

THIS AGREEMENT IS SUBJECT TO ARBITRATION IN ACCORDANCE WITH THE MONTANA UNIFORM ARBITRATION ACT, MCA §27-5-111, ET. SEQ.

O'CONNELL RANCH  
(Lyons Creek)

## DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT is made the 4th day of September, 1996, by Patricia J. Anderson and Richard J. O'Connell, as to an undivided 40.822% interest, Patricia J. Anderson and Richard J. O'Connell, as to an undivided 45.258% interest, Richard J. O'Connell, as to an undivided 5.725% interest, Patricia J. Anderson, as to an undivided 2.845% interest, Ian P. Anderson, as to an undivided 2.675% interest, and Shannon M. Anderson, as to an undivided 2.675% interest, whose address is P.O. Box 168, Wolf Creek, Montana 59648 (Landowner), to the MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, whose address is 1420 East Sixth Avenue, P.O. Box 200701, Helena, Montana 59620-0701 (Department).

### I. RECITALS

A. The people of the state of Montana recognize that certain native plant communities providing important wildlife habitat are worthy of perpetual conservation and have directed the Department to acquire conservation easements by voluntary, cooperative means to conserve such wildlife habitat.

B. The Landowner is the owner of certain real property in Lewis & Clark County, Montana, (the "Land") described in Exhibit A attached hereto and incorporated herein by this reference.

C. The Land possesses significant communities of native plants, wildlife habitat, natural and scenic open space and recreation values (collectively "conservation values") worthy of perpetual conservation and valuable to the people of Montana.

D. The conservation values of the Land can be protected by granting a conservation easement to the Department with the Landowner retaining fee title to the Land.

E. Landowner and Department intend that the conservation values of the Land be preserved and maintained by the continuation of land use patterns existing at the time of this grant which do not significantly impair or interfere with these conservation values.

F. Public hunting is an effective tool of wildlife management and the opportunity for public hunting is a desirable recreational use of the Land.

G. This Easement does not preclude the Landowner from granting access to neighboring land consistent with the purpose of this Easement to protect the conservation values of the Land. It is not, however, the intent of the parties to prevent the development of state-owned land within the area encompassed by this Easement.

## II. AGREEMENTS

In consideration of the sums paid by the Department, and the Landowner's desire to donate to the Department the Easement value in excess of sums paid by the Department, and in further consideration of the recitals, mutual covenants and terms contained in this Easement and pursuant to the laws of the state of Montana and in particular to the Open-Space and Voluntary Conservation Easement Act, §76-6-101, et seq.; §§87-1-209 through 87-1-241; and Title 70, chapter 17, MCA, Landowner voluntarily grants and conveys to the Department and the Department accepts a conservation easement in perpetuity consisting of the following rights and restrictions over and across the Land.

### A. PURPOSES

1. The purpose of this Easement is to preserve and protect in perpetuity the conservation values of the Land. The Landowner and the Department intend that this Easement will limit the use of



the Land to livestock grazing and directly related agricultural land management activities, timber harvesting and limited mineral exploration and development.

2. A further purpose of this Easement is to provide to the Department, on behalf of the public, the right of reasonable access to the Land for recreational hunting as provided in Paragraph II.B.

3. Pursuant to the terms of §76-6-107, MCA, the Land, preserved by this Easement as natural land, shall not be converted or diverted to any uses other than those provided for by this Easement.

#### **B. DEPARTMENT'S RIGHTS**

The rights conveyed to the Department by this Easement are:

1. The right to identify, preserve, protect and enhance in perpetuity the wildlife habitat, particularly the intermountain grassland and riparian vegetation communities, its ecological features and the natural flora and fauna on the Land and its water resources; subject, however, to Landowner's reserved rights in this Easement.

2. The right to enter the Land to monitor Landowner's compliance and to enforce the restrictions on the Landowner's activities and rights granted to the Department by this Easement and to observe, study and make scientific observations of the Land's wildlife habitat and ecosystems, and to establish and maintain vegetation monitoring transects and enclosures, all upon prior notice to Landowner, and in a manner that will not unreasonably interfere with the use of the Land by the Landowner.

3. The right to prevent any activity on, or use of the Land that is inconsistent with this Easement and to require the restoration of any areas or features of the Land that may be damaged by inconsistent activity or use by the Landowner, as specified in this Easement.

