Commentary to The Model Montana Conservation Easement Amendment Policy

1. Introduction.

This report discusses a Model Montana Conservation Easement Amendment Policy (hereafter "Model Policy"), attached as Appendix A, and has been adopted by the Montana Association of Land Trusts (MALT) as a guidance document for MALT's members. The report and the Model Policy adapt standards proposed by the Land Trust Alliance in its booklet *Amending Conservation Easements* (2007) (hereafter "*Amending Conservation Easements*"), and the Model Policy is intended to comply with the Land Trust Alliance's Standards and Practices pertaining to conservation easement amendments. Accordingly, the Model Policy should assist MALT members in obtaining accreditation by the Land Trust Accreditation Commission. Furthermore, the Model Policy recognizes the constraints imposed by federal income tax laws that govern charitable deductions of conservation easements and legal constraints on organizations that are "qualified" to hold perpetual conservation restrictions in land. Most importantly, the Model Policy contains provisions that are tailored to address unique aspects of Montana law.

Conservation easement amendment guidance documents abound for land trusts, including *Amending Conservation Easements*, and samples and examples excerpted in LTA's Standards Practices. Why then do MALT members need a special, unique policy to deal with amendments in Montana? For the vast majority of easement amendments, MALT members do not. The generic and standard protocols are sufficient to deal with corrections, ambiguities, enhancements of conservation values, and amendments by prior agreement. Nevertheless, the standard policies and guidance provisions provide no clear protocol for dealing with changed conditions that erode or diminish the public benefits that are provided by conservation easements, including:

1. Destruction and diminishment of conservation values resulting from climate change, catastrophes, and violations that destroy conservation values,
2. Changes in law, public policies, and public conservation values,
3. Threats to the nature and enforceability of the conservation easement rights that land trusts hold in property, and

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4. Trade-offs between conservation values and rights that may enhance the public benefits provided by land trusts' conservation easements.

In short, standard conservation easement amendment guidance documents and model policies developed elsewhere do not help MALT members answer the following questions:

> **How do Montana land trusts continue to hold and administer conservation easements for public benefit:**
>
> **(i) if the conditions under which those easements were granted have changed so that the flow of benefits to the public are impossible or impractical to maintain, or**
> **(ii) (ii) if existing conservation easements do not provide benefits that are consistent with Montana's open-space land protection policies or the purposes for which the easements were originally granted?**

Note the critical assumption underlying this question: Because Montana land trusts hold their conservation easements in perpetuity for public benefit, land trusts have an ongoing legal and fiduciary duty to ensure that their conservation easements continue to provide public benefits, even if resource conditions, public values, and prevailing laws change. Therefore, in the face of such change, if conservation easements may be reformed under law to ensure a continued flow of benefits to the public, land trusts have a responsibility and a duty to undertake such amendments.

Unlike the law in many other states, Montana's Open Space Land and Voluntary Conservation Easement Act, at Section 76-6-107, M.C.A., specifically anticipates that easements may be reformed as a result of such changed conditions. This statute reads, in full:

> ***76-6-107.*** *Conversion or diversion of open-space land. (1) Open-space land, the title to or interest or right in which has been acquired under this chapter, may not be converted or diverted from open-space land use unless the conversion or diversion is:*
> *(a) necessary to the public interest;*
> *(b) not in conflict with the program of comprehensive planning for the area; and*
> *(c) permitted by the conditions imposed at the time of the creation of the conservation easement, in the terms of the acquisition agreement, or by the governing body resolution.*
> *(2) Other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land must be substituted within a reasonable period not exceeding 3 years for any real property converted or diverted from open-space land use. Property substituted is subject to the provisions of this chapter.*

Unfortunately, the plain words of the statute do not provide land trusts, landowners, and the public with specific guidance about how this law should be applied in practice. Therefore, a

fundamental purpose of MALT's Model Policy – and the focus of much of this report -- is to encourage a standardized, consistent approach to interpretation and implementation of Section 76-6-107, M.C.A. MALT's approach to the statute is to ensure that conservation easement reform undertaken under Section 76-6-107, M.C.A., remains consistent with (a) the general and specific policies and purposes of the Montana Open Space Land and Voluntary Conservation Easement Act (hereafter the "Act"), (b) land trusts' legal and fiduciary responsibilities to hold and administer easements for public benefit, (c) the general charitable purposes of the original conservation easements themselves, and (d) federal and state laws governing tax-exempt organizations that are qualified to hold perpetual conservation easements.

In land trust legal circles, no consensus exists about the appropriate way to handle complex conservation easement amendments. In seeking a reasoned, consistent and legally defensible approach to interpretation of Montana's conversion and diversion statute, several competing approaches to conservation easement amendments were considered, including scholarship proposing use of charitable trust principles in difficult easement amendment situations and proposals to develop administrative and/or public review processes to vet the propriety of easement amendments that change the mix of conservation benefits that are provided by conservation easements. Nevertheless, these legal constructs have limited utility in Montana.

