases for conservation easements, and in a few cases, such as Colorado, for conservation easement holders. Certainly anecdotal information is also more readily available at state and local levels.

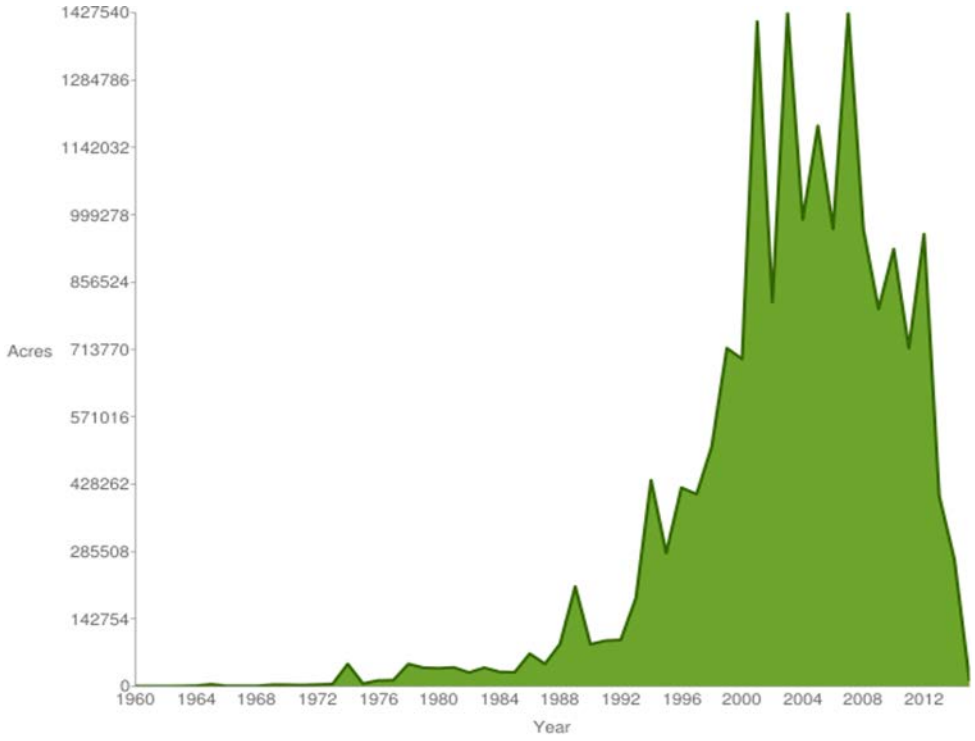
As part of this Study we have been fortunate to have attorney Richard Daly compile Colorado easement data from multiple sources into a "Colorado Database." These sources include forms 1299 filed by land trusts with the Department of Regulatory Agencies' Division of Real Estate; the National Conservation Easement Database; federal tax forms 990 filed by various easement holders, websites of various aggregators of data about nonprofit organizations, websites of various individual easement holders, a local Colorado appraisal firm, and communications from various holder organizations.

Likewise, the Land Trust Alliance conducts increasingly more sophisticated member surveys, which have been an invaluable source of information germane to our topic. Unfortunately, the biggest data gap appears to be with State and local government. Often these units of government do little record keeping of their own regarding conservation easements, and beyond the voluntary nature of the NCED, there is little effort to collect it.

D. Status of Easements

It has been nearly 125 years since the first easement was likely created in Massachusetts. Over the course of that century-plus, easements have pursued many purposes and taken many forms. With the advent of the 1976 Tax Reform Act, the UCEA, and the Land Trust Alliance, some universal concepts and general principles and practices began to take shape. Nevertheless, the history of conservation easements often reflects the same diversity as that of the land, landowners, holders and objectives that easements attempt to address.

The use of conservation easements grew exponentially in the 1990's and until the economic bust of 2008, as can be seen in this graph from the NCED:



Source: National Conservation Easement Database

The NCED estimates there are 207,000 conservation easements, covering over 40 million acres, the equivalent of eighteen Yellowstone National Parks. These easements range in size from under 1 acre, to

greater than 100,000 acres. They include pristine ecological lands, scenic lands, publicly accessed recreational and educational lands, working agricultural and timberlands, and urban open space.

Research in Colorado indicates through 2014, there are 5,700 conservation easements totaling 2,200,000 acres, an area the size of Boulder, Jefferson, Douglas, Denver and Arapaho Counties.[23] As with the diversity in easements nationally; Colorado easements vary from a few acres to 90,000 acres, and include a wide variety of land types and conservation purposes.

1. Problem easements.

Given this large number and diversity of conservation easements, the potential for problems would seem great. Tens of thousands of conservation easements, over millions of acres, over perpetuity. What could go wrong? Whatever it is, Murphy tells us it will. The good news is, so far, the actual data is encouraging.

In the conservation easement stewardship world problems are probably most manifested two ways: by easement amendments, which can be used to remedy "problems"; and the ultimate easement demise– extinguishment. While neither amendments nor extinguishments are indicators of neglected or orphaned easements, they are an indicator of "problems."

In 2014 The Land Trust Alliance reviewed 1,875 land trust tax return form 990's, required of 501(c)(3) organizations with annual receipts greater than $200,000 or assets greater than $500,000. Schedule D of the 990 was introduced in 2008, and Part II of Schedule D was specifically directed at conservation easements holder charities (see Section III D.1.a., below). The Schedule asks for information on easements "modified (amended), transferred, released, extinguished or terminated." Based on the Schedule D filings, over a five-year period from 2008 to 2012, the reviewed land trusts undertook a reported 553 easement modifications for the 20,337 conservation easements they held at the end of 2012. That represents a 2.7% modification rate. LTA determined that the majority of the modification/amendments were insignificant technical corrections, language clarification and acreage additions, which makes the potential "problem" modification/amendment rate under 1.5%.

LTA identified six land trusts that had ten partially extinguished easements, ranging in size from 0.018 to 20 acres, and seven trusts that had ten fully extinguished easements. Of these twenty partial or full extinguishments, six were by condemnation, one by court order, and the descriptions given

for the remaining varied, including "merger of title and transfer of the underlying fee to a federal agency." [24] These numbers indicate a termination rate of less than 0.10%.

Also in 2014, LTA conducted a survey of its 847 easement-holding members, receiving 409 (48%) completed responses. For the reporting period of 2006 forward, survey respondents reported holding 27,538 easements totaling 9,266,084 acres, including 2,175 Colorado easements. LTA extrapolates this to 65 percent of the total easements held by land trusts and 83 percent of all acres conserved by land trusts. It is a significant representation. 2,093 amendments were reported, representing 7.6% of easements.

State	Prior to 2000	2000-2005	2006-2010	Since 2010	State	Prior to 2000	2000-2005	2006-2010	Since 2010
Alabama	0	0	0	0	Mississippi	0	5	5	6
Alaska	0	0	0	0	Missouri	0	0	0	2
Arizona	0	0	1	1	Montana	66	72	78	30
California	6	19	20	15	New Hampshire	36	40	36	38
Colorado	**11**	**58**	**88**	**58**	New Jersey	0	0	0	0
Connecticut	1	4	0	1	New Mexico	9	3	4	15
Delaware	0	0	0	0	New York	28	50	66	43
District of Columbia	1	2	0	0	North Carolina	2	11	25	17
Florida	1	7	15	6	Ohio	2	12	17	20
Georgia	0	5	7	12	Oregon	0	2	2	0
Idaho	0	2	1	2	Pennsylvania	54	73	53	30
Illinois	2	2	5	2	Rhode Island	0	1	3	2
Indiana	0	0	2	3	South Carolina	4	8	18	2
Iowa	1	1	2	1	Tennessee	15	15	15	21
Kansas	0	0	0	1	Texas	0	1	4	9
Kentucky	0	1	1	0	Utah	0	0	0	5
Louisiana	0	0	0	0	Vermont	17	19	69	36
Maine	13	17	19	22	Virginia	0	2	34	21
Maryland	36	16	15	12	Washington	18	26	22	38
Massachusetts	21	7	7	14	West Virginia	0	2	4	2
Michigan	4	11	13	10	Wisconsin	0	17	28	16
Minnesota	0	0	0	0	Wyoming	15	10	8	9
					Totals	**363**	**521**	**687**	**522**

Table 2-6: Number of Amendments by State and Year*

* U.S. states or territories not listed in this table indicates that we did not receive any data from survey respondents for these geographic areas.

Colorado ranked second only to Montana in the number of easement amendments at 215, which is a rate of 9.8%, over 2% higher than the national average. Of the 2,093 amendments nationally, nearly 75%, were minor - correcting errors, extinguishing reserved rights, adding acreage, adding new provisions and clarifying ambiguous terms. In Colorado, 82% of the amendments fell into the minor amendment category. Assuming the remainder represent more serious potential "problem" amendments, the rate for "problem" amendments would be about 3% nationally, and 1.8% in Colorado. The LTA 990 review and land trust survey represents a significant percentage of charitable easement holders. These reviews indicate potential "problem" amendment or modifications at between 1.5% and 3%.

As for extinguishments, nationally the survey identified 190 partially or completely extinguished easements. Several states had more partially extinguished easements than Colorado, but Colorado had more wholly extinguished easements – 7 – than any other state. 64% of the easements extinguished nationally were the result of condemnation or a settlement in lieu of condemnation, merger of title, or boundary adjustment. 20% resulted from substitutions of land subject to the easement – so-called "swaps." Swaps have been controversial and infrequent, but nevertheless, have occurred. Recent case law, most specifically *Belk v. Commissioner*, indicates that [tax] courts view "swaps" as prohibited extinguishments if not accomplished using judicial proceedings. Expectations would be an elimination or dramatic reduction in the use of "swaps" going forward if this judicial trend continues. The remaining 16% of terminations vary, but are more indicative of "problem" terminations. This puts the "problem" extinguishment rate nationally for conservation easements of 0.11%.

The Colorado data indicates of the ten partial or complete extinguishments, five were done through legal settlement, judicial proceedings, or the Attorney General's office. The five remaining are unknown, which in a worst-case scenario would represent a potential "problem" termination rate of 0.22%.

State	Number of easements terminated in whole	Acres terminated in whole	Number of easements terminated in part	Acres Terminated in part
Alabama	0	0	3	20
Alaska	0	0	0	0
Arizona	1	55	0	0
Arkansas	0	0	0	0
California	5	1,163	8	688
Colorado	**7**	**41**	**3**	**5**
Connecticut	0	0	1	902
Delaware	0	0	3	3
District of Columbia	0	0	0	0
Florida	1	257	1	0
Georgia	1	39	1	0
Idaho	0	0	0	0
Illinois	0	0	2	2
Indiana	1	30	0	0
Iowa	0	0	1	0
Kansas	0	0	0	0
Kentucky	0	0	0	0
Louisiana	0	0	0	0
Maine	1	160	1	15
Maryland	1	50	4	4
Massachusetts	4	89	7	88
Michigan	1	1	1	4
Minnesota	1	250	4	210
Mississippi	0	0	2	90
Missouri	0	0	0	0
Montana	0	0	14	54
New Hampshire	2	24	40	42
New Jersey	0	0	0	0
New Mexico	0	0	0	0
New York	1	13	2	5
North Carolina	1	169	0	0
Ohio	1	2	0	0
Oregon	0	0	0	0
Pennsylvania	1	7	9	11
Rhode Island	0	0	0	0
South Carolina	1	30	5	9
Tennessee	0	0	2	1
Texas	0	0	3	8
Utah	0	0	0	0
Vermont	0	0	30	33
Virginia	0	0	0	0
Washington	0	0	8	11
West Virginia	0	0	0	0
Wisconsin	4	15	0	0
Wyoming	0	0	0	0
Grand Total	**35**	**2,395**	**155**	**2,207**

So the good news is, to the extent that "problem" amendments and terminations are indicators for other "problems" such as neglected and orphaned easements, the rate of occurrence to the number of easements is currently very small. Whether the continued aging of easements along with the increase in the number of easements will be offset by the industry's ability to address stewardship issues into perpetuity will determine the future rate of "problems."

While the large number of easements in LTA's survey is impressive, it is not scientific. The 990 data excludes the smallest land trusts (below $200k in annual receipts), and given the nature of voluntary surveys, it is certainly possible that the respondents put the best light on the circumstances, and that the trusts with the most problems did not respond at all. The land trust analysis also excludes entirely the roughly 56% of easements held by government agencies.

It is worth noting that of the 1,782 conservation easements in Colorado held by government agencies, six extinguishments are known to have occurred. Two of the extinguishments were allowed by the terms of the easement, and none were condemnations. That represents a potential "problem" termination rate for government held easements of 0.33%, slightly higher than the land trust rate (0.22%) in Colorado.

2. Characteristics of neglected and orphaned easements.

Getting a handle on the size of the potential problem of neglected and orphaned easements is difficult for a couple of reasons. First, as we have noted, is the inexact nature of our data. Second, neglected or potential orphaned easements can go unnoticed. Neglected easements occur when easement holders are unwilling or unable to meet their "commitment to protect the conservation purposes" of the easement. Orphaned easements occur when the holder simply goes away. Neglected easements are out there. Orphans, technically, may not be.

A neglected easement is being ignored by the holder. The landowner may be complying with the terms of the restrictions and the easement may be fine. Neglected easements may be the

result of a lack of interest, while those easements identified as "problems" above may be the result of pro-active interest. In fact, some of the visible red flags of conservation easement management – violations, lawsuits, landowner disputes – can actually be the result of diligence. They represent unpleasant, but often necessary, enforcement of easements. Neglected easements are the opposite. As opposed to a holder confronting problems and attempting to deal with them, neglected easements typically result from holders ignoring problems, or ignoring the easement itself. In most cases, neglected easements are the result of failures of the easement holder. The holder may neglect easements because of organizational shortcomings, or the holder may neglect easements because of problems with the easement the organization cannot or will not address.

*****

No two easements, like nature, land, or regulatory enforcement, are alike. There are no certainties as to what to look for in neglected or orphaned easements. There are characteristics that might focus our attention however. Some are characteristics of easements, and some are characteristics of holders. Some potential easement characteristics to look for in neglected or orphaned easements are:

a. Validity. Is the easement a qualified real property interest which protects the conservation interests in perpetuity in compliance with law and regulation.

b. Limited Conservation Value. Easements with little conservation value, or values different than the purpose of the holder, can become neglected.

c. Small size. While there are certainly numerous exceptions, the easements being most diligently defended (see 990 analysis and 2014 Monitoring and Termination study) are easements on average 2.6 times larger than the remaining easements.

d. No monitoring. Easement monitoring is a required function at the heart of diligent easement enforcement. By definition, failing to monitor would be an indication of neglect.

e. Complicating factors. "In many cases, a land trust that holds a problem easement will decide that the tools available to fix the problems are impractical. . . . Doing nothing is a simple and common approach for dealing with problem easements. Some members

> of the land trust community feel that talking about mistakes will draw unwanted scrutiny and may discredit us all. Others point to the potential cost in time and money to address these problems and place them at the bottom of the priority list." [26]

The nearly half (48.5%) of LTA members that responded to the 2014 Modification and Termination survey held 65% of the land trust easements, and 83% of the acreage. The average size of these easements is 336 acres. Consequently, the non-responding half of the LTA members held 35% of the easements, encumbering 17% of the easement acreage. The average size of these easements was 127 acres. This indicates the average easement held by the larger acreage holding land trusts are 2.6 times larger than the average easement held by the smaller acreage holding land trusts. In addition, of the 409 respondents, 177, or 43%, were accredited by the LTA Accreditation Commission, a rigorous process.

So the 990 tax return analysis involved the largest land trusts by revenue. The 2014 survey analysis involved the largest easement-holding half of land trusts, with the largest easements. Basically, the low potential "problem" amendment and termination rates associated with the study apply to the largest land trusts in terms of revenue and easement holdings. Whether the smaller land trusts maintain the same low "problem" rate is unknown, as they are non-respondents.

The larger land trust "problem" rate may be due in part to these organizations pro-active diligence in exposing and dealing with the "problems." If smaller land trusts enjoy a similar low "problem" rate, it may be due to the same factors as those that apply to larger land trusts. However, a low "problem" rate may more insidiously reflect neglect rather than a pro-active approach. They may have "problems" but they have not addressed them through amendments or termination. They may have "problems," but they are being neglected or avoided. Not surprising if these smaller organizations have more difficulty providing the "resources to enforce the restrictions" required by the Regulations.

What types of easements are neglected? It appears there are two answers to that question. First, some easements "drop off the radar" of an organization. Small easements, easements with average or little conservation value, or isolated easements may lose the attention of an organization. Easements with little conservation value, or values different than the purpose of the holder, can become neglected. Based on differences in organizational mission and purpose, an

easement with "minimal conservation value" for one group may be ideal for another – and therefore tricky to distinguish from a more subjective "undesirable" easement.[25] When there is little or no contact with the landowner, particularly successor landowners, properties can be forgotten. These easements are often neglected through acts of omission.

Second are easements that are consciously avoided. Most likely these are easements with problems – violations, troublesome landowners, management challenges, etc. – and the organization lacks the "commitment to protect the conservation purposes," or the "resources to enforce the restrictions."

There are several key components to stewardship diligence. As highlighted by the Easement Revitalization Study, at the foundation are sound conservation purposes in the easement, good drafting of the easement document, and thorough transactional documentation like title work and baseline reports. Good organizational practices are equally key, and easement stewardship, monitoring and reporting are at the heart. Monitoring – inspection of the property for easement compliance - is where problems are prevented or discovered or both. Not monitoring or inadequate monitoring allows problems to multiply and misses opportunities to resolve or avoid them.

Easement monitoring is a key to avoiding neglected or eventually potentially orphaned easements. One indicator of a neglected easement is an easement that is not being monitored as suggested by the federal regulations' section § 1.170A-14(g)(5)(ii) ("to enter the property at reasonable times for the purpose of inspecting the property"). State Certification and industry practice (see Land Trust Standards and Practices, Practice 11C, discussed below) have established annually as a "reasonable" time for property inspection. These provisions go to an organization's "commitment to protect the conservation purposes" required by the federal regulations. Therefore, a failure to monitor easements annually may be an indicator of a neglected easement and it would be important to know how common this is.

LTA's 2010 Land Trust Census offers some insight. LTA conducts a national survey of its members every five years and the 2015 survey will begin in January of 2016. Seventeen hundred and sixty land trusts were surveyed in 2010. Nine hundred and fifty responded, with a 55% response rate. At the time of the survey, there were 135 accredited land trusts, of which 133 responded. One part of the survey inquired about annual monitoring, question D3, which asked:

"During the past year, approximately what percentage of your land trust's conservation easements was monitored at least one time?" These were the results:

0%	1-25%	26-50%	51-75%	76-99%	100%	Total
193	17	16	41	156	512	935
21%	2%	2%	4%	17%	55%	

The 2010 LTA Census would indicate that as many as one-fifth of land trusts do not monitor their easements. These are interesting results, given that LTA has made a major emphasis on monitoring every easement every year: it is a requirement of accreditation, and a Standard and Practice of the Land Trust Standards and Practices, which land trusts are required to adopt in order to attain accreditation. Further, in Colorado, it is a prerequisite for the State's Certification of a land trust. Assuming that the Census respondents (55%) tended to be the larger organizations, and assuming that most respondents put the best light on their responses, the 21% who monitored no easements seems remarkably high. By contrast, 55% monitored all their easements, reflecting a diligent effort. Presumably, the 17% that monitored between 76% and 99% tended to miss one, two, or a few easements, and that response is likely at the upper end. The wide middle group – from 1% to 76% - contains only 8% of the respondents. This result would indicate monitoring is either diligent, or neglected. Seventy-two percent monitor all or most of their easements annually, and 21% do not monitor them at all.

E. Status of Easement Holders

1. Charitable Holders.

In order to become a member of the Land Trust Alliance, member organizations must adopt the Land Trust Standards and Practices (S & P) as guiding principles. Standard 11 deals specifically with conservation easement stewardship.

- Practice 11A requires members to secure funds to cover current and future stewardship and enforcement expenses. If the land trust does not have the funds in hand, they must have a plan and policy committing to securing the funds.
- Practice 11C requires land trust to monitor easements at least annually and keep documentation of the monitoring.

- Practice 11E requires the land trust to "take necessary and consistent steps to see violations are resolved."

When these Standards and Practices were revised in 2004, it was recognized they represented a high bar. The S&P's were to some extent aspirational, as was acknowledged in the sample Board Adopting Resolution for land trusts committing the organization to "*making continual progress* toward implementation of the standards and practices." [27] (*emphasis added*). Standards and Practices have become the focus of industry and Land Trust Alliance education efforts in the decade plus since their adoption. Further, in 2006 The Land Trust Alliance spun off an Accreditation Commission to administer an accreditation program for land trusts. The primary goals of the accreditation program are to:

- Build and recognize strong land trusts;
- Foster public confidence in land conservation; and,
- Help ensure the long-term protection of land.

The Commission's primary objective is to have 450 accredited land trusts that hold 90% of conserved land in America.[28]

Currently there are 375 accredited land trusts that hold 75% of the privately conserved land.[29] There are 19 accredited land trusts in Colorado. The accreditation process is based on compliance with Standards and Practices, and in particular, specific indicator practices. Practice 11A, C and E above are three of the 26-indicator practices.[30]

So stewardship diligence – funding, monitoring and defending – are an emphasized focus of land trusts, and are a required practice for accredited land trusts. Accredited land trusts presently hold 75% of the privately conserved land. Clearly, this 22% of land trusts (accredited trusts) that hold 75% of the land are diligent, not negligent, about easement monitoring, stewardship and enforcement. Needless to say, these land trusts also hold the larger conservation easements – averaging 10 times larger than the holdings of the other 78% of land trust holders.

Colorado State certification is required of all holders of easements for which tax credits have been claimed since 2008. Certification requirements adopted effective January 1, 2015

complemented, and often mirrored, LTA's Standards and Practices. In particular, mirroring Practice 11A, 11C and 11E, are the following certification requirements found in Rule Chapter 2:21

> • 2.1.C.2. The conservation easement holder has the necessary personnel and financial capacity and policies and procedures to ensure the short- and long-term management of its conservation easements.
>
> • 2.1.C.1.(b). Monitoring all conservation easements on at least an annual basis, including visually inspecting the property and performing other types of monitoring actions as appropriate;
>
> • 2.1.C.1.(d). Enforcing every conservation easement deed, and addressing violations in a manner appropriate to the scale of the violation;

The Colorado Department of Regulatory Affairs, through the Division of Real Estate and the Conservation Easement Oversight Commission has the responsibility for certification of easement holders, both charitable and government. Of the 64 charitable easement holders in Colorado, six appear unqualified based up either not being 501(c)(3) organizations, or not being in good standing with the Secretary of State. Of the remaining 58 holders, 30, or 51%, are state certified. The six *unqualified* charitable holders hold 303 conservation easements (281 of these are by the Colorado Natural Land Trust). The 28 *non-certified* charitable holders hold 494 conservation easements (241 of these are by Greenlands Reserve and 140 are held by four historic preservation entities).

The 2010 Land Trust Census indicates that the rapid growth of charitable easement holders is leveling off nationally. An industry that grew by 28% between 2000 and 2005, grew by only 2% between 2005 and 2010, with the total of active land trusts around 1,723 in 2010. An intriguing fact to come out of the survey regarding the trend in operating budgets among land trusts indicates that growth in land trust budgets is at the upper end:

Operating Budgets, State and Local Trusts		
Census Year	Average	Median
2000	$305,246	$34,644
2005	$338,333	$56,739
2010	$460,832	$62,000

*All budget values are in 2010 dollars, adjusted for inflation

As the Census report states "the significant gap between the average and median operating budgets suggests that it is primarily growth in land trust budgets at the upper end of the scale that are the main driving force for this increase." [31]

The Census also examined the growth of funds set aside for easement stewardship:

TYPE OF FUND	2005	2010
Monitoring and stewardship	$95,058,947	$163,053,155
Legal defense and enforcement	9,816,022	27,248,726
Monitoring, stewardship, legal defense combined	$123,959,462	$279,232,212

The Census noted this growth as follow: "state and local land trusts more than doubled the amount of funding they have dedicated to monitoring, stewardship and legal defense. With the high potential costs of defending protected lands in court, this type of funding is crucial for land trusts to ensure the permanence of protected land and easements under their care." [32]

The income inequality in land trusts identified in the Census is consistent with the conclusions drawn from the review of 990 tax filings and the 2014 Easement Modification and Termination survey. Recall in that analysis the larger land trusts by receipts displayed a low number of "problem" easements (amendments and terminations). Likewise, the survey indicated the larger easement acreage holding land trusts also displayed a low number of "problem" easements.