4. The right, on behalf of the general public, of access by motor vehicle, horses and on foot for the purpose of recreational hunting on or through the Land in accordance with the following terms and conditions:

a. Hunters shall have access by motor vehicle over and across the roadways identified in Exhibit B attached to this Easement and incorporated herein by this reference. For purposes of wildlife management, or during any period when the parties agree there is a substantial danger of wildfire, or when a roadway is unsafe or impassable, hunter access to the roadways may be limited from time to time in the Management Plan described below.

b. Hunters may use horses to hunt on the Land, but the hunters must be able to demonstrate that they use and possess weed-free feed products for their horses, as certified by a generally-recognized authority or process.

c. The public may hunt game animals and game birds of all sex and age classes in accordance with hunting regulations adopted by the state of Montana, subject to the limitations contained in this paragraph. The public's access shall be during all fall hunting seasons established by the state of Montana in the minimum numbers provided herein. The Landowner may require hunting parties to obtain written permission to hunt from the Landowner, or its designated agents, for the purpose of monitoring hunter use in accordance with this paragraph four (4).

d. The Landowner and Department intend in this Easement to continue quality public recreational hunting opportunities on the Land. The number of hunters allowed on the Land set forth below are minimums only. The Landowner must allow at least 20 persons to hunt on the Land each day of the fall hunting seasons. The parties acknowledge that this is the daily average historical hunter use of the Land. The Landowner, Landowner's immediate family, Landowner's shareholders, partners, or employees or immediate family of shareholders, partners and employees of the Landowner shall not count towards satisfying the minimum number of hunting parties allowed on the Land. The public access for hunting shall be managed on a non-preferential and nondiscriminatory basis. The fall hunting seasons are set by the state of Montana and presently run from about September 1, which is the start of the game bird and archery seasons, and end on the last Sunday in November of each year, which is the end of the general big game season. The Landowner has the right to manage the distribution of hunters on the Land on account of reasonable concerns for the safety of Landowner, its ranch personnel and livestock and other hunters. Landowner may deny access to anyone who is not conducting herself



or himself in a prudent, responsible and safe manner, or is violating any of the hunting rules or regulations promulgated by the state of Montana. Except as specifically set forth in this paragraph four (4), this Easement does not grant public access to any portion of the Land.

### C. LANDOWNER'S RIGHTS

Landowner reserves to itself, its successors and assigns, all rights accruing from ownership of the Land, including the right to engage in or permit others to engage in all uses of the Land that are not expressly prohibited or restricted by this Easement and are not inconsistent with the purposes of the Easement. Without limiting the generality of the previous statement and subject to the restrictions on Landowner's activities in this Easement, the following rights are expressly reserved:

1. The right to pasture and graze livestock in accordance with sound, generally accepted agricultural practices, provided that Landowner shall not allow any substantial degradation of range conditions below present range conditions, as documented in the Baseline Data Report described in paragraph II.F. of this Easement. Landowner is guaranteed the right to have as many as, but no more than 118 Animal Unit Months (AUMs) each year on the Land. For purposes of this Easement, an AUM is equal to one cow or cow with an unweaned calf at side, one bull or one steer grazing for one month. The equivalent grazing for one month of a yearling is .8 AUM, of a horse is 1.25 AUMs, and of a sheep is .20 AUM. Grazing attributed to wildlife shall not be counted toward the 118 AUM limit. The Landowner and the Department may agree to amend this Easement in the future to incorporate a prescribed grazing system that includes rest pastures as a part of the grazing plan. The parties acknowledge that such a plan has the potential, with satisfactory vegetation response over time, to improve wildlife habitat on the Land and allow for an increase in the AUM units now prescribed in this Easement. The Landowner and the Department are under no obligation to enter into such a grazing system, and their failure to do so will not be a dispute subject to the arbitration proceedings provided in this Easement.

2. The right to regulate public use of the Land at all times, subject to the public's hunting access described under Department's Rights in this Easement.

3. The right to develop and maintain water resources on the Land necessary for the grazing, wildlife and domestic purposes that are allowed by this Easement.

4. The right to repair, renovate or replace existing non-residential buildings and other improvements, including barns, sheds, and corrals. Such structures may be replaced with structures of similar size and utility in the same general locations.

