

## GUIDANCE FOR WORK ON PRIVATE LANDS

Prepared by the Natural Resource Damage Program, in consultation with the UCFRB  
Remediation and Restoration Education Advisory Council  
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### Introduction

This guidance serves to assist persons or entities seeking to apply for Upper Clark Fork River Basin (UCFRB) restoration grant funds for a project that involves restoration activities on privately-owned lands. Much of the needed restoration work to improve fish and wildlife habitat in the Basin is on private lands. In some cases, past land management activities have often caused or contributed to negative resource impacts. A possibility exists that detrimental future management activities might also negatively impact restored areas. Applicants submitting UCFRB grant funding requests are required to address in their applications how they will assure that work on private lands is protected in the long-term and that future land management activities will not adversely impact restored lands. This guidance discusses the various tools that could be employed to ensure long-term effectiveness for work funded by UCFRB restoration funds on private lands. Such tools include employing restrictions under existing laws and rules, deed restrictions, easements, and contracts that would be binding on the current and future landowners. This guidance also describes how public access on private lands is addressed in the UCFRB restoration grants program.

This guidance indicates which tools the NRDP considers likely to be the most effective; however, oftentimes what tools will work is best determined on a case-by case basis that takes into consideration such site-specifics as the needs and desires of the affected landowner(s). For this reason, the NRDP does not require a specific mechanism to assure protectiveness in its *UCFRB Restoration Plan and Procedures*, the legal document that sets forth the framework for grant fund expenditures.

This guidance relies on information provided by the U.S. Environmental Protection Agency (EPA) in its fact sheet entitled: "A Site Manager's Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Correction Action Cleanups," (OSWER 9355.0-74FS-P, EPA 540-F-00-005, September 2000). Attachment A contains a portion of a table from that document that defines various types of institutional controls and identifies the benefits and limitations of them. Even though EPA's document focuses on controls needed for areas where contamination may remain in place, the tools identified are generally applicable to controls needed to protect a restored area.

### Existing Laws

State and federal water quality laws and regulations contain provisions designed to protect streambeds and wetlands from implementation of destructive land management activities but less so for other riparian areas. For example, a private or governmental entity would need a Montana Natural Streambed and Land Preservation Act 310 permit or a Montana Stream Protection Act (SPA) 124 permit, respectively, to work in or near a stream. Similarly, a federal Clean Water

Act 404 permit is required for any activity that will result in the excavation, discharge, or placement of dredge or fill materials into waters of the U.S., including wetlands. Thus, work that would be detrimental to aquatic habitat, such as channelization, would likely be disapproved via the permitting approval process. Some individual/entities, however, might improperly conduct work without seeking the proper permit(s).

Grant applicants are required to identify applicable laws and rules for their project. The NRDP model grant agreement requires grant recipients to comply with any applicable laws and rules. The NRDP believes, however, that such laws and regulations are unlikely to prohibit all possible detrimental activities that might occur on restored lands. Generally relying on existing laws and regulations to prohibit potential disturbance of restored areas is not a sufficiently protective measure.

### Governmental Controls

Governmental controls use the regulatory authority of a governmental entity (typically state or local) to impose restrictions on citizens or property under its jurisdiction. Examples include a state groundwater control zone or local zoning ordinances that prohibit activities that could disturb certain aspects of restoration work.

Refer to Attachment A for EPA's summary of the benefits and limitations of governmental controls. By themselves, local controls are rarely considered permanent since the next commission can change them. EPA rarely relies on local controls unless they are conducted in tandem with other controls. State controls may work well when a large area needs to be protected, such as a groundwater control area that prohibits well drilling, but they may not be a useful tool for assuring the long-term effectiveness of individual projects that are in discreet, unconnected locations.

The NRDP does not believe these governmental controls would usually be an appropriate tool for restoration work on private lands conducted using UCFRB grant funding. They are only likely to work well in tandem with other controls.

### Proprietary Controls

Proprietary Controls are tools such as easements and covenants that are based in real property law and are unique in that they generally create legal property interest. The legal instrument is placed in the chain of title, so they require the consent of the current landowner.

A "deed restriction" is a generic term to refer to types of land use controls that are tied to the deed. A deed restriction or restrictive covenant is a restriction imposed on real property that restricts certain activities on or uses of the land. For example, a deed restriction in contaminated areas might prohibit residential uses or well drilling. To protect restored areas, a deed restriction could prohibit certain land uses on the restored areas of the property. Legally, only the current landowner can record the deed restriction. The deed restriction could provide that, once the protection is no longer needed, the restriction on land use would be lifted.