Finally, the more than doubling of funding for easement monitoring, defense and enforcement is consistent with the notion that the larger land trusts are focusing more resources

and diligence on easement stewardship. In other words, the trend in larger land trusts appears to be attention rather than neglect.

2. Government Holders.

In the past thirty years, more and more government agencies – federal, state and local – have become easement holders. Of the 113,041 conservation easements listed by the National Conservation Easement Database as of March 2016, 65% are government held. In Colorado, the percent of government ownership of easements is not likely as great, although the government has substantial fee holdings in the State. Bear in mind, the NCED database is estimated at only a little over half complete.[37]

Holder	Nationally	Colorado
Federal	22.6%	2.9%
State	28.1%	4.2%
Regional/local	14.2%	26.9%
Total Government	64.9%	34.0%
Non-Government	35.1%	66.0%

From the National Conservation Easement Database/Colorado database

As discussed in the history of conservation easement holders section of this Study, land has been held for conservation purposes by a wide variety of institutions, both public and private. Governments, colleges, museums and advocacy groups such as the Appalachian Mountain Club and Sempervirens Club all took title to land for conservation purposes. Many hold conservation easements as well.

As mentioned previously, the NCED reports 65% of conservation easements are held by government entities nationally, and slightly over half of those easements, nearly 46,000, are held by state or local governments:

Easement Holder	Count	Acres
Federal	25,543	5,226,540
Jointly Held	1,484	956,548
Local Government	15,677	1,109,836
Native American	6	345
Non-Governmental Organization	37,405	9,883,806
Private	73	44,320
Regional Agency	405	122,425
State	30,734	6,301,624
Unknown	2	115
Unknown Easement Holder	1,712	503,566

In Colorado, government easement holders account for 34% of conservation easements.

Government tends to hold smaller easements than charitable holders do. Nationally, the average government easement (at all levels of government) is 181 acres. The average charitable holder easement is 261 acres, not that dramatic a difference. However, the average size of local government easements nationally is 73 acres. That pattern holds true in Colorado as well, with the average charitable holder easement at 441 acres, the average government easement at 230 acres, and the average local government easement at 88 acres.

Information on the stewardship practices of government easement holders is not centrally collected. At this point, information on the management and stewardship of government easements is largely anecdotal. Some evidence may be derived from a 2013 audit of the federal Department of Agriculture's Natural Resources Conservation Service. The Office of Inspector General (OIG) "found that the Natural Resources Conservation Service (NRCS) has not implemented a comprehensive, integrated compliance strategy designed to verify that its $3.6 billion in conservation programs are functioning as intended." [33]

NRCS conservation easements, including those under the Wetlands Reserve Program (WRP) and the Federal Farmland Protection Program are included in the Audit. Specifically the Audit notes:

> "In August 2008, OIG reviewed WRP and found that NRCS was not monitoring producers to verify that they complied with the conservation easement agreements they had signed. NRCS did not annually monitor 134 of 153 of our sampled WRP easements (88 percent); we reviewed 92 of the 153 easements and found violations on 37 (40 percent)." [34]

The lack of annual monitoring number is rather astounding, and the 88% number dwarfs those revealed in the 2010 LTA survey of land trusts. Although many of the identified violations were likely minor, the 40% rate clearly exceeds that experienced in the land trust community, where a rate of "problem" easements between 1% and 3% is indicated.

Anecdotal evidence from Colorado shows a similar trend. In 2010, Pitkin County identified five conservation easements that had been acquired by the County through the County community development office that had been neglected for many years: "All of the easements mentioned herein have not had any administration or stewardship since the conveyance of the easements, some as long as 20+ years ago." [35] In 2012, after evaluation of each easement, the Pitkin County Board of Commissioners moved jurisdiction of the easements to the County Open Space and Trail program for proper stewardship.

Neither the NRCS nor Pitkin County lacks the resources necessary to adequately steward conservation easements. In both cases, the failure to monitor or steward may be more a result of an organizational mission not specifically focused on conservation easements. Clearly, the NRCS has a substantial conservation mission. But it is a diverse mission, over scores of programs, dozens of offices, and thousands of employees. Perpetual conservation is not at the heart of what the NRCS does.

Likewise, Pitkin County is one of, if not the, wealthiest County in Colorado. It is also a County with a long history of proactive environmental and conservation awareness. Nevertheless, their easements originated in the community development and planning offices, rather than a hands-on land steward's office. The focus and capabilities of the community

development office are not perpetual land conservation. Once recognized by the County, jurisdiction for the easements was moved to a program that did have that focus, and the potentially neglected easements are now properly stewarded.

Although it is a charitable holder, not a government holder, a stark example of improper mission focus is Noah's Crib. Noah's Crib was a charitable 501(c)(3) organization created in 2000 to "mentor children coming out of the juvenile prison system." [36] Subsequently, the group acquired three conservation easements in 2002 and 2003. Two name changes and five years later, the "Colorado Natural Land Trust" came to hold 281 conservation easements, and became the focus of intense media and regulatory scrutiny over questionable appraisals and easement transactions. They are currently delinquent in their standing with the Colorado Secretary of State.

In Colorado, state certification has been required of all holders of Colorado easements for which tax credits have been claimed, since 2008. Of the 75 government easement holders in the state, five are federal agencies, which are not required to be certified. Of the remaining 70 holders, 11, or 16%, are certified by the state. Uncertified, non-federal government holders hold 315 conservation easements.

3. Characteristics of neglected easement holders.

If neglected easements are easements ignored by their holders, how then do we go about identifying their holders? Virtually all available data has substantial gaps. The NCED has only registered 59% of conservation easements. 990 tax forms are not required for charitable organizations with receipts less than $200,000, and the 2010 Land Trust Census indicates the median land trust operating budget is $62,000, meaning there are many non-filers. LTA surveys generate 50% response rates. No entity collects government holder data. Finally, in Colorado, where we have a unique state certification process, only 29% of easement holders are certified.

One possible approach to identify the holders of neglected easements is a process of elimination. Stewardship diligence – identifying and addressing easement problems – is the opposite of neglect. Easement problems - violations, enforcement, amendments or terminations, can be nasty. Dealing with those issues is difficult, but one thing it is not is neglectful. Ignoring or avoiding the problem is. So perhaps we can narrow the criteria for neglected or orphaned easement holders by eliminating who is not.

Holders who exhibit stewardship diligence are by definition not neglecting easements, and therefore would be unlikely holders of neglected easements, although it is conceivable such an organization may avoid a particularly problematic easement or easements. Accreditation status indicates stewardship diligence. So does Colorado state certification.

LTA survey information indicates larger budget, larger land holding land trusts also tend to exhibit stewardship diligence. The huge margin between the average and median operating budgets in the LTA 2010 Census indicates a growing financial gap between the haves and have-nots. This is likely also demonstrated by the dramatic increase in dedicated stewardship funds. Financially, smaller organizations are less prepared from an operations standpoint to remain viable for a long time. They similarly have greater difficulty meeting the "commitment to protect" and "resources to enforce" requirements of the Regulations, as well as those of Land Trust Standards and Practices 11A, and Rule 2.1.C.2. This is particularly true if they have small dedicated funds for stewardship and easement defense.

As the requirements of the Regulations and certification equally apply to government holders, it is no less obligatory that they demonstrate similar compliance. Even though government entities typically enjoy a predictable tax revenue base, it is important to note the Regulations require the holder be able to demonstrate they have the "commitment to protect," and certification requires the holder "have the necessary personnel and financial capacity and policies and procedures to ensure the short- and long-term management of its conservation easements."

The Regulations state that an organization that is "organized or operated primarily or substantially for one of the conservation purposes" will be in compliance with the "commitment to protect" the conservation purposes requirement. A holder whose mission is not primarily related to one of the conservation purposes may technically qualify as a holder, but may tend to neglect their easement(s). A small number of easements and other non-conservation purposes may be indicative of such a holder.

The LTA survey data indicates smaller budget land trusts hold, on average, smaller sized easements. Both the NCED and Colorado state data indicate local governments generally have significantly smaller sized easements, on average, than other holders. Generally speaking, smaller easements may possess weaker conservation purposes and be less defensible than larger easements.

Finally, annual easement monitoring and adequate documentation is a requirement of the regulations, the state certification rules, and Standards and Practices. Easement monitoring is essential to stewardship diligence. Therefore, a lack of monitoring and monitoring documentation would be an indicator, perhaps the best indicator, of potential negligence. An LTA survey indicates that 20% of land trusts do not monitor their easements – a significant number. No records are kept as to monitoring practices for government holders.

Generally speaking, by eliminating holders practicing stewardship diligence, and concentrating on holders likely to have easements with characteristics of neglected easements, we can look at the following:

a. Lack of legal standing. These are not qualified holders under law and regulation.

b. Non-accredited, non-certified holders. These holders have not been independently reviewed for stewardship diligence.

c. Lack of financial capability. These holders may lack long-term organizational sustainability, and/or have little dedicated stewardship or enforcement funding – i.e., "the commitment to protect and the resources to enforce."

d. Non-conservation mission. An organization whose principle mission is not land conservation.

e. Small Portfolio. This may be either a holder with very few easements or a holder with several small or isolated easements. A low number of easements or small size of easements in and of themselves is not problems. However, they may be indicative of holders with other missions or priorities.

f. Lack of due diligence/monitoring. Failure to monitor and inadequate documentation and due diligence are clear examples of neglect. Monitoring is both legally required and essential to diligent stewardship.

F. Colorado Conservation Easement Tax Credit

The growth in the popularity of conservation easements in Colorado was given a significant boost in 1999, with the creation of a tax credit to be used by Colorado easement donors against their state income

tax liability, subject to maximum claim amounts. Originally introduced as a conservation measure by then state representative Mark Udall in 1998, the measure failed in the Republican controlled legislature. In 1999, approximately the same measure was championed by Lola Spradley, the Republican Speaker of the House, as an economic incentive for rural landowners, and passed.

The program originated as a maximum $100,000 refundable credit, then a transferrable credit, and has been legislatively modified several times. In the latest modification, the 2015 legislature raised the individual credit cap to $1,500,000 with 75% of the first $100,000 of value credited at 100% of the value, and the remaining $1,425,000 of value credited at 50% of the value. This final change was intended to: 1) raise the cap in order to reduce the need for multiple or "phased" easements to capture the full credit potential, consistent with a recommendation of a State audit; and 2) increase the reimbursement amount (to 100%) for small value easement donors facing ever-increasing transaction costs.

When the tax credit was made transferable, this led to the creation of an independent market for the credits, which has, in turn, allowed landowners to "monetize" the benefit more quickly than the 20-year carryforward period allowed under the law. The credit is also subject to a cash refund in years of budget surplus in which a TABOR refund is required.

The market price for tax credits has fluxed between 80% and 90% of the face value of the credit, with the party brokering the credit receiving between 5% and 10% of the face value, and the landowner receiving the remaining.

The structure of the tax credit legislation drew new players to conservation easement transactions. New attorneys, appraisers and easement holders entered the field, attracted by the opportunity of cashing out on easement values. Because landowners were limited to one tax credit easement per year, the process encouraged them to create new taxpayer entities to which title to property could be conveyed, which entities would then make donations solely for the purpose of obtaining tax credits. In this way, the original landowner could multiply the potential credit benefits by endowing multiple new entities.

According to the Colorado Department of Revenue (CDOR), some landowners were able to find aggressive appraisers who were willing to stretch conventional appraisal techniques up to and sometimes beyond the limits of credibility.

Aggressive promoters of the tax credit program, including tax accountants and attorneys, created at least one new land trust, and altered the missions of at least one other existing charitable organization, and

one Indian tribe, to acquire easements. These new and reinvented organizations appear to have had little or no organizational experience in land conservation and in performing the duties normally expected of a land trust, such as assessing baseline reports and conducting annual monitoring.

Around 2004, complaints began to surface about allegedly inflated tax credit claims, together with claims of inflated appraisals. The Division of Real Estate, which oversees the regulation of appraisers in Colorado, examined and challenged many of these appraisals. The CDOR commenced a number of audits of taxpayers that had submitted allegedly inflated appraisals. These audits found significant abuse by developers, landowners, and appraisers, who allegedly had in many instances misrepresented properties' conservation or financial values to obtain undue financial benefits.

This led to a snarl of appeals and related litigation, which continues to this day. Many of the landowners who donated conservation easements were found to have overstated their tax credit claims, leading to loss of the tax credits and to enforcement actions to collect unpaid taxes, penalties and interest by the State and the IRS. This, in turn, led to deficiency claims by the State against taxpayers who had purchased overvalued conservation easement tax credits, which led to claims by tax credit-buyers against the landowner-sellers in an effort to unravel the overvalued tax credits.

Large amounts of tax credit claims were made - over $600 million during Tax Years 2000 through 2009, and large numbers of new easements were created. Reportedly, up to 600 of these tax credits were subsequently denied by the CDOR. In 2011, the legislature allocated $16 million from the conservation easement tax credit program to fund CDOR and Attorney General costs to settle the disputed cases.

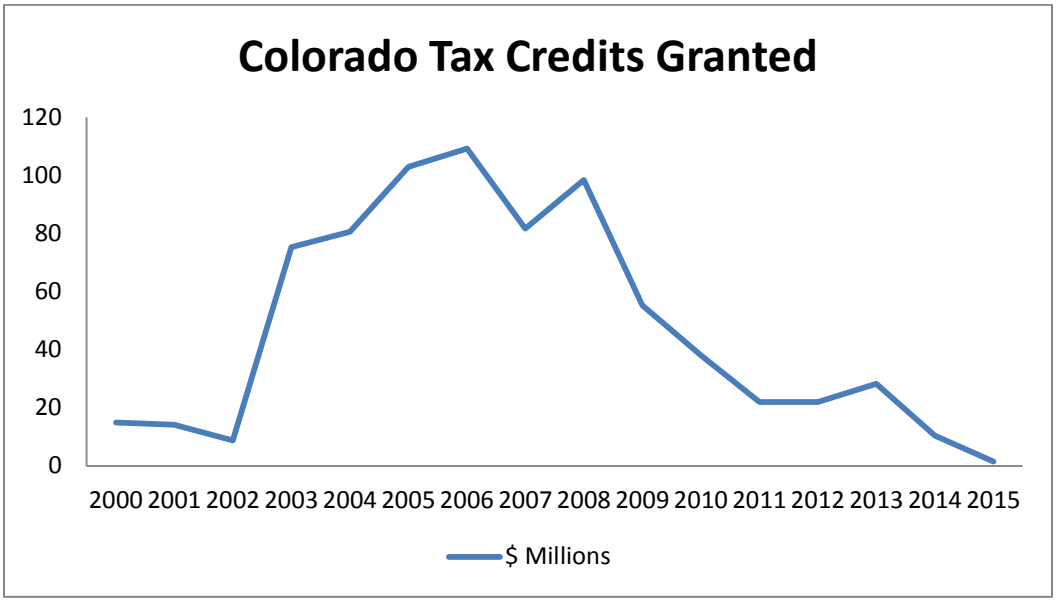
Because of public disclosure of the questionable easements and an entreaty by the CDOR for assistance, the IRS also focused on the Colorado conservation easement program, opening a special office for the purpose of auditing Colorado conservation easements. Although the IRS presence was loudly proclaimed, little is known of the outcome. A handful of IRS audit cases were eventually brought and resolved, with mixed outcomes. Due to the confidential nature of IRS audits, we likely will continue to be unaware of all the results. Nevertheless, the IRS audits resulted in nothing close to the scandalous outcomes predicted in some corners for conservation easements.

While Colorado's growth in conservation easements parallels the national growth trend, no doubt a significant portion of that growth is attributable to the State tax credit. As with the national trend,

Colorado easement gifts have fallen significantly since the economic recession, and perhaps also show the residual effects of the tainted tax credit program.

Year	Credits
2000	$14.9[1]
2001	14.1[1]
2002	8.8[1]
2003	75.3[1]
2004	80.5[1]
2005	102.9[1]
2006	109.2[1]
2007	81.7[2]
2008	98.4[2]
2009	55.2[2]
2010	38.0[2]
2011	22.0[3]
2012	22.0[3]
2013	28.2[3]
2014	10.4[3]
2015	1.5[3]

[1] 2012 Colorado State Audit
[2] CDOR Annual Reports 2007-13
[3] Colorado Division of Real Estate



G. Summary

The history of conservation easements and conservation easement holders is both long and diverse. Initiated in the last decade of the 19th Century, easements evolved slowly until the late 1960's when a blend of prosperity, environmental awareness, state enabling laws and federal incentives jump-started four decades of dramatic growth. The growth of easement holders paralleled the growth in easements. As the easements and holders grew, so did the infrastructure, funding, incentives and regulation. The industry has moved from infancy to adulthood, and realized amazing success. But it is feeling growing pains.

As the acreage protected by conservation easements approaches 40 million, the promise of perpetuity faces challenges. Some easements are falling through the cracks and face neglect and potential abandonment. It is incumbent upon the industry to address the issue and fill the gap.

1. Conservation Easements. While the number of conservation easements is staggering, the effort to record and document them is relatively new, and only a little over half complete. Consequently, while we are beginning to compile a meaningful volume of basic data on easements, we lack information specific enough to tell their condition, and danger of neglect. An emphasis on sound practices and increased scrutiny within the charitable holder industry has reduced the wide variances in easement drafting and documentation, presumably resulting in higher quality easements less prone to problems. Practices by government holders appear to have less consistency, although many agencies regularly acquiring and holding easements are known to refer to land trust industry practices. The sheer large numbers of easements and the size of the easement industry has increased the base of knowledge available to both charitable and government practitioners, and presumably increased drafting and documentation standards.

Existing data implies that easements not monitored regularly are more likely to be neglected. Indeed, lack of monitoring and adequate documentation is a defining character of neglect. Less direct indicators are small, isolated easements, or easements with limited conservation value, or easements held by non-conservation-oriented organizations or entities.

2. Easement Holders. The number of easement holders is just as staggering as the number of easements. The variety of both charitable and government holders is "maddeningly diffuse." Much attention is devoted to preventing and resolving classic easement problems – drafting errors, lack of documentation, inconsistent monitoring, violations, enforcement actions, etc. It

appears that at least attempts are being made to see that most easements are receiving the diligence necessary to address these issues. Organizational indicators are a lack of adequate resources and again, a failure to conduct sufficient easement monitoring. Less direct organizational indicators would include a conflicting or less conservation-focused mission.

In a larger sense, organizational indicators for potential neglected easements may be summed up by the regulatory requirements of section 170A-14(c), which states a qualified holder must:

"Have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions."

A qualified holder would demonstrate the "commitment to protect" by following necessary and adequate practices to draft, document, steward and enforce easements. A qualified holder would have the "resources to enforce" if they have the means to steward and enforce easements in perpetuity. We will discuss the guidance provided by the regulations and other sources in the next section.

III. Guidance

A. Law and Regulation of Conservation Easements

Initial conservation easement legislation was designed to enable easements at the state level and incentivize them at the federal level. As the volume of conservation easements grew at the end of the 20th century, law, regulation and the industry seemed to play catch-up to the tremendously popular conservation tool. There is considerable diversity in the development of conservation easement law and practice. Enabling legislation varies significantly from state-to-state, depending upon its origin. Nevertheless, because of the prevalence of both landowners and easement holders utilizing a federal charitable deduction as an incentive for creation of a conservation easement, the Federal Law and Regulations have played the dominant role in drafting conservation easements. There are cases in which a federal deduction is not claimed, particularly in government easement acquisitions, such as an easement purchase, a quid pro quo situation, or when a landowner does not desire or qualify for a charitable deduction. The dominance of the requirements of the Federal Regulations has led to most boilerplate conservation easement forms – whether those used by government agencies, land trusts, or industry attorneys – to be drafted in compliance with the Federal Regulations.

As previously stated, conservation easements were first formally authorized in Colorado in 1976, with the enactment of CRS § 38-30.5-101 through 110. The law has been amended numerous times for numerous reasons thereafter. In 1999, the legislature amended the law to create a conservation easement income tax credit, and a subsequent set of regulations, CRS §12-61-724+ grew out of that legislation. Since that time, many of the amendments, including during the 2015 legislative session, have been to address the application and limits of the tax credit.

We suggested earlier utilizing law and regulation as the principle criteria for evaluating orphan easements. In addition, increasingly relevant case law is developing that affects conservation easements and the orphan easement issue. Because case law is often situation specific, it is best to consider it in specific applications. Other considerations, such as industry practices, policy recommendations, or IRS guidance, while helpful, do not carry the force of law or regulation. The following is a review of the principle requirements of the federal tax code and Colorado state regulations relevant to our study.

1. Internal Revenue Code. Section 170(h) of the Internal Revenue Code authorizes a taxpayer that has made a donation of a "qualified real property interest" to a "qualified organization," where the donation is "exclusively for conservation purposes" and is "made in perpetuity", to take a charitable deduction for the gift.

These two provisions set forth the requirements for a conservation easement ("qualified real property interest"), and an easement holder ("qualified organization"), to qualify the taxpayer for the federal deduction. The additional qualifiers – "exclusively for conservation purposes" – apply to qualified easements, and "made in perpetuity" has application to both easements and holders. Let's explore these further:

a. Conservation Purpose protected (Sec. 1.170A-14(a)). The last sentence of this section provides a key provision of the code and regulations: "To be eligible for a deduction under this section, the *conservation purpose* must be protected in perpetuity (Emphasis added)." Note the requirement of perpetual protection is the conservation purpose, not the easement itself or the land subject to the easement. This provision sets the stage for Extinguishment - Section 1.170A-14(g)(6)(i) below, which identifies specific circumstances where the deduction remains qualified while the easement may be extinguished.

b. Perpetual conservation restriction (Sec. 1.170A-14(b)(2)). A perpetual conservation restriction is a "qualified real property interest" and is a restriction granted in perpetuity on the use, which may be made of the property. Some states provide for conservation easements of a lesser duration. Colorado requires a perpetual easement "unless otherwise stated in the instrument . . ." This section also states the terms "easement", "conservation restriction", and perpetual conservation restriction" all have the same meaning.

c. Exclusively for conservation purposes (Sec. 1.170A-14(d)(1). This section defines "conservation purposes" as one or more of four categories: (i) outdoor recreation or education by the general public; (ii) protection of relatively natural habitat; (iii) preservation of open space including farmland and forest land; and, (iv) preservation of historically important land area or structure. The UCEA, as well as many states

(including Colorado), recognize additional potential conservation purposes. Note that to qualify an easement should possess *one or more* of the conservation purposes, and need not possess all of them.

An important although seldom addressed provision of the open space conservation purposes qualifications lies in Section 14(d)(4)(v) which prohibits a deduction under the *open space section* if the easement "permits a degree of intrusion or future development" that would interfere with the scenic quality of the land. This notion is further advanced in a prohibition of certain "inconsistent uses" of the property in Sections 14(e)(2)&(3).

d. Enforceable in perpetuity (Section 1.170A-14(g)(1), (2), (3)). A conservation easement must be legally enforceable and prevent uses of the property "inconsistent with the conservation purposes" of the grant. Paragraph (2) specifies that any mortgagee on the property subordinate its right to the right of the holder to enforce the conservation purposes. Paragraph (3) utilizes a vague standard that appears also in regard to the reservation of mineral rights: that a donation shall not be disqualified because some future act or event defeats the perpetual purpose of the easement, provided at the time of the donation the possibility of the act or event was "so remote as to be negligible." In the case of mineral rights reservation, the industry practice is to retain a mineral expert to determine whether the extraction of the minerals is "so remote as to be negligible." Because of the lack of specificity in 14(g)(3), such prior determination for a "remote future event" would seem impractical.

e. Extinguishment (Section 1.170A-14(g)(6)). While the Code specifies a qualified conservation easement must be made in perpetuity, it nevertheless addresses the issue of when it may not be. Paragraph (i) provides for the extinguishment of the conservation restriction subject to three conditions: 1) a subsequent unexpected change in the conditions surrounding the property can make impossible or impractical the continued use of the property for the conservation purposes; and 2) the restrictions are extinguished by a judicial proceeding; and, 3) all of the donee proceeds are used in a manner consistent with the conservation purposes of the original contribution. This provision holds that if

the prescribed conditions are met, then even while the conservation easement has been extinguished, in fact the conservation purposes continue to be protected in perpetuity.