5. The right to place or construct two single-family residences and related structures, one in section 3 and one in section 15, T14N, R5W, provided the entire building area for each site does not exceed five acres, and that each building area is within one-fourth mile of roadways now in existence. The residences and other buildings, structures and site improvements must not be placed or constructed within 200 feet of any perennial stream. The Landowner has the right to construct or place all utilities and an access road for the residence, but the construction and placement of such utilities and road shall be conducted with a minimum of damage to the wildlife habitat.

6. The right to maintain, renovate, repair or replace fences, roads and other improvements in their existing locations for land management purposes allowed under this Easement. The right to construct, maintain, repair or replace new roads and fences, provided, however, that such improvements do not inhibit the movement of wildlife, or have a material impact on wildlife habitat or wildlife migration on and through the Land. In this Easement, new roads include roads constructed by the Landowner for Landowner's purposes, new access roads to neighboring land, and improvements to existing roads that substantially increase their utility. The Landowner will notify the Department prior to construction of a new road, or the grant of new access use of the Land. Existing roads, fences and other improvements are described in the Baseline Data Report.

7. The right to harvest timber and timber products from the Land in accordance with good and sound silvicultural practices, and Best Management Practices (BMPs), as defined and described in that certain publication called Best Management Practices for Forestry in Montana (July 1989), which is incorporated in this Easement by



this reference. The first three pages only of this publication are attached to this Easement as Exhibit C and incorporated herein as an abstract. The Department will furnish a complete copy of the document at no charge upon written request, which should be sent to the address of the Department specified for notices in this Easement. If the BMPs are revised and improved upon from time to time, then with the mutual consent of the Department and the Landowner, such revised BMPs shall be the standard under which timber and timber products are harvested from the Land, but in no event shall the BMPs fall below the standards established in Best Management Practices (July 1989), referred to in this paragraph. Prior to engaging in any timber harvest, Landowner shall notify the Department and submit a plan for the Department's review that provides for compliance with BMPs and minimizing adverse impacts on the conservation values of the Land. The Department may make recommendations for measures that would minimize adverse impacts on the conservation values of the Land.

8. The right to explore for, develop and extract oil, gas and other hydrocarbons, including the right to place and maintain associated structures, including pipelines, drilling rigs and pump houses, subject to the provisions of this paragraph. Prior to engaging in any exploration for or development and extraction of oil, gas or other hydrocarbons, Landowner shall notify the Department and submit a plan for the Department's review and approval that provides for minimizing adverse impacts on the conservation values of the Land. In addition to such other measures as may be required to protect the conservation values of the Land, the plan must provide for compliance with the management guidelines set forth in that certain publication called Interagency Rocky Mountain Front Wildlife Monitoring/Evaluation Program (September 1987), which is incorporated in this Easement by this reference. The first ten pages only of this publication are attached to this Easement as Exhibit D and incorporated herein as an abstract of the publication. The Department will furnish a complete copy of the document at no charge upon written request, which should be sent to the address of the Department specified for notices in this Easement. This paragraph does not apply to prior mineral leases.

9. The right to maintain a portable trailer for use by Landowner's employees in managing livestock on the Land.



10. The right to take all lawful measures to protect and prevent damage to persons, livestock and other property.

**D. RESTRICTIONS ON LANDOWNER'S ACTIVITIES**

Any activity on or use of the Land that is inconsistent with the purposes of this Easement is prohibited. Without limiting this general prohibition, the following activities and uses are expressly prohibited or restricted.

1. The control or manipulation of sagebrush by any means is prohibited, including but not limited to the burning, plowing, chemical treatment or removal of sagebrush, except when incidental to the control of forest encroachment on grasslands.