A conservation easement is a land use restriction in the form of an easement enforceable by a party other than the owner. It is a voluntary, legally recorded agreement between the property

owner and normally a government agency or a qualified conservation organization. Private ownership is retained. Conservation easements typically maintain the land's traditional uses, such as farming and ranching, while generally prohibiting or limiting uses, such as subdivision or surface mining, which would diminish the conservation value of the land. Easement terms are legally binding on future landowners. The easements may be in effect for a specific time period (term easements) or may be "in perpetuity." While some easements are donated by the landowner, often the landowner receives compensation for value of the rights deeded via the easement.

Another type of propriety control is acquiring the fee title to the property. By doing so, the State or other entity obtaining the title would have the legal authority to control all uses on the property and thereby assure the protection of restored areas. But this normally requires a willing seller and funding for the acquisition and may require provisions for maintenance and access/use restrictions. There are some situations where easements or fee-title acquisition may be the only way to assure protectiveness. For example, the German Gulch project development grant involves assessing the need to acquire placer mining claims that cover stream sections needing restoration to preclude the possibility of future mining.

The NRDP believes proprietary controls such as deed restrictions and conservation easements are effective tools to assure that restored areas are protected in the long-term.

#### Contractual Controls

Contracts between the State and grant recipients have provisions that allow the State to withhold payments or seek reimbursement upon failure of a grant recipient to meet the requirements of the grant agreement, such as the following standard provision in UCFRB Restoration grants:

**Failure to Comply:** If the Project Sponsor fails to comply with the terms and conditions of this Agreement, or reasonable directives or orders from the NRDP, or the Project Sponsor's performance under this contract fails to conform to the specifications herein, the NRDP may terminate the Agreement, refuse disbursement of any additional funds to Project Sponsor under the Agreement, and seek reimbursement of UCFRB Restoration Funds already disbursed to Project Sponsor. Such termination will become a consideration in any future application for grants from the UCFRB Restoration Fund by the Project Sponsor.

If the contract specifications provided in the scope are adequate, then the State will have good legal recourse if the grant recipient fails to meet their obligations. When work is conducted on private land, however, the grant recipient is typically a local or state governmental entity managing the project, not the individual landowner, and ownership can change before, during or after the restoration project is implemented. Thus it is important to have a contractual provision that covers changes in land ownership that occur during the timeframe needed to assure needed protection of restored areas and agreed-upon land management or maintenance activities. The Montana Fish Wildlife and Parks (FWP), who does contract with many landowners directly, has recently added the following language to their contract:

**Change in Property Ownership:** The applicant must notify the Department prior to any change in ownership of the property where the restoration project occurred. If the new owner does not agree to continue to protect the investment in restoration for the period specified in the contract then the applicant may be required to reimburse the Department for all or part of the project costs.

The Natural Resource Conservation Service (NRCS) routinely enters into contracts with landowners. Attachment B provides a copy of NRCS generic long-term contract for NRCS cost share programs, with the relevant sections underlined. If the land on which work was conducted with grant funds is sold, and the subsequent landowner does not assume the landowner obligations of the grant contract, the previous landowner must refund the granting entity. The approved schedule of operations tied to the contract should have the needed protective provisions, such as specifications on logging or grazing practices and required fencing maintenance. The question becomes whether the term of the contract is adequate and whether the granting entity has the resources and management support for effectively monitoring and enforcing the agreement. As part of its 2001 grant proposal, the Watershed Restoration Coalition (WRC) of the Upper Clark Fork requested the use of restoration funds to fund the landowner's portion of a NRCS project of 25% in exchange for extending the NRCS/landowner agreement from the typical 5 to 10 years to 20 years.

EPA is requiring the following language in all contracts regarding operation and maintenance of projects constructed or developed using federal Water Quality Act 319 funds, which are used for work on private lands that will benefit water quality:

**Operation and Maintenance:** The recipient will assure the continued operation and maintenance of all nonpoint source management practices that have been implemented for projects funded under this agreement, unless a particular practice did not function as planned. Such practices shall be operated and maintained for an appropriate number of years in accordance with commonly accepted standards. The recipient shall include a provision in every application sub-agreement (sub-grant or contract) awarded under this grant requiring that the management practices for the project be properly operated and maintained. Likewise, the sub-agreement will assure that similar provisions are included in any sub-agreements that are awarded by the subrecipient.