While seemingly relatively straightforward, interpretation of the extinguishment provision of the Regulations has grown in complexity over time. A wide-range of interpretations have emerged – from the position that a judicial proceeding is just *one* possible approach to termination, a.k.a., a safe-harbor, to the position that amendments are in fact a form of extinguishment, and that the judicial proceeding requirement applies to most amendments as well. To complicate matters, many state statutes vary greatly from the Regulations. The UCEA, and many state statutes, including Colorado, specifically state that conservation easements may be modified or terminated "in a manner as other easements." Obviously, this offers a far different interpretation than the federal Regulations. Further complicating the issue is whether statutes other than the conservation easement statutes, such a charitable trust law statutes, are applicable.

The extinguishment issue is critical to addressing troubled easements, and a more thorough analysis of the extinguishment alternative will be addressed in the following sections of the Study.

f. Other provisions. There a several other provisions of Section 1.170A-14 that bear on whether a donation of a conservation easement is qualified. The five listed above however are most relevant to our consideration of neglected or orphaned easements. It is important to note that both the Internal Revenue Code and existing Federal Regulations are silent on conservation easement amendments. The Internal Revenue Service has stated different positions on easement amendments over time, and there is some relevant case law developing in federal tax courts. Nevertheless, the Code and Regulations themselves are both silent.

g. Summary. The federal Income Tax Code and Regulations provide several significant requirements for conservation restrictions in order to qualify for a federal charitable deduction relevant to orphaned or neglected easements:

i. The conservation purposes must be protected in perpetuity.

ii. It must be held by a qualified holder.

iii. The easement must be a restriction granted in perpetuity on the use made of the property.

iv. It must fulfill specified, defined conservation purpose(s).

v. It must be legally enforceable and prohibit inconsistent uses.

vi. It may be extinguished on very limited and specific provisions.

2. Colorado Revised Statutes. Like the Federal regulations, the Colorado statutes provide for requirements for a qualified conservation easement in gross, and requirements for conservation easement holders. As previously discussed, the Colorado conservation easement statute is captured in CRS § 38-30.5-101 through 110. CRS §12-61-724 addresses certification requirements for easement holders, and will be discussed under the "Holder" section.

a. Definition of conservation easement (Sec. 38-30.5-102). A "conservation easement in gross" is defined as a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value."

Note that the definition in the Colorado statute of the "retaining or maintaining of such land" goes beyond the federal Regulations for "conservation purposes" by including "horticultural," and "protection of open land." Likewise, the Colorado statute goes beyond the Federal regulations as to qualified historical significance by including architectural or cultural interest, and by inclusion of state and local historic designation.

b. A real property interest (Sec. 38-30.5-103). This section declares conservation easements to be "an interest in real property" (and therefore not just a contract right) that is "freely transferable in whole or in part" for the purposes of Section 102, and which may be transferred "by any lawful method for the transfer of interests in real property in this state." Thus, nothing in this statute requires the approval of any third party (such as the landowner, a court or the attorney general) to transfer the easement, if the parties so agree.

Section 103 also provides that a Colorado conservation easement will be perpetual, unless otherwise stated in the instrument creating the easement. "The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating it."

c. Recordation (Sec. 38-30.5-106). In order for a conservation easement to be valid under Colorado law, the easement must be recorded in the public records.

d. Release, termination, extinguishment, abandoned by merger (Sec.38-30.5-107). Conservation easements may "in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee land or in any other manner in which easements may be lawfully terminated, released, extinguished or abandoned." This provision is in stark contrast to Sec. 1.170A-14(6) of the Federal regulations, which require a change in conditions, judicial proceeding, and specified allocation of proceeds, to be extinguished.

e. Enforcement (Sec. 38-30.5-108). This section authorizes both the entry of an injunction and the award of damages, in the event of actual or threatened impairment to the easement. The statute specifically authorizes damages for the loss of scenic, aesthetic and environmental values.

Note: Section 38-41-119 states that any action to enforce the terms of any building restriction must commence within one year of the date of the violation. There is no case law in Colorado in which a conservation easement has been determined to be a qualified "building restriction" under this Statute. However, 38-41-119 could present an issue for easement enforcement in the event it applies to conservation easements. Fortunately,

most landowners and easement holders contract around the applicability of the statute by agreeing it is inapplicable to conservation easements, or that even if it is applicable, they mutually agree to waive its application to the conservation easement at issue.

f. Summary. The Colorado Statute provides several significant requirements for conservation easements and their purposes:

i. It must be held by a specified type of holder.

ii. It must be recorded and is a transferable real property interest.

iii. The easement must be in perpetuity unless otherwise noted in the document.

iv. It must retain or maintain specific conservation conditions.

v. It is legally enforceable including injunctive relief and damages.

vi. It may be lawfully extinguished or terminated as with any other easement.

B. Law and Regulation of Conservation Easement Holders

Section 170(h) of the Code limits "qualified holders" to a unit of government, a publicly supported 501(c)(3) charity, or a qualified 509(a)(3) organization. The vast majority of conservation easements are held by government agencies and land trusts – 501(c)(3) charitable organizations established for conservation purposes. Nevertheless, a variety of charitable organizations other than land trusts hold conservation easements. This is potentially problematic, as it appears over time organizations with broader or different missions may be candidates as neglected or orphaned easement holders.

1. Internal Revenue Code. While the Regulations for conservation easements (Section 1.170A-14(c)) were somewhat general in describing the commitment required of an easement holder, they were specific in the types of organizations that could hold easements qualified for federal charitable deduction. Sec. 501(c)(3) of the Code provides relevant organizational prohibitions on qualified charities:

a. Qualified Organization – Commitment (Sec. 1.170A-14(c)). Paragraph (1) provides an organization qualified to hold a conservation easement must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions." It refines this requirement by stating: "a conservation group organized or operated primarily or substantially for one of the conservation purposes . . . will be considered to have the commitment required . . ." This Section further refines the requirement by stating: "A qualified organization need not set aside funds to enforce the restrictions that are subject of the contribution." Note the language specifically qualifies a "conservation" group "organized or operated primarily or substantially" for a conservation purpose.

Paragraph (2) of this Section allows a deduction only if the easement prohibits the donee organization from subsequently transferring the easement unless the conservation purposes will be protected. Presumably this would mean successor holders must possess the same "commitment to protect" and "resources to enforce" as the original holder.

b. Qualified Organization – Type (Sec. 1.170A-14(c)). Paragraph (1) of this section is more specific as to the type of organization that may hold qualified easements: (i) A unit of government; (ii) a 501(c)(3) organization that meets the public support test; (iii) a qualified public charity under Sec. 509(a)(3) of the Code that is controlled by an organization qualified under (i) or (ii). Almost all state statutes, including Colorado, allow any government agency to hold easements. A few states (not Colorado) provide for non-501(c)(3), non-government holders, and three states provide for for-profit holders with conservation purposes. Donations to these groups would presumably not qualify for a federal charitable deduction.

Paragraph (2) of this section allows a deduction only if the easement prohibits a subsequent transfer to an organization not qualified under Paragraph (1), above.

c. Inurement (Sec. 501(c)(3)). This provisions prohibits an otherwise qualified charity from having *any* "part of the net earnings of which inures to the benefit of any private shareholder or individual," also known as insiders. Tax law seems to have borrowed the term "insiders" from federal securities law. The term basically means any person that is in a position to exercise a significant degree of control over the affairs of the organization, including an organization's founders, trustees, directors, officers, key employees, members of the family of these individuals, and certain entities controlled by them.

d. Impermissible Private Benefit (Sec. 501(c)(3)-1). Paragraph (a)(1) of this section states "an organization must be both organized and operated *exclusively* for one or more" exempt purposes. Paragraph (c)(1) of the section elaborates that an organization will not considered so operated "if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." From these requirements, it is maintained that an activity resulting in a non-exempt purpose (i.e., a private purpose), if more than insubstantial, is prohibited.

e. Dissolution (Sec. 501(c)(3)-1(b)(4)). The assets of an organization organized exclusively for an exempt purpose must be dedicated to the exempt purpose. The assets will be considered dedicated to the exempt purpose, "for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed for one or more exempt purposes, or to the Federal Government, or to a State or local government, for a public purpose, or would be distributed by a court to another organization to be used in such manner as in the judgment of the court will best accomplish the general purposes for which the dissolved organization was organized."

f. Summary. Federal regulations require:

i. Holders have a commitment to protect the conservation purposes.

ii. Holders have the resources necessary to enforce the restrictions in the conservation easement.

iii. Holders must be a government agency, or a qualified charity.

iv. Prohibition of inurement or impermissible private benefit by the charity.

v. Assets of the charity are dedicated to the exempt purpose.

2. Colorado Revised Statutes. Both Section 38-30.5-104 of the Colorado Revised Statutes, which originated in the conservation easement enabling legislation, and Section 12-61-723, with its origins in the conservation easement tax credit legislation, has relevance to considerations of conservation easement holders and problem easements.

a. Qualified Holder (Sec. 38-30.5-104(2)). An easement may only be held by governmental entity or a charitable organization exempt under section 501(c)(3), "which organization was created at least two years prior to receipt of the conservation easement." Colorado law does not specifically require that a charitable holder possess a "primary or substantial" conservation purpose.

b. Certification of Holders (CRS 12-61-724(1)). The Colorado Division of Real Estate through the Department of Regulatory Agencies, in consultation with the Conservation Easement Oversight Commission (CEOC), is charged with establishing and administering a certification program for qualified holders of conservation easements under 170(h) of the Code that hold easements for which Colorado conservation easement tax credits are claimed. The purpose of certification is in part to "Establish minimum qualifications for certifying organizations that hold conservation easements to encourage professionalism and stability."

c. Criteria for Certification (CRS 12-61-724(2)). The Division and the CEOC may consider the applicant's easement selection and approval process; stewardship practices and capacity, including the ability to maintain, monitor, and defend the purposes of the easement; a financial audit; governance and ethics regarding conflicts of interest; and any other information deemed relevant.

d. Application of Certification (CRS 12-61-724(4)). This section identifies nonprofit entities holding easements on property for recreation or education, protection of environmental systems, preservation of open space, or historic preservation; and the state and any municipality, county, city and county, special district, or other political subdivision of the state that holds an easement. Section 12(b) subsequently excepts holders of non-tax credit easements, making this section consistent with Section 1 (b, above). Note, however, Section 1 does state certification applies to all holders qualified under 170(h), while this section specifically omits government holders that are not political subdivisions of the state (i.e., the Federal government, Indian tribes).

e. Accreditation (CRS 12-61-724(5)). Finally, Section five allows for the expedited or automatic certification of an entity that is currently accredited by national land conservation organizations.

f. Summary. Colorado Statutes require holders:

i. Be qualified under 170(h) and in existence at least 2 years.

ii. If holding tax-credit qualified easements - be certified by the State of Colorado.

A. If holding tax-credit qualified easements - meet State certification requirements.

- Stewardship practices and capacity.
- Financial audit.
- Governance/ethics requirements

C. Case Law.

Case or common law is law created by judges rendering judicial opinions interpreting prior judicial opinions, or interpreting other forms of law created by constitution, code, statute, regulation, or rule. Prior cases can be cited as precedent, and applicable case law decisions generally must be honored by courts lower than the opinion rendering court. Case law decisions can be very fact specific, with limited general application, or may be less fact specific and offer broad application. Determining what cases are applicable to orphaned or abandoned easement cases as precedent may likely depend on the specific legal and factual content of the prior and new cases. There exists case law regarding a variety of issues relevant to the holders of orphaned and neglected easements, including amendment and termination of conservation easements, impermissible private benefit, charitable trust law, and standing, which have relevance to specific abandonment criteria. Further, numerous cases may potentially apply to neglected or orphaned easements themselves, including those dealing with amendment, termination, charitable trust and cy pres, substitution, merger, standing and fraud.

D. Other Guidance

Several other sources are available as well to aid in the development of criteria to examine potential neglected and orphaned easements and their holders. These sources do not carry the force of law or

regulation, but may be useful in the interpretation and application of law and regulation. These sources include, but are not limited to, IRS or State agency guidance, legal guidance such as found in the UCEA or the Third Restatement of Property: Servitudes, industry standards and practices, and the relevant law and practice in other states. These sources are discussed briefly below. Specific guidance will be examined in the Assessment section of the Study.

1. IRS Policy. Policy guidance can be helpful in the interpretation of law and regulation. In the case of the IRS, policy guidance can take a variety of forms – from technical memos to private letter rulings to items such as the Tax Form 990 and the Conservation Easement Audit Techniques Guide. It is important to remember that this policy guidance is just that – guidance, and does not have the force and effect of law or regulation. There are several areas of disagreement between the Service, the industry, and taxpayers regarding IRS guidance. Until clarified by new regulation or case law, these areas of disagreement will likely remain unresolved.

a. Tax Form 990. In 2008, the IRS revised the principal tax form for tax-exempt organizations with the addition of a Schedule D, Part II, which applied to conservation easement holding charities.

b. IRS Audit Guide. The IRS published the Conservation Easement Audit Techniques Guide in September 2011, with revisions on January 3, 2012 and March 15, 2012.[38] The Audit Guide offers several perspectives representing IRS opinions not specified in law, regulation or case law. For instance, the Audit Guide states the following:

> "Conservation easements should not be amended except in limited circumstances such as to correct a typographical error in the original easement document. An easement is not enforceable in perpetuity if it allows amendments that change the nature of the restrictions imposed on the property."

This is IRS doctrine, without support in law, regulation, or case law. Recall that law and regulation are silent on amendments. Courts have in fact allowed amendments, which added land to easements or strengthened restrictions through change.

2. Legal doctrine. Two principal non-binding forms of legal guidance exist for interpretation of conservation law and regulation. The first is the Restatement (Third) of Property: Servitudes. Restatements review the general legal principals behind common law and are used as references by both judges and attorneys. The second form comes from the National Conference of Commissioners of Uniform State Laws, which "creates uniform acts as recommendations for state legislation, that, when adopted by a state, become law." [39] The Uniform Conservation Easement Act is such an act, and is the second form of legal guidance. Both the Restatement and the UCEA provide guidance for issues related to abandoned or orphaned easements, particularly in regard to termination.

a. UCEA. We discussed the Uniform Conservation Easement Act briefly in Section II.A. Uniform acts are created by the National Conference of Commissioners of Uniform State Laws (NCCUSL) as recommendations for state legislation to establish uniformity between states. Until passed into law by an individual state, a recommended uniform act has no legal effect. The UCEA was created for adoption by its commissioners in 1981, and amended in 2007. Robert Levin states that because attempting to address the various state and federal laws that might apply in each would be inappropriate, the drafters confined the Act in scope, remaining silent or neutral on issues such as amendment, termination, taxation and eminent domain.[40] Twenty-eight states and the District of Columbia have adopted the UCEA, although only three have adopted it without changes. Most of the non-UCEA states, of which Colorado is one, adopting enabling legislation prior to NCCUSL's adoption of UCEA.

b. Third Restatement of Property Servitudes. Although a Restatement of Law is not legally binding, it does offer guidance to judges and attorneys about general legal principals. To quote Jessica Jay, "it is persuasive, because it is thought to be reflective of the legal community's consensus as to what the law is, or in this case, what the law should be or should become." [41] Aware as we are that consensus within the legal community is a myth, so too is the notion that the Third Restatement is helpful to us. Jay's analysis leaves us with conclusion that the Third Restatement offers an alternative approach to the perpetuity/extinguishment direction of the Regulations. The concept behind Code Section 170(h) is that in the event of extinguishment of the easement, the conservation purpose of the easement remains protected in perpetuity if the extinguishment proceeds are used to advance protection of the conservation purpose in another location. The Third Restatement inverts that concept saying in the event of the loss of the

conservation purpose, the easement remains protected in perpetuity if a new conservation purpose is substituted. Scott Turow it's not.

Nevertheless, to the extent that extinguishment becomes a viable alternative for the resolution of some neglected or orphaned easements, the gamut of approaches must be considered, and there may be value in the concept offered by the Third Restatement.

3. Other State Statutes and Practices. All but one state (North Dakota) has enacted some form of perpetual conservation easement enabling legislation, and several states have made substantive amendments to their existing statutes.[43] As mentioned above, the Uniform Conservation Easement Act (UCEA) has been adopted in 28 states, although there is substantial variation in the many state statutes. Other state enabling statutes can offer significant guidance in a number of areas, including potential public review, registries, amendment and termination, standing, and backup holders. In other cases, some quasi-public tactics, such as non-statutory amendment approval practices in New Hampshire, a default conservation easement holding entity in Virginia, and a Conservation Easement Reform Advisory Committee in Montana may offer useful alternatives for problem easements.

4. Industry Standards. The land trust industry maintains national standards through the Land Trust Alliance, the national trade association for the industry. The Land Trust Alliance was founded in 1981 as the Land Trust Exchange. Kingsbury Browne, a Boston attorney who had begun a newsletter discussing legal issues in land conservation, had taken a six-month sabbatical to travel the country (his stops included Colorado), to research a sample of the approximately 400 land trusts around the country. At the end of the sabbatical, Browne recommended to the Lincoln Institute for Land Studies (later the Lincoln Land Institute), that they offer a workshop in which many of these local land trusts could meet and share ideas. This conference occurred in Cambridge, Massachusetts in October of 1981, followed two months later by a west-coast conference in San Francisco sponsored by the Montana Land Reliance. It was apparent to the participants of these workshops that there were major benefits to sharing information, experience, ideas and energy. The consequence, in short order, was the founding of the Land Trust Exchange in Boston. Many of these same land trusts would participate in the Feathered Pipe Conference in the fall of 1983, which provided key commentary incorporated into the 1983 IRS Regulations on conservation easements.

While the Exchange (the name was changed in 1990) started slowly, its growth generally tracks the growth of the land trust industry as a whole. Currently, there are over 1,700 land trust members of LTA.

In 1989, the Land Trust Exchange developed Land Trust Standards and Practices "at the urging of land trusts who believe a strong land trust community depends on the credibility and effectiveness of all its members and who understand that employing best practices is the surest way to secure lasting conservation." [44] Although only suspected by the most visionary or the most pessimistic at the time, that quote is particularly germane to the discussion of orphan easements. These Standards were revised in 1993, 2001 and 2004. The 2004 revision of these Standards was fortuitous.

In 2005, Congress (Senate Finance Committee) conducted hearings on land trust practices as a result of a damning series of articles in the Washington Post about The Nature Conservancy. When the Committee asked the IRS to look more deeply into land trust industry practices, concern arose for the potential reduction in tax incentives for land conservation, as well as new regulations and oversight of the industry. In an effort to stave off additional regulation, LTA negotiated with the Service and Committee staff to allow the industry the opportunity to self-regulate. Due not in little part to the knowledge and confidence the Senate Finance Committee leadership (Max Baucus of Montana and Charles Grassley of Iowa) had in their home-state land trusts, the LTA recommendation prevailed. The recommendation was two-phased: First, the 2004 revision of Standards and Practices would be adopted by all LTA member land trusts; and, second, an accreditation process based upon the Standards to encourage and reward compliance. The accreditation of land trusts was initiated in 2006 by the Land Trust Accreditation Commission, a spin-off of LTA.

The Senate Finance Committee engagement of the IRS resulted in increased scrutiny of conservation easements by the Service. Because of abuses of a state-initiated tax credit for conservation easements in Colorado, a significant number of questionable easement transactions occurred in the State between 2003 and 2007. This made Colorado a focal point for IRS scrutiny, resulting in an estimated 500 conservation easement audits by the IRS in Colorado. The Service reportedly established a 12-person team designated for that purpose. The triple whammy of negative publicity for conservation easements, increased IRS scrutiny, and a diligent accreditation process, placed a major emphasis on land trust practices. As a result, Standards and Practices became the holy

grail of the industry, although in some cases more in name than practice. The importance of Standards and Practices in Colorado was elevated even further, when, in 2007, the Colorado legislature passed conservation easement oversight legislation (see below). This legislation required the "certification" of easement holders, with accreditation by LTA as a "certification" benchmark.

The Standards and Practices offer seven Standards dealing with governance and five dealing with transactions. This is a useful basis for our analysis based on easement requirements and holder requirements. The Federal Regulations have had significant influence on development of the Standards and Practices. The Standards and Practices in turn have had significant influence on the State of Colorado certification rules pursuant to CRS 12-64-724.CRS.

E. Legal Authority

Several entities have some level of legal authority relevant to potential neglected and orphaned easements, and may have potential roles in resolving them. This section examines the legal authority and legislative bases for the Internal Revenue Service, Judiciary, Attorney General Department of Regulatory Agencies, Division of Real Estate, and Conservation Easement Oversight Commission.

1. Judiciary. The judicial branch in Colorado is an independent arm of government established pursuant to the state's constitution. All Colorado courts interpret and apply the law. It is the job of judges, therefore, to apply a general law to the facts of a specific case[45].

The Colorado Constitution (Article VI, Section 1) vests the judicial power of the state in the Supreme Court, district courts, a probate court and juvenile court in the City and County of Denver, county courts, and other such courts or judicial officers with jurisdiction subordinate to the Supreme Court, as the General Assembly (Legislature) may establish[46].

Two important functions of the judiciary relevant to this study include involuntary dissolution and the ability to direct alternative forms of dispute resolution.

Upon the inception of a proceeding for the involuntary dissolution of a charity initiated by the AG, the judiciary may issue injunctions, appoint receivers and custodians, and take any other action to preserve assets and carry on the activities of the charity until the proceeding commences:

Further, pursuant to Colorado's Dispute Resolution Act at CRS §13-22-301 et seq., courts have the ability to refer certain cases or classes of cases to alternative dispute resolution, including "arbitration, early neutral evaluation, med-arb, mini-trial, multi-door courthouse concepts, settlement conference, special master, summary jury trial, or any other form of alternative dispute resolution which the court deems to be an effective method for resolving the dispute in question.…"

This sort of unique judicial involvement in assemblages of cases, holders, or conservation easements could be especially useful in guiding the resolution or orphan or neglected easements or their holders without all the trapping of a judicial proceeding, and with a great deal more flexibility than traditional judicial proceedings.

2. Attorney General (AG). The Attorney General is elected by popular vote of the statewide electorate and is the State's chief lawyer and law enforcement official. Current Attorney General Cynthia H. Coffman oversees the Department and manages a wide range of responsibilities, including:

a. Prosecuting and defending all civil and criminal actions in which the State has an interest, including on appeal
b. Defending the laws and the Constitution of the State of Colorado
c. Protecting consumers from scams and fraudulent activity
d. Serving as legal advisor to officers of the State of Colorado and defending them from legal challenge
e. Protecting and preserving Colorado's natural resources
f. Advocating for policies that help law enforcement improve community safety
g. Investigating and prosecuting Medicaid fraud throughout the State[47]

The Colorado Attorney General is one of four independently elected statewide offices in Colorado and was established by the State Constitution upon statehood in 1876.

The Department is largely a cash-funded agency that receives funding from state agencies and various programs for the provision of legal services, the investigation and prosecution of fraud, and the protection of citizens of this State through a number of consumer protection efforts. Additionally, investigative and prosecutorial efforts help protect the interests of state citizens by minimizing fraud and ensuring public safety.

As relevant to neglected or orphaned conservation easements in Colorado, the Attorney General has three important functions: first, direct oversight of charities within the state; second, authority to investigate and prosecute charitable fraud; and third, the authority to bring action for judicial dissolution of a nonprofit[48].

The Attorney General's direct oversight of charities within the state stems from the state's common law, as well do the general responsibility to protect charitable assets, its representation of the public as beneficiaries, and protection of charitable donors[49].

Further, the AG has specific statutory authority to investigate and prosecute charitable fraud pursuant to the Colorado Charitable Solicitations Act, C.R.S. §6-16-101 et seq. ("CCSA"), under which statute the AG shares enforcement authority with Secretary of State and district attorneys[48]. This shared enforcement authority with the Secretary of State and district attorneys for charitable fraud would run to government entities as well as charitable ones. Any violation of the CCSA is also violation of the Colorado Consumer Protection Act, C.R.S. §6-1-101 et seq. ("CCPA"), which allows the AG to investigate if there is reason to believe someone is engaged in "charitable fraud." "Charitable fraud" laid out in §6-16-111(1)(a)-(p) and (1.5)(a) and (b)[50].