2. The legal or de facto division or subdivision of the Land for any purpose is prohibited, except that the sale, gift, devise, lease, exchange or other conveyance of a unit of land solely for agricultural purposes, but not for residential or any purpose related to residential use, shall not be considered a legal or de facto subdivision, provided that such transfer is effected with an express provision reflecting that the Land is subject to the terms and conditions of this Easement, without modification or expansion of the terms of the Easement. The Department shall be furnished with a copy of any document or conveyance used to effect such a transfer at least thirty (30) days prior to its execution. Purchasers or other successors-in-interest to the Landowner shall be provided a copy of this Easement prior to transfer of title. For purposes of this Easement, a subdivision means a division of land or land so divided that creates one or more parcels, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed in any manner; and includes any resubdivision and a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes. Further, the sale, rent, lease or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is considered a subdivision under this Easement. The prohibitions against subdivision contained in this paragraph shall also apply to the sale, rental, lease or other conveyance of the Land or any portion of the Land in parcels of less than 160 acres that was divided or subdivided into parcels of less than 160 acres prior to the grant of this Easement to the Department.



The Land shall not be used to satisfy requirements under the Subdivision and Platting Act of Montana as an open or natural space or park land for any subdivision or development purposes or requirements on land not covered by this Easement, nor shall the Landowner transfer any development or subdivision rights separate from the Land.

Subject to the approval of the Department, upon any conveyance of land that is less than the entire Land covered by this Easement, the AUM grazing capacity provided in this Easement shall be split and prorated between the land retained and the land conveyed, based on a formula that takes into account soil conditions, precipitation zones and then-existing vegetation patterns. The hunter access numbers provided under Department's Rights in this Easement shall remain the same for any land retained and any land conveyed, but such numbers will not be additive.

3. No cultivation or farming shall occur on the Land, except for domestic gardens in the permitted residential areas provided for in this Easement.

4. The renting or leasing of, or sale of access to the Land to others for hunting purposes, whether or not as a part of a commercial outfitting or guiding business, is prohibited. Operating a commercial hunting operation on the Land, or charging fees (sometimes known as trespass fees) to individual hunters for hunting on the Land or for access to public land, is prohibited. The Landowner shall not sell, assign, convey or otherwise transfer any interest in the Land or in the Landowner, if the Landowner is a corporation, partnership or other entity, for the purpose of providing access to the Land in contravention of this paragraph.

5. Subject to prior mineral leases, the exploration for or development and extraction of hard-rock minerals, coal, bentonite, soils (other than as provided in this Easement) or other materials by any surface mining method is prohibited.

6. All agricultural activities must be carried out in a manner that is consistent with the maintenance and enhancement of the soil composition, structure and productivity, and only to the extent that such activities do not result in the pollution or degradation of any surface waters in such a manner as to have a



detrimental effect upon fish or wildlife, their natural habitat, their passage, or the natural ecosystem.

7. Agrichemicals may be used for control of noxious weeds, as defined by the state of Montana or other lawful authority with jurisdiction. Such use shall be in the amounts and frequency of application constituting the minimum necessary to accomplish reasonable control of noxious weeds, and in a manner that will minimize damage to native plants.

8. Aerial application of agrichemicals is prohibited, except as approved in advance and in writing by the Department.

9. Motor vehicles and agricultural equipment may be used off roads in the ordinary course of Landowner's business, but only in a manner that has minimal impacts on vegetation or the natural habitat of animal species.

10. The construction or placement of any structure, building or improvement of any kind is prohibited, other than as expressly allowed in this Easement.

11. The establishment or maintenance of any commercial feed lot is prohibited. A commercial feed lot is defined for purposes of this Easement as the establishment or maintenance of a permanently constructed confined area or facility within which the Land is not grazed or cropped annually, for the purposes of engaging in the business of the reception and feeding of livestock for hire.

12. The use of the Land in connection with a game farm, game bird farm, fur farm, shooting preserve, menagerie or zoo, or in connection with the ownership, leasing, keeping, holding, capture, propagation, release, introduction or trade in any animal that may pose a genetic or disease threat to any mammalian, avian, reptilian, aquatic or amphibian wildlife species, whether or not indigenous to Montana, is prohibited. This prohibition does not apply to common domestic livestock or other animals commonly kept on a farm or ranch, or to the introduction, transplantation or release of native wildlife species on the Land by the Department with the consent of the Landowner.



13. Any commercial or industrial use of or activity on the Land is prohibited, other than commercial or industrial uses specifically allowed or acknowledged in this Easement. This prohibition includes, but is not limited to, leasing or sale of access to the Land or charging recreationists for access to public land for winter recreation activities, such as skiing, snowmobiling or snowshoeing, whether or not as a part of a commercial business.