Some of the benefits and limitations of contractual requirements are similar to those identified in the Attachment A under "Enforcement Controls." They only bind the parties named to the contract. While provisions such as the MFWP or NRCS provisions shown above can be used to address the commitment of subsequent landowners, the issue remains as to whether the funding and management support will assure effective monitoring and enforcement by the grant recipient. Extending the term of the contract is one way to increase long-term effectiveness, but that will not be sufficient if land ownership changes. Again, how protective the contract would be depends on the protectiveness of the specific operational plan(s) that are to be adhered to as well. For example, if we restore a riparian area that is in a Conservation Reserve Program (CRP) area, then the CRP provisions may be adequate since they prohibit grazing, although these limitations can be lifted by the overseeing federal entity.

The NRDP believes that, in some situations, contractual controls may be sufficient if:

- 1) The contract is over a sufficiently long period of time;
- 2) The contract has a notification provision for land ownership changes;
- 3) The contract has a failure to comply provision that applies to current and future landowners; and
- 4) The contract requires compliance with an adequate management plan. Typically the management plan is an attachment to the contract the grant recipient has with the landowner and the NRDP's contract with the grant recipient incorporates these plans via the scope of work.

If a proposal relies on contract arrangements to assure long-term effectiveness, key issues to evaluate on a project-specific basis are whether the management/operational plans for landowners that specify the protective practices are adequate and whether the grant recipients have sufficient labor and monetary resources to monitor landowner compliance with these plans.

### Informational Devices

Information devices are tools, which often rely on property record systems, used to provide public information about certain land conditions. Those devices described in Attachment A are used to notify prospective landowners about residual contamination or capped contamination remaining on a property. Under a restoration scenario that does not involve contamination remaining on site, deed notices could be used to notify potential landowners about the locations and restrictions associated with work that occurred on a particular parcel. Having a deed notice increases the likelihood that a future landowner is aware of outstanding contractual obligations tied to restoration work, but there is no enforcement mechanism afforded. The enforcement mechanism would still be the contract with original landowner. The NRDP believes deed notices can be appropriate tools to apply in conjunction with contractual provisions that cover both current and future landowner obligations.

In conclusion, which tool(s) would work best to assure long-term effectiveness for work on private lands is best determined on a case-by-case basis. The State has approved projects for work on private lands that used different tools. In planning work on private lands, applicants may want to consult the NRDP about the tools used on these projects that the NRDP deemed adequate to assure long-term protectiveness.

### Public Access on Private Lands

Public access is one of the factors the State considers in evaluating the merits of all UCFRB grant projects. It is not, however, a prerequisite for funding, nor is public access desirable in all cases from a resource protection standpoint. Having such a mandatory requirement was considered and rejected for many reasons. One major reason was that restoration planners did not want to lose opportunities for critical and worthwhile fishery and wildlife habitat restoration projects.

The following excerpt for the *UCFRB Restoration Plan Procedures and Criteria* (RPPC) describes how public access is considered for all projects, including those that occur on private lands:

**Public Access:** Under this criterion the State will examine whether public access is created or enhanced by a project. Public access issues – both the positive and the negative aspects – will be considered in funding decisions. Public access is not required of every project, nor is it relevant to all projects. Also, public access may not always be desirable from a resource protection standpoint, such as when public access to newly restored areas needs to be restricted to successfully establish vegetation. In many circumstances, however, providing public access may enhance the project’s public benefits and, in some circumstances, public access may be essential.

To help in evaluating the public access criterion, applicants are asked to address the following questions in their UCFRB restoration grant application:

1. Is public access relevant to this project? Why or why not? If public access is relevant, address the subsequent questions.
2. Describe the current status of public access for the project area. Be specific. For example, what parcels have access, what access is provided (e.g. hunting and/or fishing) and how is access provided for (e.g. via Fish Wildlife and Parks Block Management Program, by land owner permission, etc.)?
3. Describe what changes in public access that would result from this project. For example, what additional acreage will be open to public access and how will that access be provided?
4. Provide a map that indicates the nearest public access points to the project area and any new access points that would result from the project.
5. Describe any conditions specific to the project area for which increased public access would be detrimental. For example, would increased public access increase weed problems or possibly disturb fragile areas, such as recently restored areas? How will these potential problems be addressed?

