

# **ISSUE PAPER ON CONSERVATION EASEMENTS AND THEIR ROLE IN THE UCFRB RESTORATION GRANT PROGRAM**

## **1.0 Introduction**

Decades of mining and mineral processing operations in and around Butte and Anaconda released substantial quantities of hazardous substances into the Upper Clark Fork River Basin (UCFRB) between Butte and Milltown. These hazardous substances extensively injured the area's natural resources. On behalf of Montanans, the State filed a natural resource damage lawsuit, which was partially settled in 1999. As a result, the Atlantic Richfield Co. (ARCO) paid the State approximately \$130 million to restore the Basin's public natural resources, particularly its fish, wildlife, vegetation, groundwater, and rivers and streams.

In early 2000, the State finalized the *UCFRB Restoration Plan Procedures and Criteria (RPPC)*, which provides the framework for expending the UCFRB Restoration funds obtained in the 1999 partial settlement. The State elected to establish an annual grant process in which various entities could apply for funds for restoration projects within the Basin based on procedures and criteria outlined in the *RPPC*. During the pilot year of the grant program in 2000, two grant applications for conservation easements generated a lot of questions about conservation easements—what they are, how they work, what they accomplish. There were also many differing opinions as to the appropriateness of using UCFRB Restoration funds on conservation easements. These questions and opinions prompted the Upper Clark Fork River Basin Remediation and Restoration Education Advisory Council (Advisory Council) to pursue an educational effort to learn more about conservation easements and their role in UCFRB restoration activities. This effort resulted in a panel discussion on conservation easements held in Deer Lodge on March 22, 2001.

A panel of seven speakers representing farmers, ranchers, state agencies and conservation organizations discussed varying views on the pros and cons of conservation easements and whether UCFRB Restoration funds should be used to purchase easements. An audience comment and question period followed the panel discussion. This issue paper presents background information on easements and their eligibility for UCFRB Restoration funds and highlights the viewpoints offered. Attachment A contains the panelist's written speeches or outlines. Videotapes of both the panel discussion and question and answer session are available upon request from Kathy Coleman of the NRDP at 406-444-0205 or via email request to [nrdp@state.mt.us](mailto:nrdp@state.mt.us).

## **2.0 Conservation Easements and Their Eligibility for UCFRB Restoration Funds**

A conservation easement is a restriction that is attached to the land. It is a voluntary, legally recorded agreement between the property owner and a government agency or a qualified conservation organization. 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, that would diminish the conservation value of the land. Although easement provisions vary, they typically involve taking away the development rights and preserving open space. Easement terms are legally binding on future landowners. Financial benefits to the landowners can include a cash payment and/or reduction in estate taxes, income taxes, or in some cases, property taxes. Private ownership is retained.

By law, UCFRB Restoration funds may only be spent on projects that restore, replace, or acquire the equivalent of the injured natural resources and/or lost services and/or services lost due to hazardous substance contamination caused by ARCO and its predecessor's mining and smelting operations in the UCFRB.

- Restoration refers to actions taken, in addition to remediation, to return the injured resources and services to their baseline condition. For example, planting additional grasses, shrubs and trees in the Silver Bow Creek floodplain that would not be planted under remediation would help restore the area.
- Replacement actions create or improve resources and services that are the same as or substantially similar to the ones that have been injured or lost, but away from the immediate site of injury. For example, improving a streambank and aquatic habitat in a tributary stream to Silver Bow Creek constitutes replacement.
- Acquiring equivalent resources involves obtaining unimpaired resources comparable to those that are injured. For example, acquiring land along an uncontaminated tributary stream constitutes acquiring an equivalent resource.

Conservation easements can contribute to the restoration of injured resources and associated services provided by those resources by protecting those resources via management restrictions on property that encompasses or is close to injured areas. For example, conservation easements can protect restored streambanks and floodplain areas along the injured Silver Bow Creek and Clark Fork River corridors from potentially disruptive land management activities such as residential, commercial, or industrial development; over-grazing, off-road motor vehicle use, or uncontrolled public access. Keeping these injured areas protected will allow the recovery process to occur faster than what might occur if the injured areas were not the subject of protective restrictions. In addition, easements in injured areas can enhance recreational opportunities in these areas.

Similarly, conservation easements can contribute to replacement of injured resources and associated services by providing protection for resources that are substantially similar to injured resources but outside of injured areas. For example, Restoration funds might be used to improve the aquatic and riparian habitat in and along a tributary stream to Silver Bow Creek or the Clark Fork River. An easement on that restored area may help assure the long-term effectiveness of these improvements and accelerate the recovery of replacement natural resources.

Typically, most conservation easements would likely fall under the category of projects that constitute the acquisition of equivalent resources and services. The two easements funded in the Pilot Year 2000 Grant process fit this category. They involve the acquisition of public interest in high quality fish and wildlife habitat and provide associated recreational opportunities comparable to that of some of the injured natural resources in the Basin.

Easements that entail acquisition of unimpaired resources comparable to injured resources may also contribute to restoration. For example, an easement that protects a tributary stream of the Clark Fork River or Silver Bow Creek that provides critical native trout spawning habitat from potentially detrimental land management activities will enhance the native trout recruitment potential in the Clark Fork River.

In summary, easements can fit the legal threshold for Restoration funds (i.e., restoration, replacement, or acquisition of the equivalent) if they protect or improve fish and wildlife resources or provide public recreational access. If public access is guaranteed as part of an easement, such as providing a specific number of angler-days or hunter-days, then the services the project provides are augmented. While the public access is not required for UCFRB Restoration grants, having a guaranteed public access will typically make the project be more favorable in terms of its benefit:cost relationship than a similar project that does not provide such access.