14. The dumping or other disposal of wastes, refuse and debris on the Land is prohibited, except for disposal incidental to uses of the Land specifically allowed in this Easement.

#### **E. MANAGEMENT PLAN**

A Management Plan has been developed for public hunting management, specific wildlife habitat and wildlife passage improvement measures, and other matters of mutual interest to the parties. The Management Plan is attached to this Easement as Appendix 1 for reference, but the Management Plan is not incorporated into this Easement. The parties agree to abide by the specific requirements of the Management Plan, which has been developed to provide detailed guidance in management of the Land. The parties shall meet annually to review the Management Plan and, if deemed necessary, to propose amendments. Any amendments to the Plan must have the consent of both parties and must be in writing and signed and acknowledged by the parties. If there is any inconsistency between the terms of the Management Plan and this Easement, the terms of this Easement shall control.

#### **F. BASELINE DATA REPORT**

The parties agree that a Baseline Data Report (Report), will be completed by a Department biologist or consultant familiar with the area, reviewed by the Department and Landowner, and acknowledged by them to be an accurate representation of the physical and biological condition of the Land and its nonresidential physical improvements as of the date of the conveyance of this Easement. In the event a controversy arises with respect to the nature of the biological and/or physical condition of the Land and its nonresidential improvements, the parties may use the Report, as well as all other relevant or material documents, surveys, reports or other information to assist in the resolution of the controversy.



#### G. NOTICE TO THE DEPARTMENT

The purpose of requiring the Landowner to notify the Department prior to undertaking certain permitted activities is to afford the Department an opportunity to ensure that activities are designed and carried out in a manner consistent with the purposes and other provisions of this Easement. Whenever prior notice only is required, Landowner shall notify the Department in writing not less than thirty (30) days prior to the date the Landowner intends to undertake the activity. Whenever prior approval is required, Landowner shall notify the Department in writing not less than forty-five (45) days prior to the date the Landowner intends to undertake the activity in question. The notice must be sent by registered or certified mail, return receipt requested, or by courier, or personal delivery service, and must describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit the Department to make an informed judgment as to its consistency with this Easement. The Department has forty-five (45) days from receipt of the notice, as indicated by the registered or certified return receipt, or other proof of receipt to review the proposed activity and to notify the Landowner of its objections to the proposed activity. Objections shall be based upon the Department's opinion that the proposed activity is inconsistent with this Easement. If the Department objects to the Landowner's request, and the parties are unable to resolve the difference by mutually arriving at a resolution of the issue, then Landowner shall have the right to submit the issue to binding arbitration in accordance with Section P of this Easement. Landowner will not engage in the proposed activity while the arbitration is pending. If, in the opinion of the Department, it is possible that the proposed activity can be modified to be consistent with the Easement, the Department shall inform the Landowner of the manner in which the proposed activity may thereafter be conducted in a manner that is mutually acceptable to the Landowner and the Department. The Department's response to Landowner's notice shall be sent by registered or certified mail, return receipt requested, or delivered by courier, or personal delivery service.

If the Department fails to post its response to Landowner's notice within forty-five (45) days of receipt of the notice, the proposed activity shall be deemed to be consistent with the terms



of this Easement. The Department has no further right to object to the activity identified by such notice. The Landowner shall be under no liability or obligation for any failure to give prior notice for any activity undertaken by Landowner necessitated by virtue of fire, flood, act of God, or other element, or any other emergency; however, after such an event, if there is damage to the conservation values protected by this Easement, the Landowner shall notify the Department of the damage as soon as practicable.

Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by registered or certified mail, return receipt requested, or delivered by courier, or personal delivery service addressed as follows:

**To Landowner:** Patricia J. Anderson  
P.O. Box 168  
Wolf Creek, MT 59648

**To Department:** Administrator, Wildlife Division,  
Department of Fish, Wildlife & Parks  
1420 E. Sixth Avenue  
P O Box 200701  
Helena MT 59620-0701

or to such other address as either party from time to time shall designate by written notice to the other.