While providing public access is not a mandatory requirement for UCFRB grant projects on private land, the public access benefits to be derived from a project or lack thereof can influence the project’s funding recommendation. Projects on private lands that will substantially improve fishery and/or wildlife resources and have a favorable benefit: cost relationship are likely to merit funding regardless of whether they provide for additional public access beyond that which is already available. For two similar projects that differ mainly in terms of access, the project that offers greater public access would typically rank higher. A project may not be recommended for funding if it does not provide for some public access if the other public benefits are not at least commensurate with project costs.

In planning projects on private lands, applicants should consider the existing public access provisions and consult with the landowner on his/her willingness to enhance existing or create new access. Ideally, a landowner would offer access as part of his/her contribution to the project, or the “in-kind match” for grant funding. Or a landowner might be willing to provide additional access if some type of compensation could be included as part of the grant request.

Public access to areas that have high recreational values and inadequate existing public access would be particularly worthy of funding consideration.

Many mechanisms exist to provide for public access to private lands for recreational purposes and the Montana Fish, Wildlife and Parks (FWP) is an excellent resource on this issue. An informal way to obtain access is “access by permission.” Many private landowners will permit use of their roads for access to federal and state lands, and many will grant access to their private lands to recreationists who request permission and act responsibly. More formal mechanisms to obtain access to private lands are mechanisms similar to those described previously for assuring long-term effectiveness of work on private lands – through existing laws, through proprietary controls, and through contractual controls.

Via provisions of the Montana Stream Access law, all flowing, natural streams are generally available to the public for recreational use between the ordinary high water marks without landowner permission. This law also enables recreationists to gain access to streams and rivers from a public road right-of-way at bridge crossings.

An easement can provide for specific access provisions. For example, a conservation easement may have a provision that guarantees public access to the property or portions of it in a specified time frame, such as during the fall big game hunting season. An easement could also guarantee a certain amount of public recreational use, such as hunter-days or angler-days. The FWP’s conservation easement for the Manley Ranch, which was partly funded with restoration funds in 2001, provides for 350 hunter-days per year. Private property may also be available to public use via a lease agreement, such as the lease agreements the FWP arranges under the Fishing Access Site program or through the Access Montana Program that focuses on protecting and improving public access to isolated state and federal lands.

The FWP administers several programs that provide for public access on a contractual basis via cooperative agreements between the agency and private landowners. The contracts are very landowner-specific as they are designed to fit the needs of the consenting landowner, the area fish and wildlife resources, and the public recreational users. These programs offer limited compensation to cover the additional costs to the landowners for providing such access. Such programs include the Block Management Program for hunting access and the Private Lands Fishing Access Program for fishing access. Grant recipients seeking to have public access as part of their project have the option of entering into such agreements with FWP via their existing access programs, if sufficient FWP funding is available, or entering into an agreement with the NRDP. Attachment C provides a generic access agreement for the FWP’s Private Lands Fishing Access Program. An access agreement with the NRDP would be of a similar nature.

The methods described above are those that the FWP has developed to provide for public access. Applicants may choose which to propose other methods that might be acceptable as well.

ATTACHMENT A. Selected Materials from USEPA Fact Sheet Entitled: Institutional Controls: A Site Manager's Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanup." September 2000, OSWER 9355.0-74FS-P. EPA 540-F-00-005.

Institutional Controls Matrix				
Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
<b>GOVERNMENTAL CONTROLS</b> <ul style="list-style-type: none"> <li>- Zoning</li> <li>- Other Police Power Ordinances</li> <li>- Groundwater Use Restrictions</li> <li>- Local Permits</li> <li>- Condemnation of Property</li> </ul>	<p>Controls using the regulatory authority of a governmental entity to impose restrictions on citizens or property under its jurisdiction. Generally, EPA must turn to state or local governments to establish controls of this type.</p> <p>For example, a local jurisdiction may zone the site to disallow uses that are incompatible with the remedy.</p>	<p>Do not require the negotiation, drafting, or recording of parcel-by-parcel proprietary controls. This is important with large numbers of distinct parcels, particularly where some of the landowners are not liable parties.</p> <p>The legal impediments (e.g., whether the control "runs with the land"; whether the right to enforce the control can be transferred to other parties) to long-term enforcement of proprietary controls can be avoided; governmental controls remain effective so long as they are not repealed and are enforced.</p>	<p>Will almost always have to be adopted and enforced by a governmental entity other than EPA (e.g., state or local governments). Thus, their effectiveness depends in most cases upon the willingness of state or local governments to adopt them, keep them in force, and enforce them over the long term. There may also be enforcement costs for the state or local jurisdiction.</p>	<p>Usually enforced by the state or local government. The willingness and capability of the state or local government to enforce the IC should be given due consideration.</p>