### 3.0 Highlights of Panel Presentations

The following provides a brief summary of the individual panelist presentations. These speeches cover well the varying opinions on the pros and cons of easements and the use of UCFRB restoration funds on easements. The pros centered on the joint benefits easements can provide to natural resources, the public, and agriculture. The cons centered on the difficulties associated with the perpetuity of easements. Four common messages in the presentations were:

1. Easements are a valuable tool to have in the tool box.
2. Whether or not easements are the best use of UCFRB Restoration funds should be addressed on a case-by-case basis.
3. That easements should not undermine property rights with what might be burdensome restrictions for future generations.
4. “One size does not fit all” – easements need to be crafted to provide management flexibility for changing conditions.

Rock Ringling, a Managing Director with the Montana Land Reliance, opened the panel discussion with background on the nuts and bolts of conservation easements—what they are, how they work, and how easements can benefit landowners. Rich Clough, Chief of Operations at the Montana Fish, Wildlife and Parks, spoke next on the benefits of easements to water quality, fish and wildlife habitat and populations, the agricultural community, and the public. He offered examples of situations when conservation easements would be a worthwhile expense of UCFRB Restoration funds, such as protecting restored lands or protecting the overall health of the Clark Fork watershed.

Mark Simonich, Director of the Department of Commerce and previous Director of the Department of Environmental Quality, reviewed the basics of the Natural Resource Damage lawsuit and explained how easements can replace injured natural resources or lost uses. He suggested asking, “Is the easement the right use at the right time?” He advocated a stepwise approach of first seeing what can be done to improve injured resources under Superfund remediation, then determining what can reasonably be done to restore injured resources, and after that, consider replacing resources that cannot be fully restored.

Jim Berkey of the Five Valleys Land Trust reviewed the numerous benefits that easements can provide, focusing on how they are mutually beneficial for natural resources and productive working farms, ranches, and forests. He noted difficulties associated with easements being perpetual documents, whereas, the land, economy, community, and easement partners will change over time. Jim believes easements are “potentially a very useful and appropriate use of UCFRB Restoration funds, since easements can be a cost-effective and long-term tool for resource protection.” He suggested that we consider timing—whether it is better to invest in easements now since land values are likely to increase.

John Hollenback of Gold Creek, an area rancher familiar with easements, noted that while easements have some worthwhile benefits, he believes easements are sometimes done for the wrong reasons and without sufficient planning. John believes future generations should not be saddled with land use restrictions in perpetuity. We need to trust future generations to make the right choices. He suggests flexible easements such as term easements that “allow for reasonable changes because we cannot be predictive of perpetuity.” John believes UCFRB Restoration funds should be focused on restoring impacted lands in the Basin. “Easements can be a part of that effort, but should not be the main focus for these dollars,” he

concluded.

The two area ranchers on the easement panel, Barbara Clark of Rock Creek and David Mannix of Helmville both related positive experiences with the easements they have. They both also commented that “one size does not fit all.” Barbara believes restoration of the Clark Fork River Valley goes hand-in-hand with easements that help ranches and farms stay ranches and farms, summarizing: “Stabilize the stream, stabilize the ranch.” Regarding using UCFRB Restoration funds on easements, David responded, “Although I could see where easements could work, I’m not sure they are the best use of these funds. I guess it would depend on ‘Compared to what?’” He suggested looking at what provides the most “bang for the buck.”

#### **4.0 Pros and Cons of Easements**

The following is a cumulative compilation of the pros and cons most commonly identified by panelists. This list reflects the views of panelists; it does not represent the views of the NRDP.

##### Pros of conservations easements identified by panelists:

- Allow public agencies to protect valuable habitat without inheriting management responsibility.
- Keep land in the tax base.
- Assure wildlife or fisheries values are maintained without purchasing the entire property.
- Can protect streamside of riparian zones.
- Help assure working ranch or farm will remain a ranch or farm and allow ranching family to stay on the land and continue historic uses.
- Allow landowner to capitalize some of his property values and still retain those he/she values most.
- Promote good stewardship
- Promote resource stability—having more minds/diversity involved in major management issues breeds sound decisions.
- Protect habitat, open spaces and agricultural community from potentially detrimental subdivision.
- Can be customized to fit the property and the landowner’s and resource needs
- Are more cost effective than fee title acquisition
- Provide rewards of reduced estate and income taxes to landowners
- Provide perpetual protection
- Are good tools if all parties involved have primary goals in common.
- Are difficult to amend

### Cons of conservation easements:

- Are perpetual, fixed documents even though land, economy, and community conditions will change over time.
- Involve predicting the future, which is hard to do when the needs of land, wildlife, land management practices and the human uses change over time.
- Limit property rights.
- Involve taking in a partner in a way, which can be complicated/difficult.
- Are perpetual documents that must be worded carefully to be flexible, yet still specific enough to protect the desired conservation resource.
- Cannot be used as a substitute for purchasing lands in order to have strict control over management practices (i.e. for endangered species, extensive public access, etc).
- Can potentially be manipulatively used by private interest to further personal or corporate benefits without significant or proportionate public benefits.
- May offer only a short-term economic fix in the context of longer term economic and market-driven problems.
- Are difficult to amend.
- Can be difficult to manage because the parties to the easements change over time--both landowners and trust personnel will change over time, offering no institutional memory. Difficulties arise when different people are dealing with and interpret easements.
- Require funding for monitoring and enforcing the terms of the easement.
- Are not good tools for lands that need to be intensely managed or have severe management restrictions.
- Require consistent communication between the landowner and the conservation organization.
- Are many times planned with insufficient information and rushed into too fast.
- Make choices about resources for future generations that might be best decided by future generations.

**ATTACHMENT A**  
**PANELIST PRESENTATIONS**  
**CONSERVATION EASEMENTS IN THE UPPER CLARK FORK RIVER BASIN –**  
**MARCH 22, 2001 PANEL DISCUSSION ON THE PROS AND CONS**

**Sponsored by the UCFRB Advisory Council and Natural Resource Damage Program**

Following are the speech outlines or entire speech text for the seven speakers at the March 22, 2001 panel discussion on conservation easements.