#### **H. REMEDIES FOR UNAUTHORIZED USES AND PRACTICES**

If the Department reasonably determines that the Landowner has violated the terms of this Easement or that a violation is threatened, or if the Landowner undertakes any activity requiring approval of the Department without first obtaining such approval, the Department shall give written notice to the Landowner of the violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Land resulting from any use or activity inconsistent with the terms of this Easement, to restore the portion of the Land so damaged. If the Landowner fails to cure the violation within thirty (30) days after receipt of notice from the Department, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing the violation within the thirty



(30) day period, or fails to continue diligently to cure such violation until finally correct, the Department may use the binding arbitration procedure provided in this Easement to enforce the terms of this Easement, to enjoin the violation, to recover any damages to which it may be entitled for violation of the terms of this Easement or injury to any conservation values protected by the terms of this Easement or damage to any conservation values protected by this Easement, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Land to the condition that existed prior to the injury. Measures to restore the Land to the condition that existed prior to the injury may include prohibiting or limiting Landowner activities otherwise permitted under this Easement until restoration is completed.

Without limiting the Landowner's liability, the Department, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Land. If the Department reasonably determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Land or to enforce its rights under this Easement, the Department may pursue its remedies under this paragraph without prior notice to the Landowner or without waiting for the period provided for cure to expire, provided the Department has initiated arbitration proceedings by making a written demand for arbitration on the Landowner.

The Department's rights under this provision apply equally in the event of either actual or threatened violation of the terms of this Easement, and the Landowner agrees that if Department's remedies at law for any violation of the terms of this Easement are inadequate, the Department shall be entitled to the injunctive relief, both prohibitive and mandatory, in addition to such other relief to which the Department may be entitled, while arbitration proceedings are pending. Prior to requesting injunctive relief, the Department must initiate arbitration proceedings by making a written demand for arbitration on the Landowner.

#### I. DEPARTMENT'S DISCRETION

Enforcement of the terms of this Easement is at the discretion of the Department, and any forbearance by the Department to exercise its rights under this Easement in the event of any breach



of any term of this Easement by Landowner shall not be deemed or construed to be a waiver by the Department of that term or of any subsequent breach of the same or any other term of this Easement. No delay or omission by the Department in the exercise of any right or remedy upon any breach by Landowner shall impair the right or remedy or be construed as a waiver.

**J. HOLD HARMLESS CLAUSE**

The Landowner shall hold harmless, indemnify, and defend the Department and its employees, agents and contractors from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands or judgments, including without limitation, reasonable attorneys' fees, arising from or in any way connected with injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition or other matter related to or occurring on or about the Land, as a result of Landowner's exercise of rights retained under this Easement, unless due to the negligence or willful misconduct of the Department or its agents, employees or contractors.

The Department similarly agrees to hold harmless, indemnify and defend the Landowner and its employees, agents and contractors from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands or judgments, including without limitation, reasonable attorneys' fees, arising from or in any way connected with injury to or the death of any person or physical damage to any property, resulting from any action, omission, condition or other matter related to or occurring on or about the Land, as a result of the Department's exercise of its rights granted under this Easement, unless due to the negligence or willful misconduct of the Landowner or its agents, employees or contractors.

**K. ACTS BEYOND THE LANDOWNER'S CONTROL**

Nothing contained in this Easement shall be construed to entitle the Department to bring any action against Landowner for any injury to or change in the Land resulting from causes beyond Landowner's control, including, without limitation, fire, flood, storm, and natural earth movement, or from any prudent action taken to prevent, abate, or mitigate significant injury to the Land resulting from such causes.



**L. TERMINATION, EXTINGUISHMENT, CONDEMNATION**

It is the unequivocal intention of the parties that the conservation purposes of this Easement shall be carried out in perpetuity. If circumstances arise in the future that render the conservation purposes of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, and the amount of the proceeds to which the Department shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by Montana law at the time, as herein provided. The Department shall use all such proceeds in a manner consistent with the conservation purposes of this Easement.

This Easement constitutes a real property interest immediately vested in the Department which, for the purposes of this paragraph, the parties stipulate to have a fair market value determined by multiplying the fair market value of the property unencumbered by the Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of the Easement at the time of this grant to the value of the property, without deduction for these values of the Easement, at the time of this grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Section 170(h) of the Internal Revenue Code of 1954, as amended. For the purposes of this paragraph, the ratio of the value of the Easement to the value of the property unencumbered by the Easement shall remain constant.