<b>Institutional Controls Matrix</b>				
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<b>GOVERNMENTAL CONTROLS</b> <ul style="list-style-type: none"> <li>- Easements</li> <li>- Covenants</li> <li>- Equitable Servitude</li> <li>- Reversionary Interest</li> <li>- State Use Restrictions</li> <li>- Conservation Easements</li> </ul>	Tools based on private property law used to restrict or affect the use of property.	<p>Can be implemented without the intervention of any federal, state, or local regulatory authority.</p> <p>Advisable when restrictions on activities are intended to be long-term or permanent (contaminants will be left in place that prevent unrestricted use).</p>	<p>Since property laws vary by state, always check whether or not there are court recognized doctrines that would limit the extent to which the controls run with the land or are transferable to other parties.</p> <p>Property law requires a conveyance of a property interest from a landowner to another party for a restriction to be enforceable.</p>	<p>To be enforceable in most courts, the instrument used for the conveyance of any property right should clearly state:</p> <ul style="list-style-type: none"> <li>• the nature and extent of the control to be imposed;</li> <li>• whether the control will “run with the land” (i.e., be binding on subsequent purchasers);</li> <li>• whether the right to enforce the control can be transferred to other parties.</li> </ul>

<b>Institutional Controls Matrix</b>				
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1. Easements	<p>A property right conveyed by a landowner to another party which gives the second party rights with regard to the first party's land. An "affirmative" easement allows the holder to enter upon or use another's property for a particular purpose. A "negative" easement imposes limits on how the landowner can use his or her own property.</p> <p>Examples: Affirmative easement - access by a non-landowner to a property to conduct monitoring. Negative easement – prohibit well-drilling on the property by the landowner.</p>	<p>Most flexible and commonly used proprietary control. EPA can hold an "in gross" easement since it generally will not own an adjacent parcel of land. An "appurtenant" easement can only be given to adjacent landowners. (Note: the site manager or Regional Counsel should check all applicable state property laws and should not consider "in gross" easements to be transferable).</p> <p>Most useful in situations where a single parcel of land is involved and the current owner of the land is subject to regulation under CERCLA or RCRA.</p>	<p>For an easement to be created there must be a conveyance from one party to another. An easement cannot be established unless there is a party willing to hold the easement. This can present difficulties since EPA cannot hold an easement under the NCP without compliance with all procedures required by section 104(j) of CERCLA.</p> <p>Furthermore, some state governments cannot hold easements, and other parties may be unwilling to do so. Since the owner may not be the only party with whom it is necessary to negotiate, a title search should be conducted to ensure that agreements have been obtained from all necessary parties (e.g., holders of prior easements with right of access).</p> <p>Less useful where a large number of parcels are involved and the owners are not PRPs.</p>	<p>In general, an easement is fully enforceable as long as its nature and scope are clear and notice is properly given to the parties against whom the agreements are binding (e.g. by recording the easement in land records).</p> <p>Use caution when determining who will hold the easement. Sometimes PRPs acquire easements from other landowners thus taking on the burden of negotiating and paying for them. However, as a third party, EPA may not have the right to enforce or transfer the easement unless that right is specified in the agreement between the PRP and other landowners.</p> <p>The terms of easements are enforceable by the holder in the state court with jurisdiction over the property's location.</p>

Attachment A, continued

<b>Institutional Controls Matrix</b>				
<b>Type of Institutional Control</b>	<b>Definition &amp; Example</b>	<b>Benefits</b>	<b>Limitations</b>	<b>Enforcement</b>
2. Covenants	<p>A covenant is an agreement between one landowner to another made in connection with a conveyance of property to use or refrain from using the property in a certain manner.</p> <p>Similar to easements but are subject to a somewhat different set of formal requirements.</p> <p>Example: A covenant not to dig on a certain portion of the property.</p>	Can be used to establish an institutional control where the remediated property is being transferred from the current owner to another party.	This agreement is binding on subsequent owners of the land if: (1) notice is given to the subsequent landowner, (2) there is a clear statement of intent to bind future owners, (3) the agreement “touches and concerns” the land, and (4) there is vertical and horizontal privity between the parties. <sup>1</sup>	Enforcement of covenants is subject to state law and enforceable by the holder in the state court with jurisdiction over the property’s location.