**1. Presentation by Rock Ringling, Montana Land Reliance on What Easements Are and How Easements Can Benefit Landowners.**

Personal Introduction: Rock is a Managing Director of the Montana Land Reliance. In his work with the Land Reliance since 1990, Rock has gained extensive experience with easements, including many in the Upper Clark Fork River Basin (UCFRB). Rock holds an easement on his family's ranch in eastern Montana via a codicil to a will.

**I. Land Conservation Options**

**A. Agricultural Conservation Easements**

- 1) Voluntary Agreement
- 2) Designed to protect ranch lands and open space.  
Must provide at least one of the following:
  - a) Preservation of open space for scenic enjoyment, or significant public benefit
  - b) Protection of relatively natural habitat for fish, wildlife, plants, or similar ecosystems
  - c) Preservation of land areas for education of, or outdoor recreation by, the general public
- 3) Flexible tools
  - a) Tailored to landowner's needs & desires
  - b) Apply to whole parcel or specific parts of a property
- 4) Legal agreement landowner makes to restrict the type and amount of development on the property
  - a) Legally binding on future landowners
  - b) Resource values protected
  - c) Agricultural land use rights retained
  - d) Access to land retained
- 5) Private ownership is retained
  - a) Rancher remains eligible for applicable state or federal programs
  - b) Does not affect other private property rights
  - c) Continue traditional uses
  - d) May sell or transfer the land in whole or in part
  - e) Rancher controls access to land

- 6) Uses not allowed
  - a) Subdivision
  - b) Dumping of toxic waste
  - c) Surface mining
- 7) Rights transferred to the Montana Land Reliance
  - a) Annual property inspection
  - b) Authority to enforce easement terms
- 8) Benefits
  - a) Income tax deduction
    - 1) Charitable contribution for conservation easement
    - 2) Six-year carry forward
  - b) Estate tax reduction
    - 1) Reduced gross estate
  - c) Prevents subdivision
  - d) Preserves historic agricultural use
- B. Taxpayer Relief Act of 1997
  - 1) Includes incentives for conservation easements by allowing an estate tax exemption for conservation easement land located within 25 miles of a wilderness area or a national park up to \$500,000
  - 2) Allows an executor to elect to place a conservation easement on land to reduce its value for estate tax purposes
  - 3) Value of land placed in a conservation easement prior to death is reduced causing an estate tax reduction

## II. Resources

- A. Montana Land Reliance "Introduction into Private Land Conservation"
- B. Montana Land Reliance "Introduction to Conservation Easements"
- C. Montana Land Reliance "Tax Implications of Conservation Easements"
- D. Land Trusts
  - 1) Montana Land Reliance
    - a) Agricultural open space land trust
    - b) Established 1978
    - c) 440 easements
    - d) 405,000 acres
  - 2) The Nature Conservancy
  - 3) Local land trusts in some areas of the state
- E. Related Web Sites
  - 1) Montana Land Reliance: [www.mtlandreliance.org](http://www.mtlandreliance.org)
  - 2) Land Trust Alliance: [www.ita.org/whatlt.html](http://www.ita.org/whatlt.html)
  - 3) The Trust for Public Lands: [www.igc.apa.org/tpl/](http://www.igc.apa.org/tpl/)
  - 4) Planning Commissioners Journal: [www.plannersweb.com/sprawl](http://www.plannersweb.com/sprawl)
  - 5) American Farm Land Trust: [www.farmland.org/](http://www.farmland.org/)
  - 6) The Nature Conservancy: [www.tnc.org](http://www.tnc.org)

## **2. Presentation by Rich Clough, Dept. of Fish, Wildlife And Parks**

Personal Introduction: I'm currently Chief of Operations for Fish, Wildlife and Parks. Previously, I was directly involved in Conservation Easements as the Regional Supervisor in Missoula, where I served on the boards of the Rock Creek Trust and the Five Valleys Land Trust. I also oversaw our Lands Program as Administrator of our Field Services Division. I'll be retiring from State employment in June to return to my home town of Choteau and my wife, Mary Sexton, who is a Teton County Commissioner.

### **Presentation**

I've been asked to share what values I see in conservation easements, the negatives associated with this land conservation tool and how Fish, Wildlife and Parks (FWP) views this approach to land protection. I've also been asked to express my views on whether the UCFRB Restoration funds should be used to fund easement acquisitions. So, let's start with the first item.

A conservation easement is a restriction that is attached to a land.

If you break down the components of land ownership, you find that the deed to land contains many rights. The right to sub-divide. The right to mine for silver, gold or coal. The right to grow crops. The right to graze cattle. Each deeded right can be separated from general ownership rights, and sold or donated to another entity.

Conservation easements focus on the purchase of one or more of the rights to benefit everything from simple open space to critical wildlife habitat.

The benefits of easements for Fish, Wildlife and Parks are many. First, we can assure wildlife or fisheries values are maintained without purchasing the entire property. Not everyone in Montana welcomes government ownership of land. An easement allows the land to remain in private ownership. And the practice has been widely embraced in Montana. A 1999 Lee newspaper survey showed that 80% of Montanans supported MT's Agricultural Heritage Program, established last legislative session– which is essentially a conservation easement program. Montana actually leads the nation in the number of acres under conservation easement.

Our primary objective with easements is to retain open space that conserves wildlife habitat. Between 1986 and 1996, Montana saw more than 11,000 subdivision proposals for a total of 24,000 new dwellings, mostly in the Flathead, Yellowstone and Bitterroot counties. As sub-divisions encroach on native habitats, wildlife either adapts or is forced to relocate to other areas. Those species that do adapt create new challenges to wildlife agencies, from both a human safety perspective with bears and lions, and from a nuisance perspective, with deer, beavers and other critters eating flowers, shrubs, gardens and trees.