Montana's conservation easement laws, in their very essence, provide land trusts with property rights that enable them to hold and enforce conservation rights in the same way that all property owners in Montana may hold enforce their property rights. The purposes for which conservation easement rights are held are unique, as prescribed by the Act, but the rights themselves that are held by land trusts in Montana are property rights. They are not charitable trust rights. They are not rights in which the public has a direct property interest. Instead, Montana law provides that conservation easement rights in Montana are held and administered by land trusts to provide conservation benefits for the public.

Thus, Section 76-6-107(1)(a), M.C.A., specifically allows "conversion" and "diversion" of (*i.e.*, reform of) "perpetual" conservation easement rights, if necessary to the public interest, without direct public oversight, without hearings, and without attorney general or judicial supervision. Although direct oversight of conservation easement reforms is not prescribed by statute, conservation easement holders are not at complete liberty to change or amend their conservation easements. New and unique provisions in Section VI of the Model Policy and discussed in this report below at Section 4 set forth an analytical approach to help guide MALT members determine whether proposed conservation easement reforms that alter the mix of conservation benefits provided to the public are in fact "necessary to the public interest" and therefore authorized by state law.

There are many potential benefits to MALT members if they adopt a consistent analytical approach to interpretation and application of the provisions of Section 76-6-107, M.C.A. A unified, legally defensible approach that is adopted by all MALT members will help protect land trusts from accusations that they approach conservation easement amendments and reforms arbitrarily and that they abuse the discretion that the statute provides to land trusts to administer their easements without direct public oversight. Adoption of a common approach to statutory

interpretation will also help land trusts defend their easement amendment and reform decisions in court, if necessary, by establishing baseline practices that are applied across the land trust community. Furthermore, a unified and consistent approach to interpretation of the Act, if adopted by MALT members, will enable land trusts to apply a statutorily-endorsed mechanism to ensure their easements remain relevant to and supported by the public. Finally, a unified approach to conservation easement amendment and reform will assist MALT members to answer critics in the legislature by explaining why direct public oversight of amendments to conservation easements is not required under Montana law in most circumstances, unlike in some other states.

2. Conventional Conservation Easement Amendments.

The earliest conventional wisdom in land conservation communities was that conservation easements should virtually never be amended or changed. That wisdom soon crumbled under the weight of necessity. Land trusts, landowners, and their attorneys make mistakes. Mistakes need to be corrected. Conditions change, and new conservation opportunities may arise that provide enhanced public benefit. The only way to correct or improve a "perpetual" real-estate record is through a signed, notarized, recorded amendment document. Conservation easement amendments are practical and necessary and universally acknowledged as imperative in many circumstances.

Conservation Easement Amendment Clauses. Therefore, conservation easements today almost always include clauses that specifically address conditions under which conservation easements may be amended. At typical clause that is used by many MALT members reads:

> ***Amendment.*** *If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualifications of this Easement under any applicable laws, including MCA Section 76-6-101, et seq., and the Internal Revenue Code. Any amendment must be consistent with the terms and purposes of this Easement, may not affect its perpetual duration, and either must enhance, or must have no effect on, the Conservation Values which are protected by this Easement. No amendment may confer prohibited private benefit or inurement on Grantor or other third parties. Furthermore, the provisions concerning valuation of this Easement, which are set forth in Section __ above, may not be amended. Any amendment must be in writing, signed by both parties, and recorded in the official records of _____ County, Montana.*

This short statement, which is routinely included in many Montana conservation easements, also captures virtually all of the seven conservation easement amendment principles that the LTA booklet *Amending Conservation Easements* sets forth. In fact, at least one MALT member has adapted the foregoing conservation easement amendment clause as its conservation easement amendment policy.

Conventional Conservation Easement Amendment Principles. This adoption is certainly defensible and appropriate under LTA's primary conservation easement amendment guidance document, *Amending Conservation Easements*. As stated by that booklet at page 32, "[a] conservation easement amendment should meet all of the following principles:

1. Clearly serve the public interest and be consistent with the land trust's mission.
2. Comply with all applicable federal, state and local laws.
3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
4. Not result in private inurement or confer impermissible private benefit.
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

Practically, the two most important questions to ask in any conservation easement amendment decision are:

- Does the amendment enhance, or is it neutral with respect to, the land conservation purposes and values of the original easement?
- Will the landowner, the grantor, a land trust insider, or any other third party receive more than incidental financial benefit if the amendment is completed?

The private benefit "test" and the conservation benefit "test" articulated above represent the two guiding principles that override any conservation easement amendment decision. All MALT members that have adopted conservation easement amendment policies emphasize the importance of addressing these questions before making any amendment decisions.