Last but not least, the Colorado Revised Nonprofit Corporations Act, C.R.S. §7-121-101 et seq. authorizes the AG to bring action for judicial dissolution of a nonprofit if the nonprofit obtained its articles of incorporation through fraud, or if the corporation "has continued to exceed or abuse the authority conferred upon it by law." CRS §7-134-301(1); State v. Colorado Humane Society (2008) (AG took position that soliciting while suspended under CCSA (i.e., committing charitable fraud) rose to level of continuing to exceed or abuse authority conferred by law)[51].

In conclusion, the AG possesses discrete powers with common and statutory law bases to enforce consumer protection laws against charities, to protect the public against fraud and bad acts of charities and shared responsibility for governments, and can ultimately act to dissolve charities in actions involving the judiciary.

3. Department of Regulatory Agencies (DORA). As the state's regulatory department, Colorado Department of Regulatory Agencies (DORA) is an agency of the state committed to ensuring that Colorado businesses thrive in an environment that protects consumers[53].

In 1968, the Department of Regulatory Agencies was created pursuant to the "Organization Act of 1968." The act moved a group of agencies into one umbrella department. The Office of Consumer Counsel (OCC) was created by the General Assembly as a division of the Attorney General's Office on July 1, 1984. OCC is now located within DORA. Today, DORA includes nine separate divisions and the Executive Director's Office. DORA's divisions include over 40 boards, commissions, and advisory committees. The Division of Professions and Occupations (formerly the Division of Registrations) alone regulates over 50 professions, occupations and businesses in the state totaling over 345,000 people[54].

The industries and professions regulated by DORA's Divisions include conservation easements and conservation easement holders, real estate brokers and appraisers. Licensing and disciplinary records are maintained by the Division responsible for regulating the profession, occupation, or business. For conservation easements and conservation easement holders, this is the Division of Real Estate (DRE). DORA's Divisions are assisted by Boards and Commissions that provide oversight of these industries and professions, including the Conservation Easement Oversight Commission (CEOC)[55].

DORA's divisions, boards, and agencies enforce laws passed by the General Assembly. DORA's rules, policies and position statements clarify these laws[56].

The 2015 Legislative Session produced the following law relevant to conservation easement and their holders, which DORA and the Division of Real Estate (DRE) now have to implement and enforce:

DORA's regulatory agenda for 2016 includes action in the Real Estate-Conservation Easement Program under DRE for review of prior and new rules regarding certification, practice standards and tax credit application rules, with statutory bases in Colorado Revised Statutes (CRS) Sections 12-61-724, 12-61-726, and 12-61-727, the purpose of which is to review and revise rules to determine the need to amend, repeal, or add based on effectiveness, current needs, practice deficiencies and necessity; and to clarify application requirements and standards for, on the part of, and affecting the holders of conservation easements, real estate appraisers, landowners seeking a tax credit, and Colorado taxpayers generally.

4. Division of Real Estate (DRE). The Division of Real Estate licenses, regulates, and enforces licensed real estate professionals under DORA. DRE's mission is to create a balance between consumer protection and the business needs of the licensed professional[57].

House Bill (HB) 08-1353 originally enacted at Colorado Revised Statutes (CRS) Section 12-61-720(1) provided the first enabling act for DRE's conservation easement holder and conservation tax credit certification. HB-1353 was sponsored by House Speaker Alice Madden, and was shaped largely by an interim legislative committee comprised of both potential regulators and conservation industry representatives. It provided in relevant part that DRE shall review appraisals and conservation easements, investigate activities of appraisers, administer a holder certification program, and establish a conservation easement oversight commission:

> (b) To have the division of real estate review appraisals of conservation easements and affidavits of appraisers submitted to the division and maintain the information in an electronic database;
>
> (c) To have the division of real estate investigate the activities of appraisers of conservation easements to ensure that the appraisers are complying with the uniform standards of professional appraisal practice and other requirements of law;
>
> (d) To establish and administer a program to certify conservation easement holders to identify fraudulent or unqualified organizations and prevent them from holding conservation easements for which tax credits are claimed in the state;
>
> (e) To establish a conservation easement oversight commission to advise the division of real estate and the department of revenue regarding conservation easements for which a tax credit is claimed and to review applications for conservation easement holder certification; and …

As enacted, CRS Sections 12-61-702 and 12-61-724 define the CEOC and described the parameters for the holder certification process, with emphasis on the regulated entities as the holders of easements for which tax credits were claimed, and with the CEOC as advisor to DRE:

> 12-61-724. Certification of conservation easement holders - fund created - rules - repeal - definition

(1) The division shall, in consultation with the commission created in section 12-61-725, establish and administer a certification program for qualified organizations under section 170 (h) of the federal "Internal Revenue Code of 1986", as amended, that hold conservation easements for which a tax credit is claimed pursuant to section 39-22-522, C.R.S. The purposes of the program are to:

(a) Establish minimum qualifications for certifying organizations that hold conservation easements to encourage professionalism and stability; and

(b) Identify fraudulent or unqualified applicants, as determined under the rules of the division, to prevent them from becoming certified by the program. …

(2) The division shall establish and accept applications for certification. The division shall conduct a review of each application and consider the recommendations of the commission before making a final determination to grant or deny certification. In reviewing an application and in granting certification, the division and the commission may consider:

(a) The applicant's process for reviewing, selecting, and approving a potential conservation easement;

(b) The applicant's stewardship practices and capacity, including the ability to maintain, monitor, and defend the purposes of the easement;

(c) An audit of the applicant's financial records;

(d) The applicant's system of governance and ethics regarding conflicts of interest and transactions with related parties as described in section 267 (b) of the federal "Internal Revenue Code of 1986", as amended, donors, board members, and insiders. For purposes of this paragraph (d), "insiders" means board and staff members, substantial contributors, parties related to those above, those who have an ability to influence decisions of the organization, and those with access to information not available to the general public.

(e) Any other information deemed relevant by the division or the commission; and

(f) The unique circumstances of the different entities to which this certification applies as set forth in subsection (4) of this section.

(3) At the time of submission of an application, and each year the entity is certified pursuant to this section, the applicant shall pay the division a fee, as prescribed by the division, to cover the costs of the division and the commission in administering the certification program for entities that hold conservation easements for which tax credits are claimed pursuant to section 39-22-522, C.R.S. …

(4) The certification program applies to:

(a) Nonprofit entities holding easements on property with conservation values consisting of recreation or education, protection of environmental systems, or preservation of open space;

(b) Nonprofit entities holding easements on property for historic preservation; and

(c) The state and any municipality, county, city and county, special district, or other political subdivision of the state that holds an easement.

(5) The certification program may contain a provision allowing for the expedited or automatic certification of an entity that is currently accredited by national land conservation organizations that are broadly accepted by the conservation industry.

Section 12-61-724 further provides the DRE with the following authority regarding decision-making of certification, investigation of holders, and rulemaking:

(9) The division shall maintain and update an online list, accessible to the public, of the organizations that have applied for certification and whether each has been certified, rejected for certification, or had its certification revoked or suspended in accordance with this section.

(10) The division may investigate the activities of any entity that is required to be certified pursuant to this section and to impose discipline for noncompliance, including the suspension or revocation of a certification or the imposition of fines. The division may promulgate rules in accordance with article 4 of title 24, C.R.S., for the certification program and discipline authorized by this section.

(11) The division may subpoena persons and documents, which subpoenas may be enforced by a court of competent jurisdiction if not obeyed, for purposes of conducting investigations pursuant to subsection (10) of this section.

5. Conservation Easement Oversight Commission (CEOC). The CEOC is an advisory board established to guide DRE in conservation matters comprised of nine members: three permanent members from state agencies with responsibilities for conservation and six members appointed by the Governor for three-year terms. CEOC meetings are held at least quarterly and are open to the public.

DRE characterizes the CEOC as giving advice and recommendations to DRE: "The Conservation Easement Oversight Commission (Commission) gives advice and recommendations to the Colorado Division of Real Estate (Division) on the certification of easement holders and appraisals of conservation easements, and reviews applications for tax credit certificates and optional preliminary advisory opinions.[57]" Without getting caught up in semantics, the CEOC actually "advises" the DRE and provides recommendations regarding the certification program, pursuant to its enabling legislation, which legislation is the same statute as that creating the certification process detailed above.

CRS Section 12-61-724 provides that the CEOC advise and provide recommendations to DRE:

(6) The commission shall meet at least quarterly and make recommendations to the division regarding the certification program. The division is authorized to determine whether an applicant for certification possesses the necessary qualifications for certification required by the rules adopted by the division. If the division determines that an applicant does not possess the applicable qualifications for certification or that the applicant has violated any provision of this part 7, the rules promulgated by the division, or any division order, the division may deny the applicant a certification or deny the renewal of a certification, and, in such instance, the division shall provide the applicant with a statement in writing setting forth the basis of the division's determination. The applicant may request a hearing on the determination as provided in section 24-4-104 (9), C.R.S. The division shall notify successful applicants in writing. An applicant that is not certified may reapply for certification in accordance with procedures established by the division.

The CEOC's role is further explained as advisory in the following paragraphs of the statute, which role involves advising DRE and the Department of Revenue (DOR) on matters of certification. Prior to 2013, the CEOC could also review "any other issues" referred to it by

DRE, DOR, or "any other state entity", which could have included the Department of Natural Resources (DNR), Department of Agriculture, or any other state department or entity, but the language allowing CEOC to review "other issues" referred by "other state entities" has since been repealed. The CEOC's involvement is now re-focused on certifying holders of tax-credit qualifying easements, and reviewing conservation easements for which tax credits are claimed.

6. Internal Revenue Service (IRS). The IRS is organized to carry out the responsibilities of the secretary of the Treasury under section 7801 of the Internal Revenue Code. The secretary has full authority to administer and enforce the internal revenue laws and has the power to create an agency to enforce these laws. The IRS was created based on this legislative grant[58].

Certain activities may jeopardize a public charity's tax-exempt status[59]:

a. Private Inurement: when the net earnings of a tax-exempt organization come to the benefit of any private shareholder or individual. Federal tax-exempt law requires that "no part of … [a tax-exempt organization's] net earnings [may] inure to the benefit of any private shareholder or individual." Generally, this means that the financial assets of the organization may not be transferred to a private individual (without the organization receiving adequate compensation) solely by virtue of the individual's relationship with the organization. The IRS prohibition on inurement is absolute. The IRS also imposes penalties on directors, officers, key employees and other disqualified persons who engage in excess benefit transactions[60].

Once a public charity has completed the application process and has established that it is exempt under section 501(c)(3), the charity's officers, directors, trustees and employees still have ongoing responsibilities. They must ensure that the organization maintains its tax-exempt status and meets its ongoing compliance responsibilities. A 501(c)(3) public charity that does not restrict its participation in certain activities and does not absolutely refrain from others, risks failing the operational test and jeopardizing its tax-exempt status[61].

b. Private Benefit and Inurement. A public charity is prohibited from allowing more than an insubstantial accrual of private benefit to individuals or organizations. This restriction is to ensure that a tax-exempt organization serves a public interest, not a private one. If a private benefit is more than incidental, it could jeopardize the organization's tax-exempt status. No part of an organization's net earnings may inure to the benefit of a private shareholder or individual. This means that an organization

is prohibited from allowing its income or assets to accrue to insiders. An example of prohibited inurement would include payment of unreasonable compensation to an insider. An insider is a person who has a personal or private interest in the activities of the organization such as an officer, director, or a key employee. Any amount of inurement may be grounds for loss of tax-exempt status[62].

In cases where a public charity provides an excess economic benefit to a person who is in a position to exercise substantial influence over its affairs, the organization has engaged in an excess benefit transaction that subjects the person to possible excise taxes.

c. Intermediate sanctions. The most likely punishment of an entity by the IRS may be the use of the intermediate sanction as penalty excise tax for excess benefit transactions, or in the worst case from the entity standpoint, revocation of its tax-exempt status. The phrase "intermediate sanctions" refers to the penalty excise taxes imposed by the IRS when individuals associated with a tax-exempt organization receive excess benefits from that organization. Employee compensation is one area that can be subject to intermediate sanctions[63].

Before intermediate sanctions, the only recourse the IRS had when confronted with abusive financial transactions within a nonprofit was to revoke the organization's tax exemption. This one-size-fits-all, death sentence punishment, however, was not appropriate in every situation, and sometimes forced the IRS to take no action at all. Intermediate sanctions now give the IRS flexibility when dealing with fiscal irregularities among tax-exempt organizations, and the ability to mete out appropriate monetary punishment without delivering a deathblow to the organization[64].

Intermediate sanctions may be applied to "disqualified persons" who receive excess benefits, and to the organization managers who approve the transaction. A disqualified person is someone who holds a position within the organization that can include board members, substantial contributors, donors, officers, trustees and other employees, and who is "in a position to exercise substantial influence over the affairs of the organization." It also includes the family members of disqualified persons. If the IRS finds a violation, the organization can be subject to sanctions, or the IRS may revoke the non-profit's tax-exempt status[65].

d. Excess Benefit. Intermediate sanctions are administered in the form of a penalty tax. A disqualified person who receives an excess benefit is subject to an excise tax of 25 percent of the excess amount. If they do not return the excess itself to the organization by a set date, an additional tax of 200

percent is imposed. Organization managers deemed responsible for approving an excess benefit transaction can be held liable for an excise tax of 10 percent of the excess benefit, with a maximum penalty of $10,000 per transaction. The organization pays nothing itself, but must report the details of the incident and the names of those involved on their Form 990[66].

The IRS has stated in its guidance that it intends to assess excise taxes against any disqualified person who receives an excess benefit from a conservation easement transaction, and against any organization manager who knowingly participates in the transaction. In appropriate cases, the IRS states it will challenge the tax-exempt status of the organization, based on the organization's operation for a substantial non-exempt purpose or impermissible private benefit[67].

Private benefit lacks precise definition, and is generally defined as non-incidental benefit conferred on disinterested persons (non-insiders) that serve private, rather than public interests[68].

Private inurement also lacks precise definition, and generally forbids the flow or transfer of income or assets of a tax-exempt organization through or away from the organization, and the use of this income or assets by one or more persons associated with, or for the benefit of one or more persons with some significant relationship to the organization, for nonexempt purposes[69].

The purpose of the private inurement and private benefit rules is to ensure that the tax-exempt organization involved is serving exempt interests and not private interests. Under both doctrines, an organization must establish that it is not organized and operated for the benefit of private persons, such as the creators of the organization, trustees, directors, officers, members of their families, persons controlled by these individuals, or any other persons having a personal and private interest in the activities of the organization, OR other private individuals who are unrelated to the organization. The IRS sanction for violation of the private inurement or private benefit doctrine is revocation of tax-exempt status, or, in the alternative for private inurement, subjecting the organization and benefitting insider to intermediate sanctions, stopping short of exempt status revocation[70]. The IRS could therefore revoke the charitable, tax-exempt status of easement holders failing to monitor, enforce, steward their easements, or that are effectively neglecting their easements. Further, beyond its review of tax-exempt organizations, the IRS could also find holders to be "unqualified" pursuant to section 170(h) of the Code, and with this determination, make it extremely difficult for those holders to continue to take deductible conservation contributions. This would only be possible under review or audit by the charitable deduction division of

the IRS of the Chief Counsel's office, within three years of the charitable deduction's claim on the donor's tax return.

F. Summary.

As the land conservation industry grew, so did the body of law, regulation, and guidance for conservation easements and easement holders. The Treasury Regulations created in 1986 to implement the amendment to the 1976 Tax Reform Act have been refined through practice and case law, though not actually revised themselves. Colorado enacted non-UCEA easement enabling legislation in 1976, and in 1999 created one of the country's most generous state tax incentives – a transferable state conservation easement income tax credit. Abuse of the tax credit ultimately led to reform legislation, and among other changes, the country's first certification requirement for conservation easement holders.

Consequently, we now possess significant federal and state law and regulatory requirements for both conservation easements and easement holders. We also enjoy a growing body of relevant case law, legal and agency guidance, and industry standards. Remember that while in certain limited cases, easements may be non-charitable, and in certain cases non-charitable easements may be held by non-government, non-charitable entities, the vast majority of easements are charitable and easement holders are government entities or charitable organizations. These are the easements and groups we shall focus on.

So what are the key requirements of law and regulation that apply to these types of easements and holders? Our previous review of the law and regulation of conservation easements offers the following requirements:

1. Conservation Easements.
    a. Federal Law and Regulation.
        i. The conservation purposes must be protected in perpetuity.
        ii. It must be held by a qualified holder.
        iii. The easement must be a restriction granted in perpetuity on the use made of the property.
        iv. It must fulfill specified, defined conservation purpose(s).
        v. It must be legally enforceable and prohibit inconsistent uses.
        vi. It may be extinguished on very limited and specific provisions.

b. Colorado Law and Regulation:

i. It must be held by a specified type of holder.

ii. It must be recorded and is a transferable real property interest.

iii. The easement must be in perpetuity unless otherwise noted in the document.

iv. It must retain or maintain specific conservation conditions.

v. It is legally enforceable including injunction relief and damages.

vi. It may be lawfully extinguished or terminated as any other easement.

The Treasury Code lays out two provisions that underpin the intent of the law towards conservation easements: A conservation easement is a "qualified real property interest" which "protects the conservation interests in perpetuity." This concept captures items (i), (iii), (iv) & (vi) of the Federal provisions, and (iii) & (iv) of the Colorado provisions. While a condition of both the Federal and Colorado provisions for a qualified easement is the requirement of a qualified or specified easement holder, this is more appropriately dealt with in the "Easement Holder" requirements. Most of the remaining items constitute additional specific provisions that must be in the easement: Specified conservation purpose; prohibition on inconsistent uses; and be legally enforceable.

The only significant contradiction is in the extinguishment provisions, which under the Federal regulation is very limited with the intent of protecting the conservation purposes in perpetuity. The Colorado law is very permissive, providing a conservation easement may be terminated "as any other easement." However, to qualify for a Colorado state charitable deduction, the easement must meet the federal requirements as well. So in application, if the federal requirements are stricter than Colorado restrictions, Colorado charitable easements must meet the federal bar. Consequently, only if the Colorado requirements – i.e., a qualified holder must be in existence for at least two years – exceeds the federal requirements, do the Colorado requirements apply for a Colorado charitable deduction. So the federal extinguishment provisions apply to all charitable easements, and the Colorado extinguishment provisions are really inapplicable.

The Federal and State requirements key to neglected and orphaned easements may be combined in the following manner:

A grant of a qualified real property interest which protects the conservation interests in perpetuity. It must:

(i) Be held by a qualified holder.

(ii) Fulfill specified conservation purposes

(iii) Be in perpetuity

(iv) Prohibit inconsistent uses

(v) Be legally enforceable

(vi) Be extinguishable in very limited conditions

2. Holders.

a. Federal Law and Regulation:

(i) Holders have a commitment to protect the conservation purposes.

(ii) Holders have the resources necessary to enforce the restrictions.

(iii) Holders must be a government agency, or a qualified charity.

(iv) Prohibition of inurement or impermissible private benefit.

(v) Assets dedicated to the exempt purpose.

b. Colorado Law and Regulation:

(i) Be qualified under 170(h) and, if a charity, have been in existence at least 2 years.

(ii) If holding tax-credit qualified easements - be certified by the State of Colorado.

(iii) If holding tax-credit qualified easements - meet State certification requirements.

1. Stewardship practices and capacity.

2. Financial audit.

3. Governance/ethics requirements

Recall we discussed the provisions of Treas. Reg. Sec. 1.170A-14(a) that a Qualified conservation contribution is one made to a “qualified organization” and is “made in perpetuity.”

Sec. 1.170A-14(c)(1) states a "qualified organization" must have "a commitment to protect the conservation purposes" and "the resources to enforce the restrictions," and they must be "in perpetuity." These provisions capture the essence of federal requirements (i), (ii), (iii) and (v) and state requirements (i)-the first half, (ii) and (iii)(1). Because Colorado requires compliance with the Federal regulations, all Colorado easement holders must comply with the federal requirements unless the Colorado state requirements are more restrictive. Federal 170(h) rules or regulations do not differentiate between government and charitable holders; state rules and regulations require that a charity be in existence for two years prior to holding conservation easements. Federal 501(c)(3) inurement and private benefit prohibitions do not apply to government agencies, but similar authorities do. Therefore, applicable law and regulation apply to both charitable and government holders.

So we may summarize the combined requirements for easement holders in the following manner:

> An organization with the commitment to protect the conservation purposes and the resources to enforce the restrictions in perpetuity. It must:
>
> (i) Have a commitment to protect the conservation purposes and the resources to enforce the restrictions.
>
> (ii) Be a government agency, or a qualified charity in existence for 2 years.
>
> (iii) Prohibit of inurement or impermissible private benefit.
>
> (iv) Meet State certification requirements for holding post 2008 tax-credit easements.

IV. The Repair Process

Remedying the problem of neglected or orphaned easements starts with finding them. But they are not apparent, and the apparatus necessary to find them is not in place. A comprehensive approach to repairing neglected easements starts with putting measures in place to identify them. Identifying them involves five things: 1) determining what characteristics we're looking for in potential neglected or orphaned easements or easement holders; 2) determining what data is necessary to evaluate those characteristics; 3) determining whether the data supports considering the easements or holders as potentially neglected or orphaned; 4) developing criteria to make that determination; and 5) analyzing potential neglected easements and holders against the criteria.

After we have identified them, potential neglected or orphaned easements or holders must be evaluated to determine the best resolution to the problem, and developing a plan to do so. Finally, after the assessment, is the repair itself, where an array of alternatives may be applied to restore the easements to a stable and healthy condition.

Most problem easements come from problems with conservation values, drafting, transactional issues, or other specific complicating factors.[71] The majority of easement holders are addressing these issues proactively, and dealing with the problems. Neglected or orphaned easements on the other hand, may or may not have problems other than being neglected. They are typically held by easement holders who are not proactive, or who mishandle or ignore the problems.

Very often then, neglected or orphaned easements are the product of their holders, and identifying, evaluating and repairing them is a matter of identifying, evaluating, and repairing their holders.

This Section addresses the two phases of an assessment process: Identification and a resolution stage.

A. Identification

60% of them. There are an estimated 2,500 easement holders in America. There is no central registry of holders and we do not know who they all are. We will not identify the potential neglected or orphaned easements either by examining each easement or by examining each holder – there is simply too many.

Colorado does have an advantage over many states in that between 2007 and 2013, easement holders were required to file state tax form 1299 listing the number of easements they held and the counties in which they held them. So while the 1299's are no longer required, they do provide a 2013 benchmark of

the number and rough location of easements. The certification process requires annual updating of that information. In the course of this study, we have identified 139 likely holders of easements and nearly 6,000 easements in Colorado. While expansive, the list is a "live" one that requires updating and refinement. As a result, the state possesses a reasonably complete list of easement holders and the number of easements they hold.

Because of both the volume of easements and holders, and the incompleteness of the data, finding potential neglected or orphan easements requires narrowing the search. Looking at our criteria for qualified and problem easements and holders, we need to find the key search factors.

We suggest three steps to identify the target easements and holders. First is to identify the characteristics of neglected easements and holders. We have done that work in Section IID & IIE of this Study and revisit the characteristics here. Second is examining information sources available that might identify potential easements and holders possessing the characteristics. Third is to determine which of those easements and easement holders in should be evaluated for potential neglected easements, and the criteria to be used in the evaluation.