This open space also protects the agricultural community. If you look at the Bozeman valley, some of the most productive land in America is now covered with homes, roads and septic systems. The agricultural values are lost forever and many wildlife species are forced into smaller and smaller pieces of fragmented habitats.

Other benefits we look for include the protection of streamside or riparian zones for water quality and fish habitat. FWP may also seek restrictions on commercial uses like outfitting in favor of free access hunting, or a corridor to public land, or negotiate for specific land management practices that protect



specific vegetation needed by elk and deer. In one area we'd want to protect such things as sage brush and bunch grasses, in another we'd want to ensure that trees for hiding cover, and buffer zones between communities and the wildlife are maintained.

Easements work, but they are not without their detractors.

Let's start with the length of time associated with easements. Our agency negotiates all our conservation easements in terms of perpetuity, or forever. This means that we must try to look into the future for at least 100 years and predict the needs of the land, the wildlife, the land management practices and the human uses. Easements may be amended when conditions dictate, but normally must retain their original intent. Any changes require concurrence of the landowner and the holder of the easement.

While easements may provide tax benefits to the landowner, amendments may jeopardize those benefits if they de-value the easement. Amendments of any terms require careful attention, but may be appropriate. An example was a landowner wanting to incorporate a wind generation system for his irrigation wells and household, and then selling excess electricity back to the rural cooperative. Technically, all commercial activities were prohibited in the easement, but an amendment will be made to accommodate this use. If the request were for a wind generation facility, it would have required a more extensive study.

Other negatives include the cost of monitoring easement terms and enforcing those terms. If you own the property in fee title, this is not an issue. But with an easement, if the terms are violated and not reconcilable, legal defense of your rights can result in significant costs to the easement holder.

Predicting the future is perhaps the most challenging part of easements, and the terms must reflect the best analysis by those involved at that point in time. Not always the easiest assignment, but certainly necessary.

We have been asked why we don't purchase term easements to eliminate this concern. The value of a term easement is often not significantly less than one purchased in perpetuity. We know that our constituents prefer fee title acquisition to term easements, which are viewed more like leases, but they do support easements that provide benefits in perpetuity.

We feel the benefits far out-weigh the negatives with respect to this tool, and that is why FWP currently holds 44 conservation easements on 198,000 acres. We will be adding more than 131,000 acres to that total in the near future, which includes the easement with Plum Creek Timber Company in the Thompson and Fisher River drainages. That project totals 140,000 acres and represents the largest single easement accomplished by our agency.

The final question asked of me related to the legitimacy of using UCFRB Restoration Funds for conservation easements. Again, the answer lies in being a good prognosticator of what will happen in the years ahead. If a parcel of land provided significant development potential, but also had high value as open space to protect existing conditions, the answer may be yes. For example, if you have land that has been reclaimed and those reclamation values are in jeopardy due to some new activity proposed on this land, or on land above this site, an easement may be an appropriate way to protect your investment. If you want stream corridors left in an undisturbed state due to potential release of heavy metals from proposed activities, again, an easement may provide the necessary protection.

You may wish to protect water quality values with an easement on an existing piece of land that is not contaminated, since this value may contribute to the over-all health of the Clark Fork watershed.

Should the funds be used strictly for protection of winter range for elk or sheep? Probably not, since other sources of funding exist for this type easement, and may be more appropriate. However, as mentioned previously, the benefits associated with winter range may also be applicable for protecting water quality or containing contamination in areas that have potential development values.

I don't see this question as one having a simple yes or no answer. Every easement proposal our agency looks at requires an analysis of all the potential benefits weighed against our specific goals. Only then can we prioritize projects to meet available funding.

Easements provide us with one more tool in protecting land and water values for our future generations. And hopefully, in helping to address some of the issues created from our past decisions.

Thanks for inviting me!

### **3. Presentation by Mark Simonich, Montana Dept. of Commerce**

Personal Introduction: Mark Simonich is currently Director of the Montana Department of Commerce. Previously, Mark was the Director of the Montana Department of Environmental Quality (DEQ) for six years. As Director of DEQ, Mark served on the Upper Clark Fork River Basin Trustee Restoration Council, which advised the Governor on funding of UCFRB Restoration Projects. Mark also served as an advisor to the Governor on UCFRB natural resource damage litigation and policy matters.

#### **Presentation**

I am glad he explained that because I am sure those of you who don't know me are trying to figure out why a guy from the Department of Commerce was sitting up here with all these fellows that have been directly very involved in conservation easements and I will confess that I have not had that experience. I have not directly participated in purchasing, donating or acquiring a conservation easement. Although for several years I have been a very interested observer of those kinds of activities, both at the federal level and the state level in a number of jobs I have had. I have had an opportunity to watch the interest in conservation easements and the ability to use those throughout the country in a variety of settings.

The tax law is certainly one that provides tremendous incentive for people to consider donating a conservation easement on their property. I would like to say at the onset, though, so that no one misunderstands where I am coming from tonight, my background is in forestry and I am a land manager by training. I think that conservation easements are an incredibly valuable land management tool. They are absolutely necessary and important and ought to be used in a variety of circumstances.

One of the reasons I am here is because in December, when the Trustee Restoration Council was going through the grant applications and preparing to make recommendations to Governor Racicot to determine which grants should be approved, I think I was the lone dissenting vote—the single individual who voted against giving grants to fund some conservation easements out of the Restoration trust. So I need to be able to explain a different point of view tonight. Again, it is not that I disagree with conservation easements or that they are not a good idea. I think that Rock did an incredible job explaining how they work and why they can be very valuable tools. Rich touched on some things that needed to be thought about when dealing with a conservation easement. What we are dealing with here is Superfund cleanup. Let's step back for a minute and remember where the Restoration funds come from and what the process is all about.