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<sup>1</sup> Horizontal privity means that only a contract party may claim relief for a breach of a contract warranty or a condition. In other words, no person other than the buyer can sue for damages that arise out of the breach of a contract warranty or condition. Vertical privity means that each party in a distribution chain only has a contract with the person ahead of him or her in the chain. For example, vertical privity would mean a consumer only has a remedy against the person from whom he or she purchased a particular item and could not sue the manufacturer.

Attachment A, continued

<b>Institutional Controls Matrix</b>				
<b>Type of Institutional Control</b>	<b>Definition &amp; Example</b>	<b>Benefits</b>	<b>Limitations</b>	<b>Enforcement</b>
3. Equitable Servitude	Closely related to covenants, equitable servitudes arose when courts of equity enforced agreements that did not meet all of the formal requirements of covenants.	Most likely to have value as an institutional control where a party responsible for cleanup expects to own neighboring property for a long period (as might be the case in partial military base closures).	The agreement is binding on subsequent owners of the land if: (1) notice is given to the subsequent landowner, (2) there is a clear statement of intent to bind future owners, (3) the agreement “touches and concerns” the land. The third requirement should be met by any agreement that restricts what the owner can do with the land.	The ability to enforce an equitable servitude “in gross” against subsequent landowners is less likely to be recognized compared to easements and covenants, but this depends greatly on jurisdiction.  The terms of equitable servitudes are enforceable by the holder in the state court with jurisdiction over the property’s location.
4. Reversionary Interest	A reversionary interest is created when a landowner deeds property to another, but the deed specifies that the property will revert to the original owner under specified conditions. It places a condition on the transferee’s right to own and occupy the land. If the condition is violated, the property is returned to the original owner or the owner’s successors.  Example: Failure to maintain the integrity of a cap.	Binding upon any subsequent purchasers.  Most useful where it can be assumed that the original owner will be available over a long period to conduct further response determined to be necessary (e.g., where a Federal agency is selling the property).	Not useful if there is a chance that the original owner will not remain in existence for a long time.	Each owner in the chain of title must comply with conditions placed on the property. If a condition is violated, the property can revert to the original owner, even if there have been several transfers in the chain of title.  The terms of reversionary interests are enforceable by the holder in the state court with jurisdiction over the property’s location.

Attachment A, continued

<b>Institutional Controls Matrix</b>				
<b>Type of Institutional Control</b>	<b>Definition &amp; Example</b>	<b>Benefits</b>	<b>Limitations</b>	<b>Enforcement</b>
5. State Use Restrictions	State statutes providing owners of contaminated property with the authority to establish use restrictions specifically for contaminated property. For example, Connecticut property owners who wish to file an environmental use restriction must demonstrate that each person holding an interest in the land irrevocably subordinates their interest in the land to the environmental use restriction, and that the use restriction shall run with the land. <sup>2</sup>	Overrides common law impediments to allow for long term enforceability of real property interests.	In some cases, the authority to acquire or enforce the restrictions is conferred only on the state. Therefore, the state's assistance is necessary to implement and enforce.	Determine whether the restriction can be federally enforced; if not, investigate whether the state is willing to take on the role of enforcement.

<sup>2</sup> CT General Statutes, 1997, Vol. 8, Title 22a, Section 22a-133n through 22a-133s, contains the following provision: "No owner of land may record an environmental use restriction on the land records of the municipality in which such land is located unless he simultaneously records documents which demonstrate that each person holding an interest ... irrevocably subordinates such interest to the environmental use restriction. An environmental use restriction shall run with the land, shall bind the owner of the land and his successors and assigns, and shall be enforceable ....."

Attachment A, continued

<b>Institutional Controls Matrix</b>				
<b>Type of Institutional Control</b>	<b>Definition &amp; Example</b>	<b>Benefits</b>	<b>Limitations</b>	<b>Enforcement</b>
6. Conservation Easements	Statutes adopted by some states that establish easements to conserve and protect property and natural resources. Example: Open space or recreational space is maintained to prevent exposure or prevent uses that might degrade a landfill cap.	These statutes override common law technicalities and barriers that may pertain to traditional easements and covenants (e.g., “in gross” easements are not upheld in some jurisdictions).	May only be used for a narrow range of possible purposes which could limit their usefulness as institutional controls.	In general, the holder must be a governmental body, a charitable corporation, association, or trust.
<b>ENFORCEMENT TOOLS</b> (With IC Components) <ul style="list-style-type: none"> <li>- Administrative orders/Unilateral orders of consent</li> <li>- Consent decree</li> </ul>	Enforcement authority is used to either (1) prohibit a party from using land in certain ways or from carrying out certain activities at a specified property, or (2) require a settling party to put in place some other form of control. This section addresses Federal enforcement tools as opposed to those that may be available to state or local governments.	May be easier to establish than proprietary controls because EPA is not dependent on 3rd parties to establish and enforce them.	Typically only binding on the original signatories of the agreement; or binding only the party(ies) to whom it is issued in the case of a Unilateral Administrative Order.  Negotiations and finalization of AOCs and CDs can be lengthy.	Enforceable by EPA under CERCLA and RCRA or by a state if state enforcement tools are used.