1. Characteristics of neglected easements and holders.

In Section II of this Study, we determined that neglected and orphaned easements were not always the result of specific problems commonly associated with the stewardship of easements – conservation value, drafting, transactional issues, or complicating factors – although they could be. Very often, those types of problems are being proactively addressed by the holders. Easements in danger of becoming neglected or orphaned are often ones being ignored by the holder. They may be ignored because they possess the stewardship problems we identified above, but they may also be ignored because of problems with the holder. As our experience develops, the list of characteristics may change, and can be added to, reduced, or modified. The characteristics we identified for neglected or orphaned easements include, but are not limited to:

a. Neglected easements
    (i) Lack validity
    (ii) Limited conservation value
    (iii) Small size
    (iv) Lack of due diligence/monitoring

(v) Problems/complicating factors

The characteristics we identified for holders of neglected easements include, but are not limited to:

b. Neglected easement holders

(i) Lack of legal standing

(ii) Non-accredited/ non-certified holders

(iii) Limited financial capability

(iv) Non-land conservation mission

(v) Small portfolio

(vi) Lack of due diligence/monitoring

2. Information sources.

In varying degrees, information is available in existing forms to determine what easements or holders possess the characteristics identified in step 1. Other databases could be developed. Therefore, instead of having to review all easements individually for the characteristics we are looking for, we can examine databases for the characteristics and see what easements are there. Examples include:

a. NCED database. While the data is not complete, the NCED offers a good first cut in seeking information. If you wished to examine all the ranch open space easements held by local governments in Colorado, you can search the NCED database with that query. You would learn that of those easements reported to the NCED, there are 17 properties classified as such, located in 7 different counties, and ranging in size from 0.10 acre in Pitkin County to 13,708 acres in Larimer County. The search will offer us the name of the easement, and the holder, and a GIS map. With that information, we can determine from Division of Real Estate records whether the holder is certified by the State of Colorado.

b. Colorado Database. We indicated in Section IIC of this Study that we have been fortunate to have attorney Richard Daily construct a Colorado database from a variety of sources. From this database, we have made the following estimates:

(i) There are sixty-four charitable Colorado easement holders. Thirty of these (47%) are certified, and 19 also accredited. Twenty-eight (44%) are not certified, and these uncertified organizations hold 494 conservation easements. Six organizations appear unqualified, at least at this time due to delinquent filings or no IRS status. These six hold 303 conservation easements. Another 140 historic easements are held by four uncertified historic preservation entities. Some financial information exists for half of the 64 charitable holders. The average charity-held easement in Colorado is 489 acres in size.

(ii) There are 74 local and regional (county) government easement holders in Colorado. Ten of these (14%) are certified by the State of Colorado. The 64 non-certified government holders hold 466 conservation easements. Forty-seven government holders have a portfolio of five easements or less. Twenty-seven have one easement. The average local or regional government easement is 119 acres.

As databases go for searching for characteristics of neglected easements and holders of neglected easements, this is fertile ground. Legal standing, accreditation/certification status, portfolio size, financial capacity, and in some cases mission orientation is available.

c. Self-reporting. The LTA surveys discussed in section II reveal a reasonable level of success in organizational surveys, at least by charitable organizations. Because we have a reasonably good handle on the 138 easement holders in Colorado, a survey seeking information related to the neglected easement characteristics identified above would be relatively simple. At this time the Division of Real Estate collects information from the 40 certified entities, and any others seeking certification. That would leave approximately 100 surveys seeking responses to fundamental questions about monitoring and due diligence practices; easement violations and enforcement; organizational financial capacity and focus. Such as survey would be relatively simple to undertake and

may prove valuable in gathering information about small, non-certified, atypical easement holders.

A survey of easement holders would also represent an opportunity to provide information regarding conservation easements and stewardship to the many easement holders, particularly government, about which little is known. A low-key, neutral approach such as this may engage easement holders who would otherwise be guarded. Similarly, non-responses may indicate holders for further investigation.

If successful, a self-survey could be conducted annually, or otherwise periodically, to provide current information on easement and holder status.

d. Registry. Although every statute requires easements to be recorded, very few states have any separate tracking, mapping or registering requirements for easements. California law separate from the easement enabling statute requires that every conservation easement recorded since 2002 be included in a special conservation easement sub-index maintained by each county recorder. A Mississippi provision requires that copies of every easement be sent to the Attorney General and the Department of Wildlife, Fisheries and Parks. Illinois, New York and Virginia have similar provisions. In 2007, Maine and Montana both amended their statutes to create formal easement registries. In Montana, at the time of recording, holders must send a copy of each easement to the Montana Department of Revenue, which shares them with the Montana Department of Administration for "data collection and publication purposes."

In Maine, a conservation easement registry is still in its early years. All holders of easements are required to file an annual statement with the State Planning Office (SPO) indicating the number of easements held, location and acreage protected, as well as other information that the SPO deems necessary. The SPO is required to report to the Attorney General any "failure" (presumably dissolution) of a holder disclosed by the filing or otherwise known by the SPO. Other than this specified purpose, it remains to be seen how the data will be used by the state and how much information will be shared with the general public, although presumably all registry records will be subject to a Maine Freedom of Access request. One of the key concerns leading to its creation was that the

dissolution of small land trusts would produce "orphaned" easements that would fall through the cracks and effectively become abandoned.[72] This concern about "orphaned" easements was a principal rationale for the creation of an official statewide easement registry in Maine.

In Colorado, prior to 2013, DRE and the CEOC possessed reporting and record collection requirements in the now-repealed CRS Section 24-33-112, which provided that easement holders submit certain information to DRE and DOR, detailed below. The data and record-collecting act was repealed in 2013, but it might be useful to consider its reenactment without either reference to tax credits or the exclusion of local governments holding non-charitable easements. This information could pave the way for the creation of a registry and requirement for annual reporting by perpetual easement holders or qualified organizations. Interestingly, the Department of Agriculture and DNR were both at one time included in the distribution and collection of information, but were eventually stricken from the act, prior to the whole act's repeal in 2013:

24-33-112. Conservation easement holders - submission of information. (1) Any organization that accepts a donation of a conservation easement in gross for which a state income tax credit is claimed in accordance with the provisions of section 39-22-522, C.R.S., shall submit the following information to the department of revenue the department of agriculture, and the department of natural resources and the Division of Real Estate in the Department of Regulatory Agencies.

(b) The number of acres subject to each conservation easement held in Colorado, Except properties for which the sole conservation purpose is historic preservation;

(c.5) The date on which the organization received certification pursuant to Section 12-61-720, C.R.S.; And

(d) A signed statement from the organization acknowledging that: (II) The organization has adequate resources and policies in place to provide annual monitoring of each conservation easement held by the organization in Colorado, except for any conservation easement granted to a local government that did not involve a charitable donation.

In a sense, Colorado, through CRS Section 24-33-112 began to establish a form of registry in the data collected in the form 1299 required by easement holders in between 2007 and 2013. However, the 1299's are limited in two major ways: First, many easement holders did not contemplate acquiring new easements, and did not file the forms. Second, the level of detail in the information that was provided varied greatly between filers.

DRE has established and amended its permanent rules and regulations (Permanent Rule 2.1 of Number 4 Colorado Code of Regulations (C.C.R.) 725-4) for conservation easements qualifying for tax credits, and for certifying tax credit-qualifying conservation easement holders:

2. Information Request

A conservation easement holder must furnish to the Director such information or documentation as the Director in her/his sole discretion deems reasonably necessary for the enforcement of title 12, article 61, part 7, C.R.S. or any rules enacted by the Division.

Either the existing authority vested in DRE through (C.C.R.) 725-4), or the previous authority vested in DRE and the CEOC in CRS Section 24-33-112 could serve as a basis for a registry limited to certified holders. A more complete registry would be far preferable in the identification of potentially neglected or orphaned easements. Such a registry could be accomplished by not limiting the authority to easements for which tax credits are taken, and expanding it to either holders of perpetual conservation easements, or qualified holders under Treas. Reg. 170(A).

Interestingly, not all references to the process of certifying holders include the qualifier of holding easements for which tax credits are sought. In particular, when the statute is referring to qualified holders as defined by Section 170(h) of the Internal Revenue Code (Code), no such reference is included. The statute therefore could be revised to certify "qualified organizations" generally, as defined by Section 170(h) of the (Code), which would be those holders of perpetual conservation easements qualifying for federal tax deductions. The latter revision might overly exclude holders of conservation easements not given for charitable

purposes, but perhaps could be remedied by applying to “qualified organizations” or “organizations holding perpetual conservation easements.”

Colorado may wish to create a registry similar to that created by Maine for similar purposes as the Maine registry. In Colorado, data collection for new easements and organizations actively acquiring easements will be relatively easy through DRE rule making. The challenge in Colorado will be to bring the approximately 100 non-certified easement holders into a registry or recordkeeping system in order to track their pre-2008 conservation easements. As we have noted several times earlier, the on-going active easement holders are currently subject to significant state oversight, and neglected easements in these holders portfolio’s will be easier to detect. Neglected easements are far more likely among the older easements in the portfolios of the non-certified holders. Bringing this data and these holders into a registry would provide valuable information and oversight.

e. Certification. As discussed previously, House Bill (HB) 08-1353 originally enacted at Colorado Revised Statutes (CRS) Section 12-61-720(1) provided the first enabling act for DRE’s conservation easement holder and conservation tax credit certification, including:

> (d) To establish and administer a program to certify conservation easement holders to identify fraudulent or unqualified organizations and prevent them from holding conservation easements for which tax credits are claimed in the state;
>
> The Statutes also provided for the creation of the Conservation Easement Oversight Commission, to, among other responsibilities “review applications for conservation easement holder certification.”

After Sec. 12-61-720 was replaced with 12-61-724, which provided “The division shall, in consultation with the commission created in section 12-61-725, establish and administer a certification program for qualified organizations under section 170 (h) of the federal "Internal Revenue Code of 1986", as amended, that hold conservation easements for which a tax credit is claimed pursuant to section 39-22-522, C.R.S.

Section (2) provides that the process may “consider the applicant’s easement selection and approval process; stewardship practices and capacity, including the ability to maintain, monitor, and defend the purposes of the easement; a financial audit; and any other

information deemed relevant." Certainly, this information, particularly regarding stewardship practices and stewardship and financial capacity, are at the heart of several of the characteristics we would seek to identify in neglected easements or holders thereof.

This information is treated as confidential by the CEOC and the DRE, as it should be. However, used properly, the information would be valuable in identifying potentially neglected or orphaned easements, or their holders. Further, if the role of certification were expanded to cover all easement holders the information would be essential for the purpose of ensuring all easements are appropriately stewarded pursuant to regulatory requirements.

3. Identify potential neglected easements and holders.

The process of identifying potential neglected easements and easement holders, and then repairing them, is a daunting task. The process probably actually begins with the provisions of 170(h) in "the commitment to protect in perpetuity" and is memorialized in the terms and obligations of the easement itself. The development of industry practices and the creation of regulatory oversight is another step in the process. This Study is simply another step – examining how we find potential neglected easements and prevent orphans. Like the other steps in the process, we will learn, modify, correct and move forward.

With an estimated 200,000 conservation easements in America, and 5,700 in Colorado, held by 138 separate, non-federal, holders, identifying the neglected easement needles in that haystack is a challenge. It is important, however, to start. And so we are recommending in this Study that we start the process and refine as we go. As mentioned above, there is some fertile ground to begin with, and mostly with the holders.

a. Neglected easements. There are only two databases that offer potential information to identify characteristics of neglected easements. The NCED database does very often provide information on the size of individual easements (and often also mapping). As we have discussed, small size in and of itself does not indicate neglect. It may only raise questions that need to be answered with further analysis. Indeed, the information on size may be helpful evaluating other information gained in other information databases. However, size can raise issues. For example, the 0.10 acre Pitkin County easement mentioned earlier may merit a follow-up investigation.

On the other hand, the certification information base may offer substantial information. For example, if the certification process indicates a holder does not have adequate easement documentation, or does not have records of regular monitoring of specific a specific easement, that may well be an indication that easement is neglected and merits further evaluation. The fault with the certification information base is that its information is limited to those holders we have deemed least likely to have negligent easements.

b. Neglected easement holders. The Colorado database indicates at least six Colorado holders (303 easements) may not be in good standing with the Secretary of State, and/or lack charitable status. For purposes of beginning our analysis, we may wish to assume that unless the certification process indicates otherwise, we can assume easements held by certified and accredited organizations are at least not as suspect as others. There are 28 non-certified charitable organizations that hold 494 conservation easements. If we wish to further refine that group, in addition to the six organizations lacking Secretary of State or charitable status, there are 14 non-certified charitable organizations that hold five or less easements. A first step may be to examine these 14 organizations, and then addressing the remaining non-certified charitable groups.

Sixty-four non-certified, non-federal, government holders hold 466 conservation easements. Forty-seven of these hold five easements or less. Twenty-seven hold one easement. Again, a starting point may be the 27 non-certified government holders with one easement, followed by the 20 holding between two and five easements.

Our financial information on the charitable organizations is limited. We have some information on thirty-four charitable organizations. This information identifies two organizations that report less than $1,000 in assets per conservation easement held. Again, this would be a place to start to seek additional information.

Finally, one Nevada-based organization that reportedly holds two conservation easements, had its charter revoked in 2013, and presumably its easements may be orphaned.

Criteria should continue to be refined to help determine characteristics of neglected and orphaned easements. Databases as well should be developed and refined. Nevertheless, as cited above, there is adequate information in hand to begin the evaluation process.

4. Criteria.

Once we have identified potential neglected easements or potential neglected easement holders, it is necessary to undertake an evaluation to determine if in fact, the easement(s) held by these organizations are neglected. That evaluation then allows us to determine a course of action. While some characteristics of neglected easements or holders are clear (i.e., lack of "good legal standing with the Secretary of State or the IRS," or a lack of adequate "due diligence or monitoring"), others are not (i.e., "size"), and some will remain at least in part, subjective (i.e., "Mission"). In many cases criteria exists to evaluate the various characteristics. In other cases, criteria would need to be developed and modified with experience. Nevertheless, some critical criteria may be established to initiate a process.

To the extent, quantitative criteria can be and are developed, evaluation will become easier. However, because easements are extremely diverse, and holders "maddeningly diffuse," subjective judgment about, and communication with the easement principals may often be necessary. Also, some criteria will be more applicable than others, and some criteria will be much easier to evaluate. We suggest that in order to initiate an Assessment process, we begin with the more available, more specific criteria as the primary search criteria. Second-level criteria are revealing, but more subjective and time-consuming to gather. Second-level criteria would be used in follow-up analysis. It is important to recognize we have defined primary and second-level evaluation criteria based on availability and objectivity, rather than importance.

Both Colorado state certification and LTA land trust accreditation use forms to collect information from easement holders, and both have follow-up vehicles/mechanisms to collect additional information. These forms are useful for our purposes, although both evaluate issues beyond those of neglected or orphaned easements. It is also important to remember that for the initial cut of our Assessment process, the focus will be on uncertified and non-accredited organizations – ones primarily outside the certification or LTA process. This is a principle argument for the expansion of certification to all "qualified organizations," or all perpetual

conservation easement holders. A two-tiered certification – one for holders of easements for which a tax credit is claimed, and one for the remaining holders – would be conceivable.

A checklist of criteria for identifying characteristics of neglected easements or organizations is suggested below. In some cases, we have included quantitative measures that may or may not prove accurate, but which can be modified with experience.

a. Neglected easements

(i) Lack of validity. This would require review of the easement document itself for compliance with the requirements of law and regulation identified in the summary of Section III:

- Is the holder qualified? For charitable holders a review of standing with the Secretary of State and charitable status with the IRS are specific criteria found in the Colorado database. For post 2008 conservation easements, is the holder certified (Colorado Division of Real Estate website).

- Is the easement perpetual? The easement should contain specific language making it perpetual.

- The conservation purposes of the easement must be identified and the easement must prohibit inconsistent uses. With the exception of surface mining, the prohibition on inconsistent uses has always been a somewhat subjective analysis in the industry. However, there is precedence for an easement with allows other than "limited and localized" surface mining to be considered invalid. What development for example constitutes an "inconsistent use" is largely subjective. However, easements that do not have language prohibiting inconsistent uses, or which have language that may, through amendment or approval provisions for example, allow the parties to create inconsistent uses, would be a red-flag. While provisions that allow potential inconsistent uses are valid criteria for evaluation, they are less quantitative and do require specific, often legal, analysis.

A similar consideration could exist for amended easements. If review of the easement document shows the easement has been amended, the amendment may be evaluated as to whether it affected the perpetual nature of the easement, allowed impermissible private benefit, allowed impermissible inconsistent uses, or resulted in an extinguishment of all or part of the easement not in compliance with Sec. 1.170A-14(6).

In any event, analysis of this type is very useful in determining potentially invalid easements, but it is often time-consuming and inexact. Therefore, we would recommend it as a second level, not primary criteria.

- Does the easement contain enforcement language consistent with Sec. 1.170A-14(g)(1), (2), (3)? This analysis includes the consideration of inconsistent uses and surface mining discussed above. It also would include the holder's right to enter the property to inspect at least annually, and the right to enforce consistent with state law.

- Any extinguishment language in the easement must be consistent with the extinguishment and proceeds provision of Sec. 1.170A-14(6) of the federal regulations. Recent case law (Belk v. Commissioner; Balsam Mountain Investments v. Commissioner),[73] for example, may make easement provisions or amendments allowing substitution of land invalid under the extinguishment provisions, or under the qualified real property interest provisions. Floating easements or even floating envelopes within easements may also create problems under the evolving body of tax law's interpretation of the definition of qualified real property interests as "restrictions (granted in perpetuity) on the use" of the protected property under Code Section 170h(2)(c).

Analysis of this type is very useful in determining potentially invalid easements, but except for determining the status of the holder, it is often time-consuming and inexact. Therefore, we would recommend it as a second level, not primary criteria.

(ii) Limited Conservation Value. This is largely a subjective analysis requiring substantial time and consideration. It is related indirectly to easement size (see below), but would be a second-level criteria.

(iii) Small size. Size matters, but is subjective. It is related to viability. Common interpretation of conservation easement statutes require that each easement stand on its own in terms of its viability. Unless adjacent to protected land, a conservation easement with the conservation purpose of relatively natural habitat would require enough size to offer protection of the habitat from adjacent land uses. Intuitively this would indicate a large size, but that is not always the case (see Glass v. Commissioner).[74] In Glass the Tax Court disagreed with the IRS in making the determination that a 1-acre easement was adequate to protect natural habitat for bald eagles and endangered plants. On the other hand, would a 5-acre conservation easement be adequate for a viable agricultural operation? It may be in the case of a truck farm or an orchard, but not so as a cattle ranch. So size is subjective, and as such, is likely a second-level criteria, although information exists in the NCED database.

(iv) No monitoring/lacking due diligence. As we have seen, a lack of adequate easement documentation, and a lack of adequate monitoring, is emblematic of a neglected easement. Such information is not, however, readily available other than through the certification and accreditation process. Even in those cases, adequate information about documentation and monitoring often requires follow-up requests. This makes it a second-level analysis. However, lack of monitoring and adequate due diligence is a very strong indicator of neglect and potential for orphaned easements. Although it requires some subjective analysis, the information can be fairly straightforward and fairly objective.

Law, regulation and fairly strong practices exist for monitoring and documentation, and therefore a lack of adequacy can be self-evident. Regular monitoring, typically

annual, is required by regulation. So are timely baseline documentation, mineral reports and subordination agreements. Although no data source exists making this information readily available on a broad scale, as a second-level analysis, it is both very important and relatively easy to interpret. Part II, Schedule D of the revised IRS form 990 requires charitable holders (with revenue in excess of $200,000) to report the number of easements held by the organization; whether the organization has written policies regarding "monitoring, inspection, handling of violations, and enforcement of the conservation easements;" Staff and volunteer hours devoted to the above, and the amount of expenses devoted to the above.[75]

Form 990's may often be found on the internet (for example at www.guidestar.org or http://foundationcenter.org/findfunders/990finder/) although the information is often not particularly timely, and not required of all charities. Nevertheless, the 990's may be a wealth of monitoring and documentation information.

(v) Problems/complicating factors. Easements with problems or complicating factors may be neglected by organizations unwilling to devote, or lacking, the resources to resolve the issues. Alternatively, problems or complicating factors may come to light specifically because the holder is addressing the issues, and neglect is not pertinent. In any event, other than the enforcement action questions in Form 990 D II, or through the certification or accreditation process, the information are not readily available as a database. Problems or complicating factors are more commonly identified anecdotally, and may or may not be an indication of neglect. They are second-level criteria.

b. Neglected easement holders.

(i) Lack of legal [good] standing. As above, a review of good standing with the Secretary of State and charitable status with the IRS are specific criteria for charitable organizations found in the Colorado database. For post 2008 conservation easements, the holder, whether charitable or non-federal government, must be certified (https://docs.google.com/spreadsheets/d/1bEylSalJiSvii0BIEy56AEIOUovsJeStdxrpwNnaFHk/pubhtml).

(ii) Non-accredited, non-certified holders. These are not necessarily holders of neglected easements. However, they do not go through the diligent review required of accredited or certified holders, and therefore may be more likely to be holders of neglected easements. Information regarding accreditation and certification status is found on the LTA website, the Colorado Division of Real Estate website, and the Colorado database.

(iii) Limited financial capability. There are two issues involved with this criteria. The first is what is adequate financial capability? The second is where to we find that information? Financial capability comes in two forms – does the holder have adequate capability to steward and enforce its conservation easements, and does it have adequate financial capability for long-term sustainability? These are critical, but largely subjective questions that beg to be quantified.

These questions also vary between government and charitable holders.

Government: Because of existing, reoccurring tax revenues, some capacity for both stewardship and long-term sustainability exists with most government holders. However, if no funds are dedicated for those purposes, and a pattern of non-stewardship and non-enforcement of easements exists, then a case can be made that the government holder lacks the required "commitment to protect" and "resources to enforce" that underlie the financial capability requirement. Certainly, a designated funding source, or a reliable budget allocation for the purpose of maintaining an easement stewardship program, is indications of adequate financial capacity for government entities. Similarly, designated staff for the purpose of maintaining a stewardship program in lieu of budget allocations would be another indication. Generally speaking, for government holders, a mere tax base may not be a demonstration of a commitment to protect or the resources to enforce conservation easements. A designated funding source for the purpose, an annual budget allocation, or designated staff with appropriate stewardship job descriptions is better indicators.

Charitable: Demonstration of the financial capacity for charitable organizations is a different matter. As implied in the IRS Form 990 Schedule D, charitable organizations may rely on non-financial sources – such a volunteer help – to fulfill these obligations. It

is important to recall Sec. 1.170A-14(c) does not mandate an organization have funds "set aside" to meet the "resources to enforce" requirement. That is not a pass however, because the regulations still have the requirement. What then, does the requirement mean? LTA has taken the position that if the holder does not have the funds secured to "cover current and future long-term stewardship and enforcement expenses for each transaction," then the organization "has a plan to secure those funds and has a policy committing the funds to this purpose.[76]" If reporting were conducted regularly, it would be relatively easy to determine if the holder was successfully implementing the funding policy. Lacking other alternatives to the regulations somewhat contradictory position that resources are required but not necessarily "set aside," LTA's approach seems reasonable.

To summarize then, government holders should either have adequate a) designated funding source, b) budget allocation, or c) designated staff with appropriate stewardship job descriptions for the purpose of stewarding and enforcing easements. Charitable holders should have either a) dedicated or operating funds to cover current and future expenses, or b) a plan to secure the funds and a policy committing the funds to the purpose.

IRS Form 990 provides information, both in terms of general organization assets and revenue, and in specifically in term of stewardship obligations in Schedule D. Certification and accreditation also offer the opportunity to receive relevant information and ask for follow-up. No database offers this detailed information however, making it a second-level criteria.

The second question relevant to financial capacity is what is adequate? Stewardship and enforcement costs are highly variable. A few easements close to the holder's headquarters cost less to steward than many easements spread across the state. Costs can vary dramatically by location, size, monitoring method, easement complexity and reporting methods. They also vary greatly in labor costs – who is doing the monitoring? We have seen monitoring costs vary from virtually nothing to a couple of thousand dollars per easement. For government holders with an annual revenue stream, this may represent an annual appropriation. Charitable holders often establish endowments to fund the annual funding allocation. These endowments can vary from a few thousand dollars per easement to tens of thousands of dollars per easement. The experience of Colorado

Open Lands and the Colorado Cattlemen's Agricultural Land Trust is these endowments currently average $10,000 to $16,000 per easement. Many local land trusts require substantially less. The DRE recently considered, but did not adopt, establishing an estimated $3,000 per easement as a minimum. This is as good a starting point as any, although experience should result in adjustments over time. One approach may be to ask an easement holder how and why its endowment is appropriate.

Many charitable holders are also building financial reserves for enforcement of easement provisions. The creation of a land trust owned defense insurance vehicle – Terrafirma – has helped land trusts address this issue. Terrafirma premiums have several variables, but currently run about $60 per easement, per year. The legal cost of known enforcement actions has run from a few thousand dollars to several hundred thousand dollars. Four hundred and seventy-five land trusts currently participate in Terrafirma, with protection for over one million acres of easement-conserved and fee-held land.[68] Terrafirma participation is a means of addressing the "resources to enforce" requirements of the regulations, although it does not cover 100% of potential enforcement expenses.