Under the federal Superfund law, we have a Superfund site that extends from Butte all the way to Milltown Dam near Missoula and under the federal Superfund law, the responsible party is required by that law to clean up the property. In technical terms, we refer to that as remediation. The remediation phase really does not restore everything and I think that there is some confusion out there. Some people think that remediation is going to make it look like brand new and restoration is something even on top of that. The remediation phase is really a phase that removes all of the hazardous materials that have been placed on the property or site, and seeks to bring the property to a safe, stable position. It does not begin to restore any of the resource value that has been lost there, or restore the use of that land.

The State is heavily involved in cleaning up Silver Bow Creek. In the work that is being performed there, you will see some green grass growing along side the work. While some people may say this is restoration, it is really still remediation. We haven't begun to restore the values that were lost there due to the degradation of the property.

So how do we get to restoration? The federal Superfund law allows trustees to be able to file litigation against the responsible parties to collect damages for those lost resources. Those trustees generally include federal land managers, the Department of Interior, Tribal entities and Tribal Councils so that they will be able to act as trustees when necessary. State leaders are also trustees. The Governor of Montana is Trustee over the natural resources for the property within our state.

Montana filed a lawsuit against ARCO to reclaim damages for those resources that were lost and what we are talking about now is that part of the lawsuit that has been settled. The State has received \$120 million that will be going toward restoration. When we are starting to think about restoration, we are talking about that \$120 million the State has to spend at this point in time. However, the lawsuit isn't over, so we may get more dollars for different parts of the Basin. But we have \$120 million to focus on for this time period. We want to get as much out of that \$120 million as possible.

What does restoration entail? I think all of you in the Valley understand that there are a lot of different ideas, a lot of different desires on how to use the property. An opinion that I expressed as we went through the process in December, it appeared to me that before we can begin stepping out, and in essence trying to replace a lost use, and that is basically the language you are talking about within Superfund language, you need to take all the appropriate steps in remediation to clean up because that is the basis with which you are going to be able to restore. Once you have done the clean up and remediation, then you are in a better position to fully know what the options are for restoration. For example, whether or not you will be able to fully restore certain uses in a particular area. Now I think a number of us have reviewed enough to understand that nothing we will ever do will restore the Clark Fork River to a bull trout fishery. We need to understand that, and that is when we are going to look at, in essence, replacing that bull trout fishery in some other location. Then it is perfectly respectable, from my perspective, to replace that bull trout fishery in some other location in another drainage that is not directly in the Clark Fork. When you think about replacing that lost resource, then I ask myself, "How do conservation easements fit in?" A conservation easement has been described to all of you as a process where you can place some controls on how a particular piece of land will be managed. You can begin to separate rights and guarantee that certain land management activities will continue to occur. You can build some protections that other activities will not occur. I think as we move through this process, one of the questions that we must continue to look at is how much of the conservation easement is really acting to restore or replace a lost use. You need to think about the particular types of land that were damaged and lost and look at the particular conservation easement that is being offered. You need to look the conservation easement geographically, where it is located, as well as the type of land features—the type of vegetation and wildlife habitat that might inhabit or use the area. What are we really using that conservation easement for is to replace in that specific area. At least when I went through and looked at that, I was not convinced that we should be moving down the path, where we ought to start acquiring conservation easements in lieu of being able to fully restore some of those uses within the area that had been damaged. Those are things that I think we need to be mindful and careful about because I have been on the outside and watched and been a very interested observer of conservation easements. It appears to me that this is not always particularly well thought out. I want to caveat that because there are some tremendous efforts in the State where groups are trying to put together a picture for an entire management area. How do we begin to position to fully protect these uses and wildlife corridors or things like that.

When we begin to work on a conservation easement, it is because suddenly there is a proposed change in use of the land. There may be a very significant and severe timber harvest being scheduled in an area that is really some critical wildlife habitat. We want to do something quickly to stop that development so we say, "Whoa, how can we quickly stop the development from happening and put an easement in place." Or a rancher has gotten to a point either in the time of his life, or because of economic considerations, his only alternative for him to consider to assure financial security is to subdivide. This is not necessarily a plan to protect the resources; but people have responded by saying

they would prefer that the property not be subdivided. A conservation easement is a tremendous tool that I think ought to always be available. But generally you are moving very quickly. It may not be the decision you would have made otherwise, even if you have a limited pot of money and you are looking to spend some of your money on different pieces of property. That piece may not have been the one that you planned to fund, but suddenly there is an urgency because the landowner has decided to sell it or subdivide it. So you are working to try to take some action.

Whenever those activities are occurring, there is a great deal of work to be done to work with the landowner to see how a conservation easement might be donated; what other sources of funding might be available to acquire certain other parcels; and what money is available for administration of the easement later on.

I have been watching this for the last 50-60 days in the legislature. I have seen that wherever there is a pot of money, people will gravitate toward it. I have been fending off a bed tax for the last three days.

The pot of money that is here within the Restoration Fund is going to be a possible source of funding for a conservation easement and I think that it is an entirely appropriate use of funding. The question is, is it the right use at the right time? I think that is something that continually needs to be thought about as we are continually moving toward restoration so that we can replace when we realize that we can't fully restore, and is it possible to do that through a conservation easement within the drainage.

#### **4. Presentation By Barbara Clark, Rock Creek Area Rancher**

Personal Introduction: Barbara and her husband are fifth and sixth generation ranchers who have lived on Rock Creek for over 40 years. They have two grown children who help on the ranch.

##### **Presentation**

Ranching is steeped into our souls. You can not plow a field, pick rock by hand, plant that field, irrigate it, watch the hay grow, hay it, get ready to defend it from wildfire, watch the calves you calved graze it and not feel it is a part of you. A part of you just as real as your arm and leg.