Attachment A, continued

Institutional Controls Matrix				
Type of Institutional Control	Definition & Example	Benefits	Limitations	Enforcement
<b>INFORMATIONAL DEVICES</b> <ul style="list-style-type: none"> <li>- Deed Notices</li> <li>- State Registries of Hazardous Waste Sites</li> <li>- Advisories</li> </ul>	Tools, which often rely on property record systems, used to provide public information about risks from contamination.	<p>May effectively discourage inappropriate land users from acquiring the property.</p> <p>Easier to implement than other controls because they do not require a conveyance to be negotiated.</p>	<p>Has little or no effect on a property owner's legal rights regarding the future use of the property.</p> <p>If not drafted well, informational devices may discourage appropriate development and uses of land.</p>	Not legally enforceable.
1. Deed notices	<p>Commonly refers to a nonenforceable, purely informational document filed in public land records that alerts anyone searching the records to important information about the property.</p> <p>Example: Notice may state that the property is located within a Superfund site, identify the kinds of contaminants present and the risks they create, or describe activities that could result in undesirable exposures to the contaminants left on site.</p>	<p>May discourage inappropriate land use.</p> <p>Easier to implement than easements because they do not require a conveyance to be negotiated.</p> <p>Use only as a means of alerting and informing the public about information related to a particular piece of property.</p>	<p>Because deed notices are not a traditional real estate interest, proper practice in using them is not well established. Investigate state law and local practice in advance to determine whether such a notice will be recorded, how it should be drafted, and who would be entitled to revoke it.</p> <p>Before filing a notice, obtain the property owner's consent to avoid the risk of claims for slander of title.</p> <p>If not written properly, the notice may discourage all development, including uses that would be appropriate for the site, by creating a perceived liability risk.</p>	A deed notice is not an interest in real property, so recording a notice has little or no effect on a property owner's legal rights regarding the future use of the property (i.e., they are non-enforceable).

## Attachment B. Example NRCS Contract, with pertinent sections underlined.

U.S. Department of Agriculture  
Natural Resources Conservation Service

OMB NO. 0578-0013  
NRCS-LTP-002  
9-97

### FOR NCRS COST SHARE PROGRAMS

Contract No.: \_\_\_\_\_  
Program: \_\_\_\_\_  
State: \_\_\_\_\_  
County: \_\_\_\_\_

#### PART I – Participants(s)

- (1) \_\_\_\_\_  
(name) \_\_\_\_\_ (address) \_\_\_\_\_
- (2) \_\_\_\_\_
- (3) \_\_\_\_\_

Contract Period: from \_\_\_\_\_ to \_\_\_\_\_

General description of land unit (including location and acreage):

#### PART II – Terms and Conditions

Each of the undersigned and above-named participants hereby agrees to participate in this NRCS cost-share program and by his/her participation agrees to all of the provisions of this contract and agrees to all of the regulations issued by the Secretary of Agriculture governing the program which are hereby made a part of this contract: hereby agrees (1) to carry out on the land unit as shown in Part I hereof, land adjustments, cropping and grazing practices, and conservation practices in conformity with a ns as shown in the attached plan schedule of operations, which is hereby made a part of this contract, according to the time schedule conservation treatment and in accordance with the specifications and other special program criteria obtained from the local field office of the Natural Resources Conservation Service, (2) to forfeit all rights to further payments or grants under the contract and refund to the United States or the conservation district, all payment or grants received thereunder up on violation of the contract as shown in Attachment A which is hereby made a part of this contract, at any stage during the time that the participant has control of the farm if the Secretary or the conservation district determines that such violation is of a nature as to warrant termination of the contract or to make refunds or accept such payment adjustments as the Secretary or the conservation district may deem appropriate if he determines that the participant's violation does not warrant termination of the contract, and (3) upon transfer of the participant's right and interest in the farm or ranch during the contract period to forfeit all rights to further payment or grants under the contract and refund to the United States or the conservation district all payments and grants received thereunder unless the transferee of the farm or ranch agrees with the Secretary or the conservation district to assume all obligations of the contract. (4) Special provisions are included and are hereby made a part of this contract. (5) All practices in the Plan/Schedule of operation will be maintained for the life of the contract.