In lieu of the endowment approach, another possible metric for measuring adequacy of financial capability is a financial asset per easement calculation. The financial information in our Colorado database is far from complete. From the information we have been able to collect, the asset/easement ratio ranges from -$304 per easement to $123,000 per easement. This calculation would be a safety-net calculation if the holder needed to use all its assets in an enforcement or liability case.

(iv) Non-land conservation mission. Organizations with diverse missions or a non-land conservation focus may be an indicator of a potential for neglect. This may also go hand-in-hand with the next criteria – a small portfolio. This assumption however is more anecdotal than evidentiary. It is easy to imagine easements being neglected in an organization with a diverse mission and only a few easements. This would apply as much to government holders (see NRCS or Pitkin County examples, section IIE(2)), as a charitable holder (see Noah's Crib, IIE(2)). This is a subjective, second-level criteria.

(v) Small portfolio. A small portfolio is related to a mission-drift discussed above. Occasionally an organization will be created for the express purpose of holding and

managing a specific easement. We are more looking at the potential for an organization, either government or charitable, that acquires an easement and loses interest over time. Again, in and of itself, a small portfolio may not be an indication of neglect. However, it may be an indicator that reinforces or is reinforced by other characteristics of neglect. The Colorado database indicates fourteen non-certified charitable and forty-seven non-certified government holders with a portfolio of five easements or less. This may be used as a primary-level criteria.

(vi) Lack of due diligence/Failure to monitor. Like the discussion above under neglected easements, holders with inadequate due diligence or monitoring are prime examples of potential neglected easement holders. Determination of a lack of due diligence and failure to monitor is an important criteria for neglected easement holders. Some relevant information may be available in Schedule D of the 990's. This material would constitute primary criteria. However, a determination of neglect through a lack of due diligence or failure to monitor probably requires more thorough second-level analysis, through certification for instance.

c. Criteria checklist. The above discussion may be summarized in a checklist for criteria for characteristics of neglected easements and easement holders. This checklist is split into primary and second-level criteria. Information sources for primary level criteria are available. Second-level criteria are less available and more subjective.

Criteria Checklist

Primary-level Criteria	Information Source
1. Non-qualified Holder	1. Colorado database
2. No monitoring/lack of due diligence	2. 990's/certification data
3. Non-accredited/non-certified	3. Colorado database/DRE/LTA
4. Limited financial capacity	4. 990's/certification data
5. Limited portfolio	5. Colorado database
Second-level Criteria	
1. Compliance with Law and Regulation	1. Easement document
2. Limited Conservation value/small size	2. NCED/Site inspection
3. Problems/complicating factors	3. Certification/anecdotal
4. Limited financial capacity	4. Certification
5. Non land conservation mission	5. Organizational website
6. No monitoring/lack of due diligence	6. Certification

4. Analyze Data.

As reviewed in several parts of this Study, the screening of the criteria for characteristics of neglected easements and neglected easement holders against various information sources has already begun. Because of the larger numbers of potential easements and easement holders and the fragmented nature of pertinent information, it is recommended that we begin the process of analysis and refine the steps as we proceed. If we wait until all the necessary information is in hand, the potential problem will be much farther along. We propose taking the criteria we have developed and matching against the readily available information sources, and start the process. To do this, we suggest beginning with the primary-level criteria and matching it with its corresponding information source. It looks like this:

a. Non-qualified Holders. The Colorado database indicates six potentially non-qualified easement holders.

i. Holder A is a charitable organization delinquent in its Secretary of State filings (as of 4/1/15); It has never been accredited or certified; Its 2013 1299 filing indicates it holds 281 conservation easements. It is 2012 990 filing shows assets of $42,000, or an asset per easement amount of $151 per easement.

ii. Holder B is an Indian tribe or tribes. It is delinquent in its Secretary of State filings (last in 2011) and its charitable status is uncertain; It has never been accredited or certified. The last 990 on file at the Foundation Center is 2001. A criminal proceeding is pending. It holds 16 Colorado easements.

iii. Holder C is a non-charitable association in good standing with the Secretary of State. It holds 2 conservation easements. These easements may be non-charitable.

iv. Holder D appears to no longer exist. It never qualified for charitable status and its Secretary of State standing has been revoked. Its last filing, in Nevada, was in 2005 and it appears its charter was revoked in 2013. It reportedly holds 2 conservation easements.

v. Holder E is in good standing with the Secretary of State as a Delaware corporation. It appears it never obtained charitable status. It reportedly holds one easement for which it appears a tax credit was claimed.

vi. Holder F is in good standing with the Secretary of State, but is not a registered 501(c)(3) charity. It holds one easement, which may not be charitable.

vii. Holder G is delinquent with the Secretary of State and is not listed as a 501(c)(3) organization. The NCED lists it as holding one, 1-acre easement.

b. No monitoring/lack of due diligence. Schedule D of the 990's should be reviewed for information on monitoring. To the extent certification data can be made available, it will help to refine this criteria.

c. Non-accredited/non-certified. There are 19 accredited land trusts in Colorado. There are a total of 106 non-certified, non-federal easement holders in Colorado. These non-certified holders have 960 conservation easements. With the presumption that certified and accredited organizations receive sufficient scrutiny regarding neglected easements, non-certified holders are a base to begin an evaluation. This large group should be further refined against other criteria to a more manageable size. Form 990, portfolio, and mission review will help refine this group.

d. Limited financial capacity. Existing Form 990 data on the Colorado database indicate three charitable organizations with questionable financial assets for long-term sustainability. However, there are many missing 990 forms overall.

i. Holder H is certified. It holds 117 conservation easements with 2012 assets of $410,000, an asset to easement ratio of $3,500.

ii. Holder I is not certified. It is a 501(c)(3) in good standing with the State. Its 2012 990 reports no financial assets. It holds 12 conservation easements.

iii. Holder J is not certified. It is a 501(c)(3) in good standing with the State. Its 2012 990 listed the estimated value of the easements, not monetary assets. It

verbally reported it has assets not listed on the 990. It holds 241 conservation easements.

e. Limited portfolio. Colorado database indicates 70 non-certified easement holders with a portfolio of 5 or less easements. Thirty-eight holders have one conservation easement.

Several relatively short-term next steps are available and indicated by the data:

- Update 990's for Holders A, E, H, I,&J and for 11 charitable organizations that hold one easement.
- Obtain easement documents for seven easements held by Holders C, D, E, F & G.
- Review websites for mission statements for 38 holders of one easement.
- Review NCED for listings for 38 holders of one easement.

Other steps to undertake as time and resources permit:

- Obtain and review updated 990's for all charitable organizations.
- Review websites and NCED portfolios for 70 holders of 5 easements or less.
- Determine what information may be available through the certification process.

B. Assessment

When we have identified potential neglected easements or holders, and we have analyzed them against our criteria, we enter a stage where we can hopefully assess how to resolve the neglected or orphaned condition. It would likely be appropriate to assign easements, or in the case of holders, perhaps entire portfolios, to the assessment stage. This stage involves several detailed steps, including a determination of the repair alternatives, including perhaps a period of triage, and then developing a plan for the repair.

1. Determine Repair Mechanisms.

In the introduction to this Study, we stated that one of our objectives was to "tier" this Study to previous related efforts. Tiering to well thought out ideas allows us to build on previous good works, and not duplicate or contradict them. Several of our repair mechanisms are tiered to other studies, particularly

that of Solid Ground (Easement Revitalization) and the 2007 LTA and Darby Bradley's report A Practitioner's Guide to Amending Conservation Easements. Easement Revitalization is highly recommended as valuable background to anyone seeking to understand the nature of neglected or orphaned easements.

Easements, easement holders and landowners are widely diverse (maddeningly so). Resolution of neglected or orphaned easements will always be easement or holder specific, depending upon the nature of the problems. However, there are an array of mechanisms that may be useful in repairing neglected or orphaned easements.

a. Condition of the holder. The first step in determining an appropriate means of repairing an easement is to determine the condition of the holder. Typically, the holder will be functional, dysfunctional, or non-existent, either literally, or figuratively. A holder may be cooperative, uncooperative, or somewhere in between. The first preference is to deal with a cooperative holder.

Communication with the holder is critical. Promoting cooperative solutions by dealing openly and constructively with key stakeholders, including landowners, easement holders or potential holders is important. Creating mentoring or partnering opportunities or other forms of assistance to holders can be useful to establish a cooperative relationship. In adverse circumstances, regulatory control or other intervention may be necessary.

i. Mentoring. Because the problem of neglected easements often begins with the easements being avoided or ignored by the holder, this is a tremendous opportunity to bring the holder assistance. Outside eyes are sometimes invaluable at taking a fresh look at a situation that has stagnated. Neighboring easement holding organizations, bigger organizations with large easement portfolios and staff resources, trade associations like the Land Trust Alliance or the Colorado Coalition of Land Trusts, industry consultants such as Solid Ground, Conservation Impact, or skilled individuals, could provide assistance.

Government holders that lack a stewardship process, or the necessary staff expertise, could use such assistance to both bring their easement portfolio current, and design an on-going program. Small budget charitable organizations could use such assistance to evaluate their program to determine their long-term obligations and capacity. What starts as assistance in establishing a sound stewardship program can evolve into a mentoring relationship for project assistance, governance issues, and capacity building.

Indeed, a mentoring relationship to fix a negligent stewardship program could be the first step to a permanent partnership or merger.

If the holder and assistor have similar mission and service areas, the assistor may be willing to help at little or no cost. Government entities may have contracting funds available. Interested donors may be willing to help fund the assistance. A landowner may be willing to contribute to an effort to restore their easement to the original intent.

An uncooperative holder, including perhaps those in denial of their condition, could prove more challenging. An analysis of the urgency of the situation should be made. Are the easements in violation, or otherwise threatened? Are the resources of the holder being drained? Are there simply too many unknowns about the situation? Urgency may well direct the nature of the repair. Several alternatives may exist for dealing with an uncooperative holder. Among there are:

ii. Intervention. As the name implies, an intervention is a less cooperative opportunity. If a holder organization fails to fulfill its obligations to an easement or a portfolio of easements, various forms of intervention could occur to force them either to do so, or to allow others to assume the responsibility. Charitable organizations have legal, contractual and ethical obligations to perform in a fiduciary manner. Failing to do so has consequences.

An original easement donor, or a group of easement donors, or the public at large may have claims against either a charitable or government holder for breach of trust. As a result, a court may declare either judicial or declaratory relief for the claimants.

If an easement or easements in a holder's portfolio were acquired with public funding, restrictions on the management of those easements usually exist, including the requirement to enforce the provisions of the easement(s) and reporting requirements. In the case of Great Outdoors Colorado funding and most federal funding programs, the funder reserves the right to require transfer of the easement to a new holder in the event of a failure of the current holder to fulfill the easement obligations. Therefore, such a failure by a holder may bring the attention of either state or federal funders

Public scrutiny and pressure can be brought to bear on negligent easement holders, both charitable and government. The Colorado Division of Real Estate, the Conservation Easement Oversight Commission, groups like the Land Trust Alliance and the Colorado Coalition of Land Trusts, government

watchdog groups, and members of the general public or the press can all expose a holder's questionable stewardship practices.

The Attorney General has specific statutory authority to investigate and prosecute charitable fraud pursuant to the Colorado Charitable Solicitations Act, C.R.S. §6-16-101 et seq. ("CCSA"), under which statute the AG shares enforcement authority with Secretary of State and district attorneys. Any violation of the CCSA is also violation of the Colorado Consumer Protection Act, C.R.S. §6-1-101 et seq. ("CCPA"), which allows the AG to investigate if there is reason to believe someone is engaged in "charitable fraud." "Charitable fraud" laid out in §6-16-111(1)(a)-(p) and (1.5)(a) and (b)[77].

In certain cases, the IRS has the authority to intervene in the activities of a charitable organization. It is important to bear in mind that the IRS, through Form 990, Schedule DII, has created the opportunity to tract terminations, amendments, and stewardship practices of charitable easement holders.

Individual directors or managers may have liability, including financial sanctions, under 501(c)(3) laws if they fail to act in a fiduciary manner to the public interest.

All these vehicles can lead to either a formal (IRS, Attorney General, the courts) or informal (peer or public pressure) intervention. Such an intervention may be necessary to either halt detrimental action by the holder, or to compel the holder to address neglect and programmatic problems. In cases where the holder denies there are problems, means of dispute resolution such as outside evaluators, mediation, or arbitration may be good alternatives. The range of solutions may go from correcting problem easements to changes in governance or leadership in the holder, to easement transfer.

iii. Dispute Resolution. A unique sort of judicial involvement in assemblages of cases, holders, or conservation easements could be especially useful in guiding the resolution of orphan or neglected easements or their holders without all the trapping of a judicial proceeding, and with a great deal more flexibility than traditional judicial process.

Pursuant to Colorado's Dispute Resolution Act at CRS §13-22-301 et seq., courts have the ability to refer certain cases or classes of cases to alternative dispute resolution, including by appointing a "special master" to a case or cause:

13-22-313. Judicial referral to ancillary forms of alternative dispute resolution.

(1) Any court of record, in its discretion, may refer a case to any ancillary form of alternative dispute resolution…. Such forms of alternative dispute resolution may include, but are not limited to: arbitration, early neutral evaluation, med-arb, mini-trial, multi-door courthouse concepts, settlement conference, special master, summary jury trial, or any other form of alternative dispute resolution, which the court deems to be an effective method for resolving the dispute in question. …

(4.5) "Multi-door courthouse concepts" means that form of alternative dispute resolution in which the parties select any combination of problem solving methods designed to achieve effective resolution, including, but not limited to, arbitration, early neutral evaluation, med-arb, mini-trials, settlement conference, special masters, and summary jury trials….

(8) "Special master" means a court-appointed magistrate, auditor, or examiner who, subject to specifications and limitations stated in the court order, shall exercise the power to regulate all proceedings in every hearing before such special master, and to do all acts and take all measures necessary or proper for compliance with the court's order.

The Colorado rules of judicial discipline further define special master as a person appointed by the Colorado Supreme Court to preside over hearings of an evidentiary or procedural nature, and to address legal issues arising in these hearings. Such a special master might be appropriate in groupings of cases involving orphan or neglected easements where a collective approach to consolidation of easements, amendment, or termination might be appropriate:

In complex cases, parties can agree to, or the court can appoint, a Special Master (or referee) to help them move their case along. Special Masters help the parties resolve discovery disputes or help settle some of the legal issues so the trial can be more efficient. Parties can give the Special Master as much authority as they want. This can make the process go faster. Parties can also stipulate to make a Special Master's decision on any issue "binding" or final. In public disputes, special masters are often, but not always, appointed to implement a court order following trial.… Cases can include natural-resource allocation, hazardous-waste cleanup and associated-cost allocation, land-use planning, and reform of public institutions (for example, city school systems, city zoning boards, state prisons, and state mental-health institutions or schools for the mentally retarded)[78].

iv. Dissolution. If a holder believes it can no longer fulfill its mission or meet its fiduciary obligations, it may wish to consider dissolution. An orderly dissolution would likely include an

assessment of its easement holdings and a transfer of them through appropriate means. Federal and state law both require the bylaws of nonprofit organizations to spell out means of dissolution. The disposition conservation easements, must meet the standards of the Internal Revenue Service Code and state statutes, which means they must be disposed of to another "qualified organization" pursuant to Sec. 1.170A-14(c) of the regulations. State certification rules further require that any certified organization must transfer easements for which a tax credit was claimed to another certified organization. Very often, a merger between organizations is actually a dissolution of one organization into a "surviving" organization. Mergers are discussed in details in section c.iv., below.

The challenge comes when a holder is dysfunctional or non-functional. If the directors and/or managers cannot be found, or refuse to act, it may be necessary to engage the Attorney General. Under C.R.S. §7-134-301 et seq. the Attorney General has the power to bring an action in district court seeking the dissolution of a non-profit corporation if the organization is "exceeding or abusing its authority conferred upon it by law.[79]"

The Colorado Nonprofit Act §7-134-101 et seq. provides for voluntary dissolution by incorporators or directors if the organization has no members, as well as involuntary dissolution by the AG under certain circumstances:

The Colorado Nonprofit Act §7-134-101 et. seq. provides for voluntary dissolution by incorporators or directors if the nonprofit corporation has no members, a majority of its directors or, if there are no directors, a majority of its incorporators may authorize the dissolution of the nonprofit corporation:

(2) The incorporators or directors in approving dissolution shall adopt a plan of dissolution indicating to whom the assets owned or held by the nonprofit corporation will be distributed after all creditors have been paid.

Further, §7-134-301(4)(a)(a), provides: If a nonprofit corporation has been dissolved by voluntary action taken under part 1 of this article:

(I) The nonprofit corporation may bring a proceeding to wind up and liquidate its business and affairs under judicial supervision in accordance with section 7-134-105; and

(II) The attorney general, a director, a member, or a creditor may bring a proceeding to wind up and liquidate the affairs of the nonprofit corporation under judicial supervision in accordance with section 7-134-105, upon establishing the grounds set forth in subsections (1) to (3) of this section.

In the involuntary instance of judicial dissolution, the AG may establish grounds for dissolution including fraud or abuse of authority, and bring a judicial proceeding to effect the dissolution and wind up the affairs of the charity, see:

§7-134-301. Grounds for judicial dissolution. (1) A nonprofit corporation may be dissolved in a proceeding by the attorney general if it is established that:

(a) The nonprofit corporation obtained its articles of incorporation through fraud; or

(b) The nonprofit corporation has continued to exceed or abuse the authority conferred upon it by law . …

(4) (b) As used in sections 7-134-302 to 7-134-304, a "proceeding to dissolve a nonprofit corporation" includes a proceeding brought under this subsection (4), and a "decree of dissolution" includes an order of court entered in a proceeding under this subsection (4) that directs that the affairs of a nonprofit corporation shall be wound up and liquidated under judicial supervision.

§7-134-302. Procedure for judicial dissolution. (1) A proceeding by the attorney general to dissolve a nonprofit corporation shall be brought in the district court for the county in this state in which the street address of the nonprofit corporation's principal office or the street address of its registered agent is located or, if the nonprofit corporation has no principal office in this state and no registered agent, in the district court for the city and county of Denver. …

Upon the inception of a proceeding for the involuntary dissolution of a charity initiated by the AG, the judiciary may issue injunctions, appoint receivers and custodians, and take any other action to preserve assets and carry on the activities of the charity until the proceeding commences:

(3) A court in a proceeding brought to dissolve a nonprofit corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the activities of the nonprofit corporation until a full hearing can be held.

b. Correct the problems. The Solid Ground[80] report identifies "problem" easements as having four basic components: Minimal conservation value, drafting problems, transactional problems (supporting documentation or conveyance problems), and a catch-all category of "complicating matters." These latter groups are not problems per se, but matters that make problems more difficult (i.e., a violation resulting from drafting problems). The report goes on to state that the typical organizational response to "problem" easements is one of three alternatives: fix it, manage it, avoid it. Needless to say, neglected easements are most often the product of the third alternative.

Hence, one of the repair mechanisms available is to stop ignoring problems, and instead fixing or managing them. This is the pro-active approach we discussed earlier that LTA studies seem to indicate are the practice of most, larger, accredited land trusts. Certainly, it's the approach endorsed in accreditation, Terrafirma[81], and industry Standards and Practices.

In its approach to fixing problem easements, Easement Revitalization takes an approach similar to our Assessment process in this section IV: Identifying problem easements, analyzing the problems, evaluating options and fixing the easements. Many of the options discussed for fixing problem easements also apply to neglected easements, and are discussed further below.

The approaches to fixing easement problems are relevant also for fixing a neglected easement holder. Assisting and mentoring as discussed in a.i., above would very likely lead to fixing much of the problems with neglected easements. A couple of tools potentially useful in fixing easements are worth mentioning.

i. Amendment. Amendments are rapidly becoming the hot potato of conservation easements. A long history exists of easement holders and landowners amending easements. For years, many practitioners and conservation attorneys saw easement amendments as a convenient way to correct errors and resolve issues. Many believed they were a practical

approach to improving easements. Others cautioned that amendments were indicative of poor drafting and sloppy documentation, while still others were concerned of potential abuse. The Land Trust Alliance offered cautious direction in their 2004 Standards and Practices ("amendments are not routine"). The IRS eventually took notice resulting in increasing case law surrounding easements. Although they have gone nowhere near adopting the IRS's draconian perspective that anything but the most pedantic amendments are prohibited, the courts have begun to define their use. All this, of course, with the backdrop that the law and regulations are completely silent on the subject.

If the repair of neglected or orphaned easements in Colorado becomes commonplace, so may the need to amend them. A significant number of neglected or orphaned easements and the need to resolve them may likely draw the attention of the public, the press, the legislature, the Attorney General and the courts. If amendments become a frequently used tool to resolve the easement problems, they do may draw attention. In that event, consensus around the use of easement amendments would be very useful.

Increased scrutiny of easement amendments has led to attempts to find safe harbor processes. In 2006, the Land Trust Alliance asked Darby Bradley, President of the Vermont Land Trust, to assemble a committee to offer guidance for easement amendments. The result was the LTA's 2007 Amending Conservation Easements: Evolving Practices and Legal Principles. That report set forth seven key principles for amending easements[82]:

> AMENDMENT PRINCIPLES. A conservation easement amendment should meet all of the following principles:
>
> 1. Clearly serve the public interest and be consistent with the land trust's mission.
>
> 2. Comply with all applicable federal, state and local laws.
>
> 3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
>
> 4. Not result in private inurement or confer impermissible private benefit.
>
> 5. Be consistent with the conservation purpose(s) and intent of the easement.

6. Be consistent with the documented intent of the donor, grantor and any direct funding source.

7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

In two states, the land trust community has worked with the state to develop an amendment procedure that builds on the LTA principles. Both Montana and New Hampshire set forth three categories of amendment, with increasing degrees of scrutiny as one moves up the risk scale, while any termination requires court approval. New Hampshire labels the three categories low risk, more risk, and high risk. Montana has adopted less judgmental language of Category 1, 2 & 3. The New Hampshire describes the categories as follows:[83]

- Category 1 amendments are clearly consistent with or further the conservation purpose of the conservation easement, and the owner of the land is receiving nothing in return (other than the potential of an additional income tax benefit based on the value of a new donation). If an amendment clearly and unequivocally falls into Category 1, the easement holder should notify the Attorney General, that the amendment is being proposed.

- Category 2 amendments require more review. These amendments are more complicated, may involve trade-offs, and could have the potential to create private benefit or other complications. The Attorney General should review each Category 2 amendment proposal to assess whether the amendment complies with the seven principles listed in step one.

- In New Hampshire, Category 3 amendments require review and approval by the court. These amendments may involve complex issues, trade-offs of restrictions, possible harm to the conservation purposes of the easement, or removal of more than a de minimis portion of the land from the easement's restrictions. Category 3 amendment proposals require consultation with and review by the Attorney General and most likely subsequent review and approval by the probate court.

Montana law, by contrast to the New Hampshire process, does not grant the Attorney General standing to enforce conservation easements, so these statutory restrictions must be

enforced by conservation easement holders. Under the Montana Association of Land Trust's Policy, any such proposed review of amendments must be submitted to a Conservation Easement Reform Advisory Committee, whose current members are land trust professionals and two former Montana Supreme Court Justices.[84]

Any large-scale approach to neglected or orphaned easements in Colorado may very likely involve a significant number of amendments with some perhaps substantial. In that event the community may believe a more systemized approach to amendments is appropriate, as well as offering a potential safe harbor. In such a case, Colorado may wish to consider the LTA/Montana/New Hampshire approach. The Conservation Easement Oversight Commission(CEOC), already in place under current statute, would seem ideal to serve as an amendment review body for Category 2 amendments, and possibly recommendations to the court for Category 3 amendments.

ii. Reformation. Reformation is a process requiring court approval that changes the deed or other writing to be consistent with the actual agreement originally made by the parties, not to make it more favorable to any party or to address changes occurring over time. It goes beyond technical errors (deed corrections), and goes back to the original date, unlike amendments.

In conservation easements, common circumstances in which reformation may be appropriate include[72]:

a. omission of an exhibit or attachment to the easement,

b. omission of an intended term from the document,

c. inclusion of a term that had been discussed and was agreed would not be included,

d. error in setting out the property description or otherwise in identifying the property and its boundaries, and

e. inaccurate depiction of the building envelope.