We are fifth and sixth generation Montana ranchers. Our family has faced bad prices, wolves, drought, blizzards, depression, bad prices, bankers, fires, crop failure, cattle diseases, grasshoppers and bad prices. Sometimes these have won out for a short time. That's why sixth generation is on the third ranch. But never have we been as threatened or in danger as now. We have problems facing us now that our ancestors never had to face. Global markets, environmental extremists, special interest groups and soaring land prices. Ranches competing with recreation markets and coming out a very distant second. Urban sprawl, special interest groups buying winter ranges and wet lands, playgrounds for the rich and famous gobbling up ranch and farm land as we speak. Never before have we needed to draw a line in the dirt and say this ranch or farm will remain a ranch or farm. Conservation easements are a tool that we can use to do just that.

My family entered in a conservation easement in 1991 and another in 1996. The first, placed 920 acres of prime land in protection from sub-division forever. In other words we sold the right to sub-divide the land or use the land for anything but agriculture. We retain the land in our ownership and ranch. With our easement we can build any building for agriculture purposes, we have since built a hay barn. We are restricted to an agreed number and location of any new homes. We are monitored once every year. For us, it is a visit from some friends. We go over any improvements we've made or any questions we have or they have. We have had no problems with our ranching operation and are very committed to our conservation easements with Montana Land Reliance and Rock Creek Trust.

Conservation easements are a real commitment and certainly one size does not fit all. It is a very personal issue and needs lots of effort from both sides to place one on a ranch. We are glad we did.

The second conservation easement placed 160 acres into an easement that protected it directly from subdivision, something it was slated for before we purchased it. We purchased it because it was going to be sub-divided and we felt it would impact our ranch very negatively. So with the help of Rock Creek Trust, we purchased it and placed it in easement. Today it has cattle, not condos, on it.

Wildlife, people and cows all need open spaces. By helping ranches and farms stay ranches and farms, we will have open spaces forever. To me that is as important as the restoration of the valley. It goes hand in hand. Stabilize the stream, stabilize the ranch.

This morning I stood out in the meadow, the meadow that will always be a meadow raising hay and cattle. I felt the wind blow up the valley, as it does in March and I heard the blackbirds singing in the willows. I watched bighorn sheep in the cliffs, a bald eagle soaring along and a whitetail deer flashing by with twenty new calves sprinting after her and I knew I was truly blessed.

## **5. Presentation By Jim Berkey, Five Valleys Land Trust**

Personal Introduction: Jim Berkey has been involved in the stewardship of conservation easements since 1995 and has worked with the Five Valleys Land Trust, the Montana Department of Fish, Wildlife and Parks, the Montana Land Reliance, and the Bitterroot Land Trust. Mr. Berkey is currently the Land Protection and Stewardship Coordinator at the Five Valleys Land Trust, where he works with prospective easement donors and stewards approximately 50 easement properties. Mr. Berkey's formal training is in resource conservation and he holds degrees in Environmental Science and Earth Science.

### **Presentation**

I am primarily in the stewardship branch of the land trust at Five Valleys and that has been my experience overall in conservation easements. In conservation easement lingo, the stewardship branch essentially deals with an easement after it has been acquired. I have the opportunity to inherit the joys and headaches of the conservation easement, and I also have the joy of working with the landowners and getting to visit them like friends. I also provide them with resources that they might benefit from. So I guess I have been exposed to a lot of pros and cons.

First the pros. The main purpose that I can think of for a conservation easement and what really drew me to this field, is that they are a voluntary, customized and very flexible tool for protecting the resource. That resource could be agricultural uses, wildlife habitat uses, or open space. Like Rock said, if it is a donated easement, there are some tax benefits tied to the specific language for the tax code.

These then are co-authored essentially by the landowner and the conservation organization and are designed, essentially, to meet the landowners needs, hopefully the conservation needs of that land, and the mission of the particular organization. So you are going to see a whole myriad of easements out there. They are all called conservation easements but they vary highly between the different organizations that will be holding them, the different people that will be holding them, and also the different land types and what they demand. Like Rock mentioned, you can take one piece of land that has many different attributes to it: uplands, rangeland, forest lands, crops lands, riparian wetland areas. One tool, the easement can place very appropriate levels of restrictions for the different areas of the property, so that some areas might have quite heavy restrictions for very specific uses. Those levels of restrictions are sometimes challenging to figure out, but those are much more appropriate than trying to put a blanket level of protection across the whole property.

Another main pro, I believe, is that the lands remain in private ownership. This isn't anything new, we've already discussed this already. They remain part of the tax revenue basis, which I know in other states that's not the case. The land can continue to contribute to the local economy. This also, of course, encourages continued historic uses, in most cases, and supports our cultural heritage. Although this isn't typically written into the specific purposes of the easement, it certainly is a major benefit to families who are having a hard time maintaining their historic uses and want to pass the land on to their children. They want to be able to see those lands retained as their forebearers had.

Another benefit attached to that, is that there can be significant tax benefits both in income and in the form of estate tax relief for the landowners.

They are often times a very cost-effective protection tool. Obviously much more cost effective than fee title and in the case of restoration—I can see that this can be a much more cost effective tool than on-site restoration, which can be measured in the tens of thousands of dollars per acre. A conservation easement

might be able to achieve similar goals through management goals and good stewardship, a cheaper alternative.

Finally, although it can raise some problems, conservation easements are a perpetual tool if you are coupling it with some other type of program like the NRD settlement, your expenditure is going to last a long time. I don't know how you place a dollar figure on that value.

Some of the cons that I can think of—the main one has already been touched on by both Rock and Rich, is that predicting the future is difficult. When the landowner and the conservation organization are drafting an easement, it does take foresight in trying to understand what might happen on this land in the future: rangeland might become forested land; cropland might convert back into pasture land and then eventually might become upland range again. So we have to think about perpetuity. It's a hard concept to grapple with. I don't think we are necessarily predicting the future, since that's impossible, but we have to author these easements in such a way that provides flexibility and essentially targets the key conservation goals that the landowner is going after and allows for flexibility within that. At the same time, we have to make it specific enough that it is legally binding if we end up in a situation down the road where there is a desired use that clearly is not compatible with the original intent.