#### PART III – Participant(s) Signature(s)

Date:

- (1) \_\_\_\_\_ (signature for tax purposes) (3) \_\_\_\_\_ (social security # or tax ID #)
- (2) \_\_\_\_\_ (signature) (4) \_\_\_\_\_ (signature)

#### PART IV – Approval

By: \_\_\_\_\_  
(contracting officer)

Date: \_\_\_\_\_



## Attachment C. Sample Access Agreement from FWP

### PRIVATE LANDS FISHING ACCESS AGREEMENT

This Agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_, between the State of Montana, DEPARTMENT OF FISH, WILDLIFE & PARKS (FWP) and the Owner or Owner's legal designated representative of lands being enrolled in the Private Lands Fishing Access Program (COOPERATOR).

### COOPERATOR INFORMATION

Landowner/Cooperator \_\_\_\_\_  
Ranch/Farm Name \_\_\_\_\_ Phone \_\_\_\_\_  
Mailing Address \_\_\_\_\_

### SITE LOCATION AND MANAGEMENT

Water body Name \_\_\_\_\_ County \_\_\_\_\_  
Legal Description \_\_\_\_\_ 1/4 \_\_\_\_\_ Section \_\_\_\_\_ Township \_\_\_\_\_ Range \_\_\_\_\_  
Map - Agreement **must** include a copy of a USGS topographical map showing exact area boundaries.

Landowner Property Rules and Other Restrictions: (Attach additional sheets if needed)

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Other Management Issues: (Attach additional sheets if needed)

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

### AGREEMENT TERMS AND PROVISIONS

Through this agreement, the Department and the Cooperator will provide the public with equal opportunity angling access free of charge on the Cooperator's property. Access will be granted under conditions mutually agreed upon by the Cooperator and the Department. Information on those conditions and methods of gaining access will be available through the Department's regional headquarters and/or the Cooperator. Anglers will not be required to purchase any services or pay any fees as a condition of access. Through participation in the Private Land Fishing Access Program, the Cooperator agrees to permit Department personnel on the property for the purposes of establishing and monitoring angler use, enforcing fish and wildlife laws, and maintaining contact with the Cooperator so as to respond to any needs, issues, or problems which develop over the course of the use season. By permitting Department personnel on the property, the Cooperator is not relinquishing any rights or control over property under his/her ownership or responsibility.

In consideration of the mutual promises and provisions of this Agreement, the parties agree to the following terms and provisions:

## **DUTIES, RESPONSIBILITIES, AND CONDITIONS**

1. **Cooperator's Duties:** The Cooperator agrees to perform the following identified duties:
  - a) \_\_\_\_\_
  - b) \_\_\_\_\_
  - c) \_\_\_\_\_
2. **Department Responsibilities:** The Department agrees to provide the following services or materials:
  - a) \_\_\_\_\_
  - b) \_\_\_\_\_
  - c) \_\_\_\_\_
  - d) Compensation \$ \_\_\_\_\_

The term of this Agreement is for \_\_\_\_\_ year(s), beginning on \_\_\_\_\_, 20\_\_\_\_ through \_\_\_\_\_, 20\_\_\_\_.

The parties shall have the right to terminate this Agreement at any time and for any reason by giving 30 days notice to the other party prior to the expiration of this Agreement.

### **HOLD HARMLESS AND INDEMNIFICATION**

**Liability:** The restriction on liability of a landowner, agent, or tenant that is provided under 70-16-302(1) applies to a landowner who participates in the Private Lands Angling Access Program. The Department agrees to hold harmless, indemnify and defend the Landowners and Landowners' 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 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 Cooperators property as a result of the Department's negligence in exercising its rights under the terms of this agreement. Provided, however, that the Department shall have no obligation to indemnify the Landowners as a result of any negligent act or omission on the part of the Landowner with respect to the Cooperators property.

In signing this agreement, the parties acknowledge that all the terms and conditions are incorporated in and are part of the agreement and binding on the parties.

BY: \_\_\_\_\_  
Cooperator Date

BY: \_\_\_\_\_  
Regional Fisheries Manager Date

BY: \_\_\_\_\_  
Regional Supervisor Date