Reformation may be appropriate for fixing perplexing issues where amendments and deed corrections are not appropriate. It could be particularly appropriate when due diligence and documentation is faulty, missing or inadequate, which may be the case with many neglected or orphaned easements. Reformation does require consent of the Grantor or Grantor's successor, so landowner cooperation is necessary.

If court-ordered dispute resolution discussed in a.iii., above, is in place, reformation may be particularly appropriate, as court involvement already exists.

c. Transfer. As with the notion that repairing neglected or orphaned easements is easier with the cooperation of the holder, likewise the transfer of all or an interest in an easement is easier with cooperation of the holder. Nevertheless, it is possible to compel an involuntary transfer. Easements may be transferred in part, individually, as a group, or as part of a dissolution.

i. Voluntary transfers. The assignment of an easement is a voluntary transfer that is not uncommon to the industry. Sec. 1.170A-14(c)(2) of the regulations prohibits the transfer of a qualified easement from the original donee to any entity other than another qualified one. DRE rules prevent a certified organization from transferring easements for which a tax credit was claimed to non-certified holders. The Treasury regulations also require that the terms of the transfer must require the new donee organization to carry out the original purposes of the easement. Hence, any new transferee must be prepared to accept the responsibilities and liabilities of the easement. It is not uncommon for new transferees, upon approval of the landowner, to seek qualified amendments to the terms of the easement either immediately prior, or immediately subsequent to, the transfer. This may offer a "fresh start" to a neglected or troubled easement, both by correcting or removing problems via amendment, and providing for a new steward.

Recipient organizations must consider carefully the consequences and liabilities of a transfer. It is important the organization perform adequate due diligence as to the consequences of the transfer. Many organizations contemplating the assignment of an easement from another organization treat it as a new project, and complete their full due diligence as they would with any other transaction. Available stewardship funds should accompany the transfer. Like any other easement, a transferred easement will have financial, stewardship, and organizational impacts. In some cases, multiple transfers may impact Land Trust Accreditation standing.

It is also important that the original holder examine the consequences of the conveyance. Is this the best alternative for the easement? What does the original Grantor think? What do our stakeholders think?

ii. Involuntary transfer. As discussed in section a.iv., above, holders can be compelled to transfer an easement or easements. The Colorado Revised Nonprofit Corporations Act, C.R.S. §7-121-101 et seq. authorizes the AG to bring action for judicial dissolution of a nonprofit and a winding up of the nonprofit's affairs, including the transfer of assets. Not only can the court dissolve a non-profit and transfer its assets, under the Dispute Resolution Act at CRS §13-22-301 et seq., courts can refer certain cases or classes of cases to alternative dispute resolution. Parties in these cases can stipulate to make a decision on any issue binding, in which case said a decision to transfer easements would be final.

Funders, particularly public funders, may also reserve the right to compel an easement transfer. Standard easement language required by Great Outdoors Colorado and several federal funding agencies provides for the funder discretion to compel the transfer of the easement to another qualified holder in the event the original holder is not meeting its obligations either under the easement terms, or, often, the grant terms.

iii. Shared holding. Another alternative is to have the transferee serve as a co-holder of the easement with the original holder, instead of taking easements by transfer free and clear. Technically, this is not a transfer from one holder to another, but rather a sharing of the easement obligations between the organizations. The new co-holder is assuming some or all of the responsibilities (and liabilities) of the original holder. A co-holder may share in the same responsibilities as the original holder, or the co-holder and original holder may each have specific responsibilities. The relationship between the co-holder and the original holder is typically determined by a separate agreement, often also signed by the landowner. Unless the original easements terms provide otherwise, co-holding would require consent of the landowner.

Co-holding can expand the available skill sets and resources brought to bear on a potentially neglected easement by bringing a new organization(s) to the table. One Colorado land trust considered an alternative of conveying all its interest in its easements to another land trust and the local county as co-holders. The new co-holders were to be given separate obligations – the land trust to steward, and the county to enforce.

iv. Merger. "No other class of nonprofit organizations bears the equivalent burden of perpetual stewardship that land trusts are required by law to perform." So begins an excellent article entitled "Durable Collaborations," by Dale Bonar and Jim Morris in the Land Trust

Alliance newsletter.[85] While different organizations have different approaches and different skill sets, most land trusts have some variation of saving land in perpetuity as their goal. The authors speak of a "spectrum of collaboration" which describes the gamut of potential levels of cooperation between land trusts. Starting with networking and shared training, the spectrum runs through joint programs, shared resources, and eventually merger. A different type of collaboration is that discussed in section a.i., regarding mentoring and assistance. Another kind still is discussed in section 2 below, Triage. In all cases, Bonar and Morris emphasize, "the key ingredient of successful and durable collaboration is personal relationships."

Having gone through one merger, and engaged in a second, Colorado Open Lands can state unequivocally that mergers are all about personal relationships. There are many paths organizations can take to their land protection goal, but shared objectives, trust and transparency are all part of developing those key relationships that make collaboration possible.

Combining organizations with land assets is complicated. When the Columbia Land Trust and the Three Rivers Land Trust (Oregon) began their merger in 2009, they felt like there was land in the Three Rivers portfolio that did not align with the mission and goals of the new organization. Ultimately, they chose to transfer the easements from Three Rivers to Columbia in phases "giving us flexibility to continue to explore options, complete due diligence on the properties in a manageable time frame, find other appropriate organizations to take some properties, and perhaps work with the landowners to improve the conservation values of some properties.[86]"

Proper mergers are a method of combining the strengths of two organizations. One organization may possess knowledge, contacts and credibility in a particular landscape. The other organization may possess resources and technical skills that offer permanence. Together they provide a viable conservation presence in that landscape that neither organization can offer individually. More importantly, in the case of potentially neglected easements, a merger may offer a solution to the conservation commitments made but not fulfilled.

As Bonar and Morris note, "the failure of a land trust may lead to "orphaned" easements and eventually the loss of protections on those properties. In domino fashion, these events could lead to loss of public confidence in the land trust model."

v. Sequestration. When an existing easement is being neglected, we often consider the option of transferring the easement to an alternative holder. In some cases, potential holders are difficult to identify. In other situations, potential holders may find the easement undesirable. If the easement has characteristics that make it undesirable, we may wish to find a temporary alternative holder while we sort through the options. If the easement has significant and difficult problems, a long-term solution may be a new holder.

Transferring an easement to either an existing organization or one created for the purpose to hold such problem easements, either short or long term, is considered "sequestering" the easement. Sequestration may serve to "freeze" a negative or declining situation and by isolating the easement and buying time to resolve problematic issues. As with other transfers, it is important to recognize that sequestration does not remove the problems, and the stewardship and enforcement obligations to the easement remain. The problems must still be solved, but someone new is charged with that responsibility. Therefore, when the holder is the problem, or when the holder, for whatever reason, cannot remedy the problem, sequestration may represent a temporary solution.

Sequestration of an easement or easements is a complex step, however. It may be undertaken by an existing easement holder (charitable or government); it may be undertaken by an organization created for the purpose of holding the easement(s); or it is conceivable the current holder could be reconstituted to serve as a sequester for it easement or easements. In any of these cases, the requirements continue that the new holder be a qualified organization, and the conveyance terms obligate the new holder to fulfill the obligations of the easement.

Several issues factor into the consideration of sequestration. A summary of these by Solid Ground in Easement Revitalization are discussed below:

a. Legal Constraints. In addition to needing to meet the "qualified holder" requirements of the federal regulations, section 501(c)(3), state nonprofit laws, and the organization and its directors and officers may be liable for inappropriate actions. These requirements then lead naturally to internal constraint issues.

b. Internal Constraints. The requirement that the sequestration entity is properly capitalized and administered would likely include having directors who meet regularly, maintain

records, file required reports and carry out the activities it is designed to accomplish, including stewardship and enforcement. Some minimal threshold amount of adequate financial and other resources must be available to carry out those activities.

The creator of a new entity will also need to consider whether there are people willing to serve as a director or officer of a sequestration entity considering its odd mission and potential liabilities. At least some directors must be unrelated to the parent holder to ensure that the two entities are not collapsed into one, so the parent cannot rely only on insiders.

c. External Constraints. If the sequestration entity fails to fulfill the obligation to defend the easements it holds, the resulting negative publicity is likely to include the parent trust as well. In fact, the very knowledge of the sequestration trust structure is likely to raise eyebrows with some in the community. The parent holder may be called on to explain why sequestration is a public benefit.. Creation of a new easement holder, if it is a legitimate and distinct corporate entity, could represent a durable liability barrier even if it is controlled by a land trust or government holder. If the sequestration entity is fully separate, the liability stops there. However, if the sequestration entity is not fully separate, the liability passes on to the parent holder.

To preserve its shield (especially because a controlling holder is vulnerable to an argument that the sequestration entity is really not a distinct organization), the sequestration entity needs its own board of directors and its own separate office. It will have to carefully maintain corporate records, hold meetings as its articles and bylaws specify, make required filings, and generally build a record that the sequestration trust is in fact a distinct, viable, and operating entity. It needs to have enforcement and stewardship endowment for the easements it holds. In short, it needs resources in order to be its own viable organization – and those resources will likely come from the parent holder. This requirement and related conclusions regarding the importance of the sequestration entity being a legitimate and viable entity suggest that it may be as costly to properly sequester problem easements as it would be to deal with them. On the other hand, if the demand for such an entity was great enough, external funding may be considered.

d. Sequestration and abandonment. If the current easement holder considers sequestration, it might be tempting to take a next step and consider permitting the sequestration entity to quietly fade away, without making further arrangements for the easements it holds, thus effectively abandoning them. However, tax-exempt charitable organizations and government agencies with "qualified organization" status are held to much higher standards with respect to the care and protection of their assets. An entity set up with that intent would likely be seen as fraudulent without the blessing of the attorney general or a court. The goal of providing a corporate shield to limit liability would fail, and the individuals involved could be exposed to personal liability for their actions.

d. Extinguishment. Extinguishment of an easement terminates its existence, although not necessarily the protected conservation purposes. Recall the discussion Under Sec. 1.170A-14(6) of the regulations in Section IIIA.: Extinguishment is permitted only if it meets three conditions: 1) a subsequent unexpected change in the conditions surrounding the property can make impossible or impractical the continued use of the property for the conservation purposes; and, 2) the restrictions are extinguished by a judicial proceeding; and, 3) all of the donee proceeds are used by the holder in a manner consistent with the conservation purposes of the original contribution. The concept underlying this provision is that if the required conditions are met, then even while the easement itself has been extinguished, in fact, the conservation purposes continue to be protected in perpetuity.

A Colorado case, Carpenter v. Commissioner, reinforces that a qualified charitable easement can only be extinguished through judicial proceeding[89].

The IRS, land trusts, and various conservation attorneys debate the nuances of Sec. 1.170A-14(g)(6). A literal reading of the regulations, however, deems the extinguishment bar to be very high, at impossibility or impracticality. The first provision of the requirement says unexpected changes must make the use of the property for the conservation purposes impossible or impractical. There is some debate over the meaning of impossible or impractical. Likewise, attorneys debate the meaning of the conservation purposes. Does this mean the conservation purposes stated in the easement or any conservation purposes listed in regulation? Does it even mean conservation purposes or interests beyond those listed in the regulations? What if a conservation purpose later becomes possible or practical? In any event, while the differences in these interpretations are significant, regardless of the interpretation the bar remains high. It is not an overly excessive argument to say it's very difficult,

though not impossible, to contemplate a property with absolutely no remaining practical use for its original conservation purpose, as we are directed to contemplate by the Regulations, and virtually impossible to contemplate a property with absolutely no use for any conservation purpose at all, as we are directed to contemplate by the Restatement of Law.

Non-charitable easements – those not claiming a federal tax deduction or state tax credit - may be terminated by other means,. However, if a termination of a non-charitable easement results in an impermissible private benefit to a third party (such as the landowner), however, such termination may violate 501(c)(3) regulations applicable to a tax-exempt, charity holder.

So extinguishments will likely occur only in rare circumstances, under strict process requirements, and should be pursued only with extreme caution and excellent legal counsel. Unless easements are determined to be invalid at their creation, it is difficult to imagine large-scale terminations being used to remedy neglected or orphaned easements.

That said, as we reported in Section II, the 2014 LTA survey found ten full or partial easements extinguishments reported for Colorado by land trust holders. Seven of these were total extinguishments, and five of these were done through legal settlement, judicial proceedings or the Attorney General's office. In addition to the ten reported by charitable holders, six government holder extinguishments, all-total, are known to have occurred in Colorado. Two were non-charitable easements, and extinguishment was allowed by the terms of the easement, and another two were charitable easements extinguished through judicial proceedings. Again, Easement Revitalization raises issues germane to the consideration of extinguishment as a solution for easement problems:[90]

a. Merger of Title. Extinguishment should not be confused with "merger of Title," a different legal concept. In merger, there is a carrying on of the substance of the thing, except that it is merged into and becomes a part of a separate thing with a new identity. In the case of a merger involving an easement, the substance of the thing is the conservation purpose of the easement. For example, if a landowner were to transfer the fee interest in her land to a holder that held the conservation easement over that land, the fee interest and the easement are now held by the same entity. In theory, this could cause the two interests to "merge," thereby potentially causing the easement to legally "evaporate" and no longer be enforceable. Of note is that the

Colorado conservation easement enabling statute is distinct from the rest of the country in that it expressly allows mergers of conservation easements.

b. Proceeds. After a court has agreed to the extinguishment, upon the subsequent sale of the property and receipt of its required share of the proceeds, the holder must use its share of the proceeds in a manner consistent with the original conservation purposes of the easement. The holder's share of the proceeds can be no less than the easement's proportionate value of the property's full value at the time of the donation. Until the subsequent sale of the property, for which there is no time limit, the holder has a vested legal right in the property that will protect its right to its share upon the property's sale.

c. Non-charitable easement. If the original donor did not claim a federal tax deduction, IRC § 170(h) may not apply. Nonetheless, a charitable holder still has significant obligations due to its status as a 501(c)(3) "public charity," or as a "nonprofit corporation" under federal law and under most state statutes. To receive the tax-exempt benefits provided by federal or state law, the holder agrees to abide by restrictions and prohibitions that protect the public interest. These include the federal rules that a public charity act "exclusively" for charitable purposes and not for private purposes.

Perception. In addition to legal restrictions, an easement extinguishment opens a holder and the entire land conservation industry to potential scrutiny. An extinguishment could result in members of the public questioning the holder's and the industry's principles.

2. Triage.

Neglected and orphaned easements are often forgotten. They are not on the radar screen. It is not unheard of for an easement holder to be unaware a particular easement exists, or where it is located. Recall the 21% of land trusts in the 2010 LTA census that did no monitoring (Section II). Or the 88% of Wetlands Reserve easements the Office of General Council determined were not monitored in 2008 (also Section II). How about the sixteen Colorado easements held by a defunct Oregon Indian tribe? Do those holders know what is going on with these easements? Do those holders have adequate documentation

regarding the easements? Probably not. And without monitoring, they would not know if their documentation was correct or not. They would have *some* idea that it is not current.

So one of the first questions we ask about potential neglected easements, is, what do we know about it? Without current monitoring, even if documentation exists (baseline reports, old monitoring reports, etc.), we do not know if it is still relevant. So in order to begin to get a handle on the nature of potential neglected easements and their status, we have to collect a variety of information:

a. Documents. There are many important documents, which should be collected and organized. This begins with a copy of the easement and any amendments. Is it a signed and recorded version, or copy? Are there signed Baseline reports? The property descriptions in the baseline should match the deed, and the report should be dated on or prior to closing. Are there title policies for the property? The exception documents should be included with the policy. Is the property subject to a mortgage, if so, is there a signed subordination agreement? Does the title report indicate there are outstanding mineral rights? If so, is there a mineral remoteness letter? Are there annual monitoring reports? Are there any monitoring reports missing for specific years? Are there management plans, maps, photos, critical memos, landowner information, property history, board resolutions? What is missing?

b. Financial information. Are the organizations form 990's available? Have there been audits, either independent or board? Are bank statements available? Are there board dedicated stewardship and defense funds available for the property? Are they adequate? Are there outstanding expenses or liabilities?

c. Property inspection. When was the property last visited? By who and is it documented? Should it be visited to determine the status? Should it be monitored? Has there been recent contact with the landowner?

d. Current status. Are there violations or threats to the property? What has been done in that regard? What is the relationship with the landowner? Are there any legal actions taken or pending?

These are all questions that must be answered to evaluate the easement and determine a course of action. This becomes a form of triage for the easement – an assessment to sort through the relevant information and decide the status of the easement, the severity of any problems, and likely next steps.

It may be that a holder that has gotten to the point they are not be in a position to conduct a triage, or it may be they want help in doing so. In either case, their cooperation would be invaluable. Triage can occur with a mentor, or be undertaken by an intervenor or a contractor retained for the purpose, by a potential merger partner, or by an appointee of the AG, the court, or a dispute resolution mediator.

Recall the case of the merger between the Columbia Land Trust and the Three Rivers Land Trust in Oregon. Both trusts had questions about several easements, and so staggered conveyance of the easements into several phases to allow time to review and analyze them. Essentially, they were doing a triage exercise.

With a large portfolio, a triage analysis might take some time. Presumably, one or more organizations could both undertake a triage analysis and conduct annual monitoring. This would stabilize what might otherwise be an unknown situation, and allow for a thoughtful review of the situation and the easements. The better the information obtained during a triage, the better equipped the parties will be to make repair recommendations.

In the end, a triage becomes a potential key first step in either restoring a neglected easement to a current status, or to stop the bleeding and develop a recovery plan for problem easements. In the case of orphaned easements, triage provides a basis of determining what we are dealing with.

5. Develop a plan.

At this point, the assessment process has hopefully developed information adequate to construct a repair plan for the easements or easement holders. If a triage stage is necessary, a plan could be crafted prior to triage, and then completed afterwards. The plan need not be elaborate, but at a minimum should include the following:

a. Goal. What is the desired ultimate resolution

b. Status sheet. This should include all the relevant information gathered on the easement, portfolio, or holder under consideration.

i. Name, location, ownership

ii. Maps, photos, GIS data

iii. Conservation values, property features, stewardship status

iv. Documentation and GAP analysis

v. Funding

c. Pro's and Con's. This should be as accurate as possible summary of the strengths of the property, portfolio, or holder, and their weaknesses. It should examine the nuances of the situation to determine potential problems and opportunities.

i. Problems/opportunities

ii. Stakeholders

iii. Funding

d. Plan. A plan may have several gaps at the outset. A key part of the plan may be to fill the gaps. It is important the key stakeholders participate and have buy-in to the plan.

i. Repair mechanism alternatives

ii. Recommended repair mechanism(s)

iii. Key stakeholders

iv. Costs

v. Timetable

vi. Next steps

Depending on the circumstances, a plan could be developed by the holder organization, a transferee, a consultant, or any combination thereof. It is important, however, that key individuals or groups with responsibilities for repair be involved in the planning. It is also important that the board or other leadership of the holder and/or potential holder be knowledgeable of the situation, briefed on any potential financial and legal liability, and approves the plan. Finally, unless the landowner is part of the problem, regular communication should be maintained with the landowner, and their support of the plan obtained.

6. Summary

The assessment process for neglected and orphaned easements involves several steps leading to the identification of potential neglected easements and holders, followed by an evaluation to determine the best steps to repair, and a plan to get there. Because of the large number of easements and easement holders, an in-depth examination of each, certainly at the outset, is not feasible. By matching easement and organizational characteristics of neglect against data sources containing those characteristics, we start to find potential easements and holders to examine further. Reducing the large number of easements and holders to a smaller number for further examination allows us to subsequently look at other more specific information, such as websites, form 990's, and easement documents themselves.

This Study has completed a modest review that takes us to the point of identifying some candidate easement holders for which additional investigation into other information sources is recommended.

Subsequent steps in the assessment process will involve creating new information sources, such as a registry, self-survey, or sharing of certification information. It will be necessary to establish contact with easement holders, preferably in a cooperative fashion. The holders or the holders and other stakeholders will be able to analyze the existing information on potentially neglected easements in their portfolio, review the needs of those easements, and evaluate various repair mechanisms, with the objective of developing a repair plan. The review, evaluation, and plan development could involve an internal or external triage process.

C. Resolution

The assessment process is intended to lead to the actual repair of the neglected easement and neglected easement holder problem. The first step in the assessment is identifying the characteristics we are looking for, where to look for them, the criteria necessary to determine whether we are dealing with actual examples of neglect and orphans. The second step is the resolution stage where we determine the right repair mechanism and develop a plan to repair the easement or holder. Together the assessment and resolution stage set the stage for the actual repair.

With the tremendous variables affecting potentially neglected easements or holders, repair plans will likely be easement or holder specific. While it is not inconceivable that multiple easements could follow similar repair plans, repairing neglected easement holders will almost always be holder specific. We have discussed at length the distinct steps in the assessment and resolution process. The opportunity exists to potentially enhance some of these steps in creating an overall repair process for neglected and orphaned easements.

We suggest the following enhanced components in a neglected easement repair process.

1. Identification.

We have discussed the current capacity in each of the four steps in the identification process. The first three can be enhanced.

a. Self-survey. Although the Colorado database is not foolproof, it is reasonable to conclude we have identified nearly all the easement holders in Colorado. In this Study, we have assumed that certified organizations are not likely to be leading candidates for negligent or orphaned easements. In any event, they are not likely to be the most egregious. Although public information on certified holders does not exceed other holders, the certification process does provide substantial organizational information to the DRE and CEOC. On the other hand, information on the roughly 100 non-certified charitable and government holders is very limited.

Because we have the last publicly available contact information for these organizations, a survey seeking information related to the neglected easement characteristics identified above would be relatively simple to distribute. Such a survey would serve several purposes:

i. First, it would open an opportunity for dialogue with non-certified conservation easement holders, something that has never been done. Creating a contact point for future discussions may go a long way towards minimizing the future growth of neglected easements.

ii. Second, a survey of easement holders would represent an opportunity to provide information regarding conservation easements and stewardship to the many easement holders, particularly government, about which little is known. A low-key, neutral approach such as this may engage easement holders who would otherwise be guarded. Similarly, non-responses may indicate holders for further investigation.

iii. Finally, a survey would ask fundamental questions about monitoring and due diligence practices; easement violations and enforcement; and organizational financial capacity and focus – key information currently unavailable. Even though voluntary, the survey would likely yield valuable information. Hopefully, the Land Trust Alliance 50% response rate for surveys would hold true in Colorado.

Such as survey would be relatively simple to undertake and may prove valuable in gathering information about small, non-certified, atypical easement holders. One hundred survey participants is small enough that follow-up to non-responders would not be too difficult.

If successful, a self-survey could be conducted annually, or otherwise periodically, to provide current information on easement and holder status and greatly enhance the Colorado database.

b. Registry. Colorado may wish to create a registry similar to that created by Maine for similar purposes as the Maine registry. In Colorado, data collection for new easements and organizations actively acquiring easements will be relatively easy through DRE rule making. The challenge in Colorado will be to bring the approximately 100 non-certified easement holders into a registry or recordkeeping system in order to track their pre-2008 conservation easements. As we have noted several times earlier, the on-going active easement holders are currently subject to significant state oversight, and neglected easements in these holders portfolio's will be easier to detect. Neglected easements are far more likely among the older easements in the portfolios of the non-certified holders. Bringing this data and these holders into a registry would provide valuable information and oversight.

Many of the elements of a registry are in place, including substantial data from 2013 form 1299's, certification information, and the current tax credit approval process. A more systematic approach to data collection and availability would be valuable going forward. Collecting information from non-certified holders will be more labor intensive, but is not impossible. Some gaps, such as information on federal easements and non-charitable easements, exist, and should be filled over time. The registry should be sensitive to confidential information, and who has access to that information.

Either the existing authority vested in DRE through (C.C.R.) 725-4), or the previous authority vested in DRE and the CEOC in CRS Section 24-33-112 could serve as a basis for a registry limited to certified holders. A more complete registry would be far preferable in the identification of

potentially neglected or orphaned easements. Such a registry could be accomplished by not limiting DRE (or CEOC) authority to easements for which tax credits are taken, and expanding it to either holders of perpetual conservation easements, or "qualified holders" under Treas. Reg. 170(A). We have discussed this enhancement in greater detail under certification, in section 3, below.