It's a tricky business. Conservation easements have only been widely used for about 30 years and it is a learning process like anything.

Another thing is that it requires consistent communication between the landowner and the conservation organization, especially when you move beyond the first generation landowner. We think of them as second generation, or beyond landowners who have purchased this property. They don't always have the original donors conservation interests. It is our challenge to work with these people so that we can achieve common goals and avoid legal hassles and headaches on both of our parts. A good easement document is important and then good communication. Good collaborative skills are also very important. I guess it is a challenge and it can begin to create large legal expenses for both parties. The legal challenges are great when things start to go awry.

Finally, I think that one of the dangers in conservation easements is that they are not a very good tool for putting severe management restrictions on the property, essentially giving over too many of that bundle of rights that Rich was talking about to the conservation organization. In situations where intensive public access or management of specific endangered species are desired, it is probably better to purchase in fee title or leave it alone.

I think that we need to realize that the owner is still the manager of the property. Conservation easements are essentially, the transfer of negative rights. The conservation organization can say, "No, you can't do that," but it is not really a tool that we can use to say, "You have to do this." It is not really appropriate for intensively managing lands.

To touch on the appropriateness for the Upper Clark Fork River Basin Restoration Fund, I feel that people have already mentioned a number of things that I have thought about. It depends on the case, essentially. I think that the Advisory Council and others need to review on a case-by-case basis and ask some really hard questions about the appropriateness. In general, I feel like the tool, conservation easements, are a great long-term, cost effective means for protecting resources.

I think that like I mentioned earlier, combining it with some type of on-site manual restoration after remediation is completed, provides a double layer of protection for the investment of NRD money and that also obviously, it assures that the resources will persist in the future.



They are also a cost effective tool for replacing injured resources. I reviewed the criteria and procedures to see if this would fit and I do think it would fit in specific cases. I think that a lot of the questions that the review team has already asked are appropriate for conservation easements, namely: Does it restore injured resources and services? Is it a cost-effective proposal? Does it fit within the geographic scope of the settlement? Another question specific to easements is, “Will potential development preclude that kind of restoration on those lands.” I think, in summary, you really need to look at things on a case-by-case basis.

I think they are definitely a valid tool. A lot of things Mr. Simonich was saying is true. Conservation easements a lot of times are driven by opportunity. We all know, who work in this field, that fires come up and often times we run toward them if there is some time dependent factor. That still doesn’t mean that those questions couldn’t be asked.

I think like every other value, land values are going to continue to go up, easement values will go up, and it probably will be important to look at, “Will the NRD Program be able to afford buying conservation easements farther down the road or should we be doing that now? Is it a better use of funds now?”

With his speech outline, Jim provided the following list of his view of the”pros and cons of easements:

**Pros:**

1. Protective Covenants that can be customized to fit the property and the landowner’s needs
2. Can create quite variable and suitable levels of natural resource protection with one tool.
3. Lands stay in private ownership and remain part of public tax revenue base.
4. Much more cost effective than fee title acquisition
5. Easements can still be productive working farms, ranches and forests and provide base level protection of conservation resources.
6. Help families keep their land and continue historic uses.
7. Provide rewards of reduced estate and income taxes to landowners.
8. Provides perpetual protection
9. Difficult to amend
10. Reflects a cooperative effort between the easement holder and the landowner – “bottom-up” approach
11. Easements are an expression of private property rights that acknowledges the greater good of natural resource conservation.

**Cons:**

1. Are perpetual documents that must be worded carefully to be flexible, yet still specific enough to protect the desired conservation resource.

2. Cannot be used as a substitute for purchasing lands in order to have strict control over management practices (i.e. for endangered species, extensive public access, etc.)
3. Lack of understanding of how easements work can create problems with “second-generation” easement landowners and the public at large.
4. Can potentially be manipulatively used by private interest to further personal or corporate benefits without significant or proportionate public benefits.
5. Over time land, economy, and community conditions will change, yet easements are perpetual, fixed documents
6. In the case of purchased easements, they may offer only a short-term economic fix in the context of longer term economic and market-driven problems.
7. Difficult to amend
8. Changing parties over time--both landowners and Trust personnel will change over time--offering no institutional memory.

## **6. Presentation By John Hollenback, Gold Creek Area Rancher**

Personal Introduction: John is third generation Montana rancher from Gold Creek. He serves as Vice Chairman of the Deer Lodge Valley Conservation District, Chairman of the Watershed Restoration Council of the Upper Clark Fork, and a member of the Powell County Planning Board. He does not represent any of these groups today. Instead, he shares his personal views on conservation easements gained through his membership in these organizations and through his ranching experience.

### **Presentation**

#### **Pros & Cons of Conservation Easements and Their Uses**

##### **Some of the pros I see if used properly:**

- Allowing the ranching family to stay on the land
- To help a ranch operation to expand so they can stay in business and keep the young people on the land
- To protect critical areas such as a particular area that is crucial waterfowl or wildlife habitat or riparian area of a critical spawning stream
- To keep subdivision out of unwanted areas

We have to realize that conservation easements are not a cure for all conservation problems and they are not intended for everyone.

##### **Some of the cons of conservation easements:**

I'm concerned that some easements are done for the wrong reasons. Ranching is not lucrative and sometimes easements are used for financial rescue without much thought to long term consequences. The dollars seem to dominate the transaction instead of the focus on the resource.

Under financial and time pressures easements are negotiated too quickly in some cases for something that is locked into perpetuity. We don't know now what needs to be done in perpetuity and by locking in we may lock future generations into something that won't work well for them.

Maybe we can agree what are fair uses of the land now, but a big question remains about the future. The guidelines are forever without the necessary flexibility to make changes based on guaranteed changing conditions.

A lot of resource planning is needed with easements and many of them happen without sufficient planning. Some easements require management plans to be part of the deed for the easement, others do not. I prefer ones that management plans are flexible and not legally tied to the easement. Or perhaps term easements such as one for 30 years that allow for reasonable changes because we cannot be predictive of perpetuity. There are problems I've seen with some of the easements that can be worked out if given adequate time and resource knowledge.