If the Land covered by this Easement is taken, in whole or in part, by exercise of the power of eminent domain, the Landowner and the Department shall be entitled to compensation in accordance with applicable law.

**M. SUBORDINATION**

If at the time of conveyance of this Easement, the Land is subject to a mortgage, the mortgage holder must agree by separate instrument, which will be recorded immediately after this Easement



is granted, to subordinate its rights in the Land to this Easement to the extent necessary to permit the Department to enforce the purposes of the Easement in perpetuity and to prevent any modification or extinguishment of this Easement by the exercise of any rights of the mortgage holder. The priority of the existing mortgage with respect to any valid claim on the part of the existing mortgage holder to the proceeds of insurance, or to the leases, rents, and profits of the Land is not affected by this Easement.

Upon request, the Department agrees to subordinate its rights under this Easement to the rights of any future mortgage holder or beneficiaries of deeds of trust to the proceeds, leases, rents and profits described above and likewise to subordinate its rights under any lien and to execute any documents required with respect to such subordination, but this Easement shall not be subordinated in any other respect.

#### **N. AMENDMENT**

If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the Landowner and the Department are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualifications of this Easement under any applicable laws, including §76-6-101, et seq., MCA, or §170(h) of the Internal Revenue Code, as amended, and any amendment shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration.

#### **O. RECORDATION**

The Department will record this instrument or an abstract of it in a timely fashion in the official records of Lewis & Clark County, Montana, and may re-record it at any time as may be required to preserve its rights in this Easement.

#### **P. DISPUTE RESOLUTION PROCEDURES**

If any claim or controversy arising out of or relating to this Easement, or any claimed breach thereof, cannot be resolved by the parties in the normal course of business, the dispute shall be referred for arbitration in accordance with the commercial dispute



arbitration rules of the American Arbitration Association or such other rules as may be agreed to by the parties. Such arbitration shall be subject to the provisions of the Montana Uniform Arbitration Act, Title 27, Chapter 5, MCA.

Arbitration may be initiated by either party by making a written demand for arbitration on the other party. The parties shall endeavor to agree upon an arbitrator, but if no arbitrator has been designated by mutual agreement within thirty days after written demand for arbitration, each party shall designate an arbitrator within forty days after the original demand for arbitration and give written notice of such designation to the other. Within ten days after these notices have been received, the two arbitrators so selected will select a third arbitrator and give notice of the selection to the Landowner and the Department. The arbitrator or arbitrators will hold a hearing and decide the matter within sixty days after they have been so designated.

The parties will share equally the fee of a single arbitrator or a third arbitrator, but each party shall pay the fee of the arbitrator which it chooses, as well as the costs of its own counsel and technical or consulting support in connection with the arbitration. The arbitrator(s) shall have the power to award arbitrators fees and expenses to the successful party to the arbitration.

## **Q. GENERAL PROVISIONS**

1. Controlling Law. The interpretation and performance of this Easement will be governed by the laws of the state of Montana.

2. Construction. If the validity of any provision in this instrument is questioned, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

3. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged into this Easement.



4. No Forfeiture. Nothing contained in this Easement will result in a forfeiture or reversion of Landowner's title in any respect.

5. Successors. This Easement shall be binding upon, and inure to the benefit of the parties, their heirs, administrators, successors and assigns, and shall continue as a servitude running in perpetuity with the Land.

6. Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon transfer of the party's interest in the Easement or Land, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

7. Severability. If any provision of this Easement is found to be invalid, the remainder of the provisions of this Easement shall not be affected.

8. Taxes. Property and other taxes assessed against the Land are the responsibility of the Landowner. Upon request by the Department, the Landowner shall furnish written proof of payment of taxes to the Department. The Department is authorized but not obligated to pay the Landowner's taxes if they become delinquent, without inquiry as to their validity. The Landowner shall be obligated to repay such taxes paid by the Department on demand by the Department, together with interest thereon from the date of payment by the Department to the date of repayment by the Landowner at the rate of ten (10%) percent per annum. Upon request by the Department, Landowner will furnish written proof of payment of taxes to the Department.

TO HAVE AND TO HOLD unto the Department, its successors, and assigns forever.

IN WITNESS WHEREOF, Landowner and the Department have set their hands on the day and year first above written.