If the authority to create a registry were not created through the expansion of certification, the alternative would still exist for legislative authorization of a registry in a manner similar to that of Montana or Maine.

> Repealed regulations (section 39-22-522, C.R.S) specifically required "any organization that accepts a donation of a conservation easement in gross for which a state income tax credit is claimed" to submit the following information:
>
> (b) The number of acres subject to each conservation easement held in Colorado, Except properties for which the sole conservation purpose is historic preservation;
>
> (c.5) The date on which the organization received certification pursuant to Section 12-61-720, C.R.S.; And
>
> (d) A signed statement from the organization acknowledging that: (II) The organization has adequate resources and policies in place to provide annual monitoring of each conservation easement held by the organization in Colorado, except for any conservation easement granted to a local government that did not involve a charitable donation.

This regulation was replaced with amended permanent rules and regulations (Permanent Rule 2.1 of Number 4 Colorado Code of Regulations (C.C.R.) 725-4) for conservation easements qualifying for tax credits, and for certifying tax credit-qualifying conservation easement holders:

> 2. Information Request
>
> A conservation easement holder must furnish to the Director such information or documentation as the Director in her/his sole discretion deems reasonably necessary for the enforcement of title 12, article 61, part 7, C.R.S. or any rules enacted by the Division.

c. <u>Certification.</u> Some information collected by the DRE and the CEOC during the certification process would be valuable to the neglected/orphaned easement assessment process. At this time,

neither the Division nor the Commission shares this information with the public or the industry. Recognizing the confidential nature of some of this information, work-arounds for the sharing of selected data would be necessary.

Two changes to the current DRE certification authority would greatly enhance easement data collection, and easement compliance.

i. Expanded Certification. If the certification program were expanded to all holders of perpetual conservation easements, it would be a major step in identifying potential neglected easement holders, and perhaps preventing orphaned easements. If certification were required of all easement holders, it would create a process intended to protect the integrity of all easements, not just easements for which a tax created is claimed, as it is today. The information gathering, investigational, and enforcement provisions of certification would be a vehicle to identify and prevent potential neglected or orphaned easements.

Current certification is designed to ensure that holders maintain adequate practices for new easements they acquire for which a tax credit is claimed. Consequently, the DRE is concerned as much with an organizations governance and acquisition practices as it is its' financial and stewardship practices. If an easement holder does not intend additional new easement acquisitions in the future, the DRE may choose to focus exclusively on the organizations stewardship and financial capabilities. As a result, the diligence and certification requirements may differ for entities holding and acquiring easements, versus entities only holding easements. This creates the opportunity for a two-tiered certification process – the current program for entities holding and acquiring easements, and a modified, less diligent program for entities only holding easements.

To accomplish this, the several instances where the statute refers to the holders as "entities that hold conservation easements for which tax credits are claimed" would have to be revised for the holding-only entities. This revision would remove the reference to tax credits, perhaps as follows: "qualified organizations that hold perpetual conservation easements."

ii. Expanded data collection. The above change would bring all easement holders into the certification process. This in turn would make all easement holders subject to the information collection requirements of the statute. This would greatly relieve the lack of adequate data on

easement holders that exists today. This in turn would greatly enhance the ability to identify and repair potential neglected easements. A commitment by DRE to maintain and provide data to a registry would be the finishing touch.

d. Screening. We have developed a criteria checklist from which to screen selected information sources for criteria that may be indicators for neglected and orphaned easements. A checklist that allows us to screen criteria against data is an important step in funneling potential neglected easements and neglected easement holders into the repair process. As the process develops, both the criteria and the information sources will require adjustment over time.

Nevertheless, as reviewed in several parts of this Study, the screening of the criteria for characteristics of neglected easements and neglected easement holders against various information sources has already begun. Because of the larger numbers of potential easements and easement holders and the fragmented nature of pertinent information, it is recommended that we begin the process of analysis and refine the steps as we proceed. If we wait until all the necessary information is in hand, the potential problem will be much farther along. We propose taking the criteria we have developed and matching against the readily available information sources, and start the process. To do this, we suggest beginning with the primary-level criteria and matching it with its corresponding information source. This yields several relatively short-term next steps:

i. Update 990's for Holders A, E, H, I,&J and for 11 charitable organizations that hold one easement.

ii. Obtain easement documents for seven easements held by Holders C, D, E, F & G.

iii. Review websites for mission statements for 38 holders of one easement.

iv. Review NCED for listings for 38 holders of one easement.

v. Obtain and review updated 990's for all charitable organizations.

vi. Review websites and NCED portfolios for 70 holders of 5 easements or less.

vii. Determine what information may be available through the certification process.

Implementing this screening should be relatively simple with several benefits:

- It will provide additional information on relatively likely neglected easement holders.
- It will allow us to test the proposed screening process
- It will allow us to refine and adjust criteria and information sources.

2. Implementation

The implementation stage is when we employ specific solutions to resolve neglected easements or holders. This stage involves implementing the repair plan, including the repair mechanism(s) perhaps a triage period, and then the rest of the plan for the repair.

1. Repair mechanisms. There are a variety of vehicles that should be consider repairing neglected easements or neglected easement holders. Part of this process is to determine which vehicles are potentially viable for a given case, and then evaluating the pro's and cons of each. Repair mechanisms fall into four main categories of which there are several mechanisms that merit special mention, as they may require decision making on the part of the industry.

a. Easement Holders. There are several alternatives for dealing with cooperative, dysfunctional, and non-existent holders. Regardless of which alternative is ultimately used, it is important to try to establish a cooperative relationship with the holder.

i. Intervention

ii. Mentoring

iii. Dispute resolution

iv. Dissolution. What is unique about these mechanisms is the potential role of the AG and the courts in their implementation. The AG could potentially play a role in all four of these approaches. The court could play a role in at least dispute resolution and dissolution. The question for the industry is to what extent do we wish to engage them? They both can also play a role in each of the other four categories. The AG and/or the court can be a powerful tool in resolving neglected or orphaned easements, but they are just that – powerful – and the industry may have little control or influence over the direction they take. Eventually, the AG, and also very likely the court, will engage in some part of the neglected/orphaned easement issue. Our industry should have a strategy for that inevitability.

b. Correct the Problems. Among the approaches to correcting what may be traditional easement problems are amendments and reformation, which as noted above, may also involve the AG, the court, or both.

i. Amendment. The point for industry discussion regarding amendments is whether there is benefit in establishing a safe-harbor process in the event they come under attack from various quarters. If so, there is precedent in Montana and New Hampshire for a standardized approach. There is potentially a role for the CEOC.

ii. Reformation.

c. Transfers. Several vehicles exist for transferring easements, portfolios, or entire organizations, in a voluntary or involuntary basis. Both the AG and the court play a role in involuntary transfers.

i. Voluntary.

ii. Involuntary.

iii. Shared estate

iv. Merger. Various forms of collaboration between charitable holders are becoming more common both in Colorado, and across the country. While merger is the ultimate collaboration, other measures addressed in this study, such as mentoring or easement co-holding, are forms of collaboration. While collaboration and merger seem to be a logical progression over time, they tend to be time consuming and challenging. Nevertheless, merger may be the only viable option for a struggling holder with a large portfolio.

v. Sequestration. In the event there appears to be a need to transfer a large number of easements, particularly if there are no willing recipients, additional examination of the creation of a sequestration entity, should be made. Determination should be made whether a public or quasi-public entity, with a level of governmental immunity, makes sense. A realistic funding source would need to be identified.

d. Extinguishment. Once again, a mechanism requiring court involvement, traditional extinguishment is a rare event. If Colorado ultimately faces a large number of orphaned

easements, extinguishment may become a more viable alternative. It is difficult to imagine that occurring without AG or legislative assistance.

2. Triage. Triage is a useful process in which a third party can step in and either temporarily hold potentially negligent easements, or contract for their stewardship. Triage can be a valuable opportunity to get to understand and know certain easements while also "buying time" against potential crises. Unless court appointed, triage could be viewed as a form of collaboration.

3. The Plan. A plan provides an opportunity to address all stakeholders and hopefully secure their concurrence with the plan.

VI. Goals and Recommendations

A. Goals

As stated on page one of this Study, we have three goals

Goal: Define and understand the range of issues for orphan or neglected easements;

Goal: Understand options available to easement holders and stakeholders; and

Goal: Develop a process for assessing potential orphan or neglected easements.

B. Recommendations

We undoubtedly have missed some issues and options related to neglected or orphaned easements. We have proposed a repair process to start the evaluation of easements with the knowledge it will be refined and adapted as our experience grows.

The repair process proposed here is far-reaching. The task of actually fixing or transferring hundreds of easements and empowering dozens of easement holders is potentially enormous. But the impact on conservation in Colorado is also enormous. Fixing the neglected and orphan easement problem will require the combined efforts of government and charitable easement holders, regulators, the Attorney General, the Conservation Easement Oversight Commission, the Division of Real Estate, funders, and likely political leaders and the courts.

Land conservation in Colorado has a history of collaboration between the principle players. Hopefully this issue will stimulate continued cooperation between easement holders and the State toward a comprehensive resolution. Nevertheless, there are a number of steps that can be taken immediately. We have addressed our recommendations in four areas: Funding; The conservation industry; The State; and, Legislation.

1. Funding

Pricing the various components of this Study was beyond our capability. Suffice it to say the overall cost, including easement due diligence, stewardship, and endowments is potentially very large. Looking at the Study incrementally, however, it is not that daunting. Components of the Study, particularly the costs of some identified initial evaluations, are manageable. Certainly, private or government grants could accommodate several of the next steps. The long-term cost of a program involving dozens or hundreds of easements could certainly run several million dollars. From that perspective, it would seem only a government-funding source is feasible. Such a source may be a legislative appropriation, Great Outdoors Colorado, or an appropriation from the conservation easement tax credit cap. There is precedence for use of the cap. In 2011, 2012 and 2013 the total number of conservation easement tax credits was capped at $22 million, $22 million, and $34 million, so the State could divert $16 million to the Department of Revenue and the Attorney General's office to expedite processing of challenged tax credit claims. Funding the repair of conservation easements, particularly conservation easements for which a tax credit was claimed, would be consistent with the legislatures prior reallocation to fund tax credit appeals.

Immediate next steps, particularly a self-survey, additional research on holders indicated by the Colorado database, and the exploration of State and legislative involvement could be undertaken by the industry. Some of these issues are discussed below.

These steps are largely that of staff time – website and records research; creating a survey; a mailing, and contacting holders. Presumably, this could be undertaken by one or two FTE's.

2. The Industry

Land protection through conservation easements originated as isolated, independent, frequently local, efforts. It has come a long way. Particularly in the charitable sector, communication, cooperation, and collaboration are now prevalent. Regulation, industry standards, a plethora of consultants, and guidance in many forms, as noted in this study, is abundant. In Colorado in particular, primarily because of rogue tax credit transactions, the

industry came together in a highly cooperative basis to address the questionable transactions, to deal with the IRS and Department of Revenue follow-up, and to advocate and develop legislative and industry reforms. Dealing with neglected and orphaned easements, many of which may be the result of the rogue transactions, is a next logical step.

This report recommends several actions immediately possible. Criteria should continue to be refined to help determine characteristics of neglected and orphaned easements. Databases as well should be developed and refined. Nevertheless, as cited above, there is adequate information in hand to begin the evaluation process.

a. Existing holder information. Because of the larger numbers of potential easements and easement holders and the fragmented nature of pertinent information, it is recommended that we begin the process of analysis and refine the steps as we proceed. If we wait until all the necessary information is in hand, the potential problem will be much farther along. We propose taking the criteria we have developed and matching against the readily available information sources, and start the process.

i. Schedule D of the 990's should be reviewed for information on monitoring.

ii. Obtain easement documents for seven easements held by Holders C, D, E, F & G.

iii. Review websites for mission statements for 38 holders of one easement.

iv. Review NCED for listings for 38 holders of one easement.

v. Obtain and review updated 990's for all charitable organizations.

vi. Review websites and NCED portfolios for 70 holders of 5 easements or less.

vii. Determine what information may be available through the certification process.

b. Review/refine the Repair Process. As noted throughout the Study, direct data on neglected and orphaned easements and easement holders is very limited. Several of the conclusions herein are based on related but not direct information – LTA surveys, 990

financial statements, NCED database information, for example. Also, because there is no national or state registry, and only about half of all conservation easements have been mapped by the NCED, existing data contains large gaps.

The proposed easement repair process as well contains several mechanisms not used to date. Therefore, it is important to remain flexible regarding the data collection, interpretation of that data, and the decisions made based on that data. The process must be considered a work in progress, and the proposed process as a starting point.

Specifically, in addition to the information suggested in #1, above, we make the following recommendations regarding refining the data and process:

i. Prioritize holders for data collection.

ii. Discuss with DRE the availability of any certification information.

iii. Develop criteria for financial capability – specifically that capability necessary to establish "the commitment to protect the conservation purposes," and "the resources to enforce the restrictions." This capability will likely be a sliding scale.

iv. Examine screening alternatives to verify monitoring and due diligence.

v. Examine vehicles to serve as a sequestration entity.

vi. Explore the publicly available/limited access status of a registry.

vii. Explore what information is beneficial and appropriate in a registry

c. Self-survey. Draft a self-survey for distribution to all perpetual easement holders. Screen/test the survey with a sampling of holders. The survey should introduce the sender, the neglected easement project, obligations for holders of perpetual conservation easements, and the reason for the survey. It should also offer further information or consultation upon request. Schedule D of IRS form 990 may be a reasonable survey template.

d. Political strategy. The industry should collectively address the best approach to both State government and any potential legislation. It is important that the sensitivity of the topic of potential neglected or orphaned easements is properly handled, and that discussions with the State and the legislature are coordinated with other industry objectives. Presumably, the Policy Committee, or a subcommittee of the Policy Committee, of the Colorado Coalition of Land Trusts (CCLT) is the correct entity for this.

e. Industry Leadership. Identifying the leadership within the industry to undertake the next steps is necessary. At some level, a broad representation of the industry should be engaged, such as through an advisory committee. Representatives of both charitable and government should be involved in this oversight role. A specific entity should be responsible for seeking and obtaining funds for the project, hiring FTE's, and undertaking the work objectives. This could be a land trust, a partnership of one or more land trusts, CCLT, or a consultant.

3. The State of Colorado

As we have reported, within the State of Colorado, several agencies fund conservation easements, or are conduits for funding. In some cases, these agencies may hold the right to intervene in the case of a negligent holder of a funded easement. The Colorado Division of Real Estate currently conducts a conservation easement regulatory program that focuses on conservation easements for which a tax credit was taken, and holders of such easements. The Attorney General has authority over charities and/or charitable fraud, and consumer protection, and as such has broad latitude over both charitable and government easement holders. The courts as well have broad jurisdiction to intervene in the case of negligent holders, and an array of tools for the purpose – from various forms of dispute resolution, to appointment of custodians, to dissolution of organizations, to extinguishment of easements. Finally, the role of Conservation Easement Oversight Commission has been reduced in recent DRE rules to that of advisory to the Division of Real Estate only. However, the CEOC represents a unique entity that could generally play significant roles in oversight of conservation easements and conservation

easement holders, and specifically in the crafting and implementation of remedies for neglected/orphaned easements and their holders.

These various state entities potentially play critical roles in resolving the neglected and orphaned easement situation. Such roles include:

a. Great Outdoors Colorado (GOCO). GOCO has a long history of involvement with both conservation easements, and conservation easement holders. It has directly funded over 470 conservation easement acquisitions, as well as another 177 fee acquisitions that required a conservation easement be placed on the property. It has established thorough criteria for reviewing easements and reviewing easement holders, and has extensive firsthand knowledge of both. This agency expertise may be valuable in evaluating the practices of potential neglected easement holders, or the status of potential neglected easements. Virtually all easements funded by GOCO contain provisions that give some level of easement oversight to the agency. Such provisions have varied over time, but typically include notification of monitoring and also notification of easement violations. Often the provisions provide GOCO with the right to transfer an easement to a new holder in the event the current holder is not adequately enforcing the terms of the deed. Generally speaking, funding from GOCO has been to larger holders, both government and charitable. As such, the preponderance of easements with GOCO review provisions are held by holders deemed less likely to have negligent easements. Nevertheless, it is certainly feasible there are potentially neglected easements funded by GOCO, and their role in these may be critical. Finally, as a funder (including this Study), GOCO has the ability to continue support of this project, and could play a critical role in helping to fund stewardship and due diligence costs in negligent or orphaned easement repairs.

b. Department of Natural Resources (DNR). Like GOCO, the Department of Natural Resources wears several conservation easement hats. Two divisions of the Department – Colorado Parks and Wildlife and the Colorado State Forest – own a combined 239 conservation easements. Consequently, knowledge of easements and easement stewardship exists within the DNR. Colorado Parks and Wildlife also provides both state funding and is a conduit for certain Department of Interior federal funds for the purchase of conservation easements. Easements

purchased with these funds often contain oversight and transfer provisions similar to those in GOCO agreements. The State Forest Service works with local charitable organizations in the distribution of federal Forest Legacy funds, but easements that utilize those funds must be held by the State. The Department of Natural Resources may be a logical home for a conservation easement registry.

c. Colorado Division of Real Estate (DRE). The DRE currently provides the most active oversight of conservation easements and conservation easement holders through the Division's Conservation Easement Program. The certification program is specifically focused on easement holders, but is limited to those seeking to acquire new easements for which a tax credit is claimed. The existing program allows the Division to collect a wide variety of information from these holders. This information is shared with the CEOC, but is otherwise confidential. The information collected is adequate to initiate an easement registry, but is limited in two ways: First, it includes only 40 of the 140 easement holders in Colorado; and, Second, it is, at least at this time, considered confidential.

Nevertheless, the DRE has the ability through the certification process, to presumably collect enough information on easement holders to determine who fits, and who doesn't fit, the criteria for a neglected easement holder.

The DRE could play a key role in identifying neglected or orphaned easements with two changes to its authority.

i. Two-tiered certification. Add a second tier of certification for uncertified holders of perpetual conservation easements. This second group would not be limited to those holding easements for which a tax credit was claimed, but would include all holders of perpetual easements – whether or not they were eligible for federal or state charitable benefits. First tier certification would remain as it is today. Second-tier certification would focus specifically on the stewardship capacity and practices of the holders. This would enable the DRE, in consultation with the CEOC, to make a determination of which holders possess the characteristics of a potential neglected easement holder.

ii. Expanded public (or semi-public) information gathering. The DRE would collect additional information for holders valuable for a registry.

d. The Conservation Easement Oversight Commission (CEOC). The CEOC is appointed by the Governor and is comprised of individuals and organizational representatives possessing experience and expertise with conservation easements. The Commission is intended to advise the DRE in regards to certification, appraisals, tax credits and "optional preliminary advisory opinions." As originally conceived, the Commission had a broader advisory role to the DRE, the Department of Revenue, and "any other state entity," for "any other issue" that may be brought to them.

The Commission is required by law to meet "not less than quarterly." It is a voluntary group, and therefore its capacity is limited. It is staffed by the DRE. It is conceivable, with an expanded role of the nature envisioned in the original authorization, to see the Commission with additional functions related to neglected easements and holders, such as:

i. Oversight of a neglected/orphaned easement program. Comprised of government and industry conservation leaders, the Commission could play a leadership role in designing and coordinating a neglected easement program, or providing input to a repair plan.

ii. Dispute resolution. The Commission could provide advisory opinions to arbiters, custodians, special masters, and charge with dispute resolution, or conceivably serve as an arbiter itself.

iii. Amendments review. If amendments become an important tool in repairing a significant number of neglected easements, clarity and safe-harbor may be desirable. The CEOC would be suited to serve a review and approval role for amendments that raise questions of acceptability. Montana offers a precedent for such a review body.

iv. Sequestration. A sequestration entity appears at this time to be a potential step in the neglected easement repair process. Such an entity could be private, public or quasi-public.

There could be a role in that for a respected Governor-appointed Commission such as the CEOC.

e. The Attorney General (AG). Almost by definition, neglected easements, and certainly orphaned easements, represent a threat to charitable assets, a potential loss to the public as beneficiaries of those charitable assets, and a loss to the easement donors. As such, the Attorney General would clearly have jurisdiction through its direct oversight of charities within the state. The AG may exercise oversight through its authority to investigate and prosecute charities, charitable fraud, and consumer protection. Finally, to the extent dissolution of a holder is a desirable repair mechanism, the AG has the authority to bring action for judicial dissolution of a charitable holder.

The AG's broad power may prove essential in reaching a satisfactory resolution of a neglected or orphaned easement or holder. The ability to intervene may force an otherwise uncooperative or unresponsive holder to deal with the situation. Investigative powers allow the AG to determine critical factors that may be very difficult to determine otherwise. In short, the AG may be able to compel holder behavior that would not be possible by the industry.

There are two important aspects to the role of the AG. First, because the AG's power is so broad, it is important that it be exercised in a fashion complimentary to a conservation solution. In this regard, AG cooperation with the industry is highly desirable.

Second, the AG's office is cash funded, which means any significant engagement by the AG should likely include a funding method. The AG can work through its assigned assistants to certain agencies or departments, so conceivably, it could be the AG consumer protection/charities division that does this work, or perhaps the Assistant AG assigned to the DRE, DORA or DNR.

f. The Judiciary. In terms of conservation easements, the judiciary possesses the power of involuntary dissolution of a charitable easement holder, various forms of dispute resolution, and review and approval of easement extinguishment, and perhaps certain amendments that effect termination.

In the case of dispute resolution, the courts may presumably be involved with assemblages of cases, holders, or conservation easements. This could be especially useful in guiding the resolution of orphan or neglected easements or their holders without all the trapping of a judicial proceeding, and with a great deal more flexibility than traditional judicial proceedings. Courts can assign special masters to a class of cases, assign special masters to special cases, order dispute resolution in certain cases, review stipulated settlements where classes or parties have agreed upon resolution, and render judgments in adversarial or cooperative/non-adversarial cases. To date, several judges nationally and at least one in Colorado has overseen joint petitions and stipulated settlements proposed by non-adversarial parties (Walter and Otero County in Colorado, and Hicks v. Dowd in Wyoming). In Wyoming, when the state Supreme Court dismissed the plaintiff in Hicks v. Dowd for lack of standing, the court instructed to the state's Attorney General to reconsider his non-involvement in the case. The Attorney General negotiated a stipulated settlement with the defendants in the subsequent stipulated judgment blessed by the Wyoming Supreme Court in Salzburg v. Dowd.

Such judicial oversight could be complemented by the Attorney General representation of the public, or by the CEOC, a special master, or the industry representing a class or group of easements or easement holders independently. A coordinated representation of holders and/or easements involving the AG on behalf of the public and the industry on behalf of holders in a cooperative, non-adversarial judicial proceeding or petition for judgment is possible.

Obviously several agencies play potentially important, perhaps essential, roles in resolving neglected and orphaned easements. Two aspects of State involvement in the process are important.

i. Coordinated State position. At the present time, the various state agencies engage in conservation easement activity more or less individually, if at all, in an uncoordinated fashion. To address a large-scale neglected easement repair it would be much better to have all agencies working together for a common outcome. For that reason, the industry should work with the State, perhaps at the level of the Governor's office, to seek an agreement

among state agencies as to objectives, actions, and responsibilities for neglected easement repair.

ii. Unified approach. As recommended in section 2D. above, the industry needs to carefully coordinate both the industry interaction with State agencies on this issue, and coordinate the approach taken with the State.

4. The Legislature/Legislation

We have suggested a few potential changes to existing Statute to facilitate the recommendations. These include:

a. Certification - jurisdiction. Amend the statute to provide for certification of all "qualified holders of perpetual conservation easements," as opposed to "conservation easements for which a tax credit is claimed."

b. Certification – expansion. Authorize a second-tier of certification for all holders of perpetual conservation easements to ensure they have "the commitment to protect" and "resources to enforce."

d. Registry – creation. Reinstitute authorization of DRE to collect information adequate for a conservation easement registry, and to determine the proper availability of the registry information. Potentially house the registry in DNR in cooperation with DRE data collection.

d. CEOC. Restore the original jurisdiction of the Commission, and allow for additional responsibilities at the Governor's discretion.

f. Easement Amendments. Authorize a safe-harbor easement amendment process. This could be based on a multi-level amendment structure similar to that of LTA and New Hampshire, with approval from an independent entity such as the CEOC in a manner similar to the Montana process.

VII. Endnotes

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