Here's a few examples of easements that have generated some of my concerns. One is an easement near Deer Lodge that was initially planned for along the river. However, due to estate planning benefits, it was expanded to include the hillsides next to Deer Lodge that are the logical place for Deer Lodge to grow. This may backfire of future generations. Some MWF easements have involved locking

into grazing management plans that need more work ahead of time. I don't think they should rush into these so fast. There needs to be a lot more resource planning regarding how to manage grass because everyplace is different. Another example is an easement that is managed for the elk herd—the numbers managed for are higher than the neighboring landowners can absorb.

### **Other objections to the easements**

I've heard from some of my rancher friends that I work with that easements take away private property rights that are already threatened from other pressures and give control of the land to outsiders.

Montana has the most easements in U. S. Many groups are doing them.

Sometimes I think that we feel that we have to manage all of our resources for the future generations and I think the kids and grandchildren and future generations will have the ability to make good decisions about our resources.

A lot of the easements are made with good intent but they will be handed down and different people will deal with them and the interpretation will be made by those at that time. I see a problem for that easement always being handled by different people.

### **Use of UCFRB Restoration Funds on Conservation Easements**

When it comes to using the Restoration funds, I believe that a priority for these funds is for correcting the substantial land resource problems in the Basin. I am dedicated to improving conservation practices on the land and I know there is a great need for improvement in the Basin from the past damages. And I also believe that there are many good projects that can be done to correct the riparian areas, the upland areas, and in general to use best management practices to do these improvements. The wildlife, the fish, the land, the tax base for the county all can benefit—it's a win/win situation. We need to focus on restoring these lands, correcting the problems, and I believe that is where most of the money should go. Easements alone, I feel, will not do that, but I think easements can be a part of that effort. Particularly in habitat areas, on a case by case basis. But they should not be the main focus for these dollars. Correcting the problem should be the main focus but we need to find a proper balance.

I have talked to some legislature people and they were questioning the amount of money used for purchase and easements.

Thank you for allowing me to share my views with you.

## 7. Presentation By David Mannix, Helmville Area Rancher

Personal Introduction: I am part of a fourth generation ranching family in the North end of Powell County. Our operation is comprised of both deeded land and public and private leases. We have two conservation easements on our deeded land. U.S. Fish & Wildlife holds one easement encompassing about 1200 acres. Montana State Fish Wildlife & Parks holds the second easement on 3000 acres. This is the oldest of the easements and was implemented in 1994.

### Presentation

Our experience with easements to date has been positive. At the time we entered into these easements they were a tool we used to get cash out of our land and used this to acquire adjoining property. It is one of the few ways that traditional ranchers can expand in these times of high land values. There are of course many other applications for the use of easements as a tool. I suspect that going into a list of those potential applications isn't what you need to hear from me.

Before we change the subject from our experience I'll make these observations. Within our easements we have management language that addresses things like grazing, timber harvest, brush control, weed control, etc. Of course the easements also address home sites, commercial developments, gravel pits, mining, public access, and other important issues. Those holding our easements conduct annual inspections to monitor these activities. To date we have had no problems arise. Herein lies the biggest key in my opinion: The resources controlled in the easements are by their nature continually changing and evolving. We can't possibly predict for future generations what proper management practices will be. ***We must leave room in the easement document for management flexibility.*** This comment is meant for both parties, the buyers and sellers, the donors and recipients. Don't assume that easement language on one property will be adequate for the next parcel. Give it special thought. I don't like blanket (one size fits all) easements. Each property is unique and deserves particular attention.

We hope we've been successful in structuring the easements on our property in such a way that both parties are satisfied with the values they received. We hope that future generations will be able to continue to manage the resources and survive in agriculture. This requires open space. The public agencies holding our easements also need open space. They are concerned with wildlife and the healthy resources on which the wildlife depend. So here is a second key: ***Easements are a good tool if all parties involved have the primary goals in common.***

### Easement cons:

1. Limiting your property rights.
2. You are taking in a partner in a way, this can complicate.
3. Making decisions now for future generations. It is dangerous to take yourself that seriously. That doesn't mean it's necessarily bad, but it's dangerous. It needs serious consideration.

Note: Certainly placing an easement on your land is binding on future generations. But likely no more binding than placing a development (feedlot, substation, housing subdivision, etc.) on the same land.

### Easement pros:

1. Allows landowner to capitalize some of his property values and still retain those he values most.
2. Promotes good stewardship.
3. Promotes resource stability, more minds/diversity involved in major management issues breeds sound decisions.
4. Allows public agencies to protect valuable habitat without inheriting management responsibility.
5. Keeps land in the tax base.

## **Easements and UCFRB Restoration:**

In general it would appear that easements qualify for UCFRB Restoration funds. It seems that the definition of Replacement and Acquisition of Equivalent Resources both make room for easements.

I am not well informed about the potential for other projects out there. I can imagine in the case of vast, severe toxic deposits where it may be wise to set aside land so it won't be disturbed. In this case a conservation easement would both protect the land from future disturbance and compensate the landowner. I can also envision placing easements on other lands reasonably close in an effort to preserve their health, kind of a replacement or acquisition of equivalent.

That said I'm not sure that easements are the best use for these funds. I guess it would depend on "compared to what." What are the values of the projects in competition for the funds?

All things being equal I would channel the money towards rehabilitation or restoration efforts provided these projects were biologically wise and economically feasible. In other words look at the "most bang for the buck". After all we can't really "Replace" these resources nor "Acquire" new resources. Easements only limit land use and change property right ownership, they don't make fresh resources. Easements are a tool to have in the tool box. They are a good tool but not the only tool. They have their place but I suspect they are not the tool to be used most in this restoration effort. It's a case by case situation.