Conventional Amendment Principles Adapted for Montana (Model Policy – Section II). MALT members have been less inclined to explicitly address the other guiding "principles" suggested in *Amending Conservation Easements* in the amendment policies that they have adopted. This is not a significant problem, for a number of reasons. First, as tax-exempt organizations that are qualified to hold perpetual conservation easements, land trusts in Montana know and understand that they must follow the laws of the state and the federal government to retain their tax-exempt status. Stating the obvious in an organization's operational policies is deemed to be unnecessary by many MALT members. Second, the LTA principles that require strict adherence to the conservation intentions of donors, grantors, and funders is overly strict in the context of amendments that are allowed under Montana law, as the discussion below of Montana's Open Space Land and Voluntary Conservation Easement Act (Enabling Act) may suggest. Third, complicated and difficult conservation easement amendments and reforms that are "necessary to the public interest" (in the words of our statute) may *require* reformation of the "conservation purposes and intent" of the original conservation easement. Such reformation is actually prohibited by the principles articulated in *Amending Conservation Easements* and therefore the principles proposed by *Amending Conservation Easements* – especially principles 5

and 6 noted above -- are arguably inconsistent with MALT members' fiduciary duties to the public.

Nevertheless, the general intentions and guidance of the seven principles suggested by *Amending Conservation Easements* are helpful to, and are welcomed as important guidance by, MALT members when amendment proposals are under consideration. Accordingly, Section II of the Model Policy adapts and modifies these seven principles to the opportunities and constraints provided to land trusts under our Enabling Act. In particular, Section II suggests that conservation easements will not be amended by a land trust if:

> (a) the amendments would be inconsistent with the policies and purposes of our Enabling Act;
> (b) the amendments would violate rights of landowners, grantors or funders and the public provided that those rights are specifically documented in the conservation easements themselves, or that may arise by operation of state law or federal or state mandate; [1] and
> (c) the amendments do not serve a public purpose.

These provisions are intended to clarify that conservation easements in Montana are authorized by statute, not by common law, and the Enabling Act represents the overriding state law that governs the propriety of any amendment decision. Furthermore, Section II's policy statements are consistent with our statutory framework that conservation easement rights in Montana represent a set of property rights that are irrevocably transferred to Montana land trusts by landowners, for land trusts to administer, interpret, and enforce in perpetuity for the public interest, and that landowners, grantors and funders do not have any special rights in easements, unless the easements themselves describe those rights or unless a state or federal mandate pre-empts the Enabling Act's provisions.

Non-Controversial Amendments. Among land trusts of all sizes and capacities across the country, a general consensus exists that some kinds of amendments are warranted and desirable. For example, clerical mistakes and typographical errors in conservation easement drafting sometimes occur, and amendments to **correct mistakes in easements** are routinely and appropriately executed. Furthermore, the need for conservation easement amendment is also very often anticipated in conservation easements themselves. If a landowner reserves development rights in a conservation easement that may be exercised in the future, for example, many easements provide that the land trust and landowner will sign and record amendments to document where and how those development rights have been exercised. Thus, amendments that reflect **prior agreement** of the parties are typically presumed to be acceptable.

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[1] Note that the Model Policy focuses on ensuring that land trusts respect and protect the enumerated "rights" of landowners, grantors and funders in conservation easements. Unlike *Amending Conservation Easements*, the Model Policy specifically does not focus on these parties' "intentions" at the time the conservation easements were granted. The reasons for this change in focus are numerous, and are explained in some detail in Sections 3 and 4 below, but, fundamentally, under Montana law land trusts receive and hold conservation easements to provide conservation benefits in *the public interest*, not to protect the *private interests* of landowners, grantors, and funders.

Despite the best efforts of all parties, too, conservation easements very often include ambiguous terms that land trusts will seek to clarify so that their conservation easements are not vulnerable to legal challenge. Ambiguous terms in conservation easements often lead to enforcement problems. Accordingly, as long as the parties to easements agree that an ambiguity exists about the original purposes of the easement, and as long as the parties agree on a clarification, virtually all authorities endorse such joint **amendments to clarify ambiguities**, provided the conservation purposes are preserved and that private benefit or inurement is not conferred.

Easement amendments that enhance conservation goals, without detracting or modifying the original terms or purposes and without conferring private benefit, are almost universally endorsed. Examples of such amendments include changes to easements to terminate rights originally reserved to grantors or to convey them to land trusts, and amendment to add additional acreage or conservation values to an easement, as long as the conservation protection provided by the original easement are not impaired.

Finally, land trusts often find that certain provisions of original conservation easements are impractical or impossible to implement, despite the best intentions of the parties at the time the easements were drafted. For example, a land trust may discover that a designated building area in a conservation easement lies within a sensitive wetland or fails to protect an important viewshed. Amendments to realign such development areas, and thereby to enhance the flow of public benefits from the easement property, are appropriate in such circumstances. In addition, land trusts are eager to amend older easements, with inferior language pertaining to enforcement and monitoring of conservation easements, among other clauses. Systematic updating of older conservation easement language to enhance enforceability of those easements is authorized. All such amendments are allowed under the Model Policy as **administrative amendments**.

Most MALT members have conservation easement amendment policies that address these types of amendment. Section III of the Model Policy replicates typical provisions that are designed to address these non-controversial amendments.

A Special Case: Amendments in Lieu of Condemnation. Section IV of the Model Policy includes a section that allows land trusts to amend conservation easements if their easements are credibly threatened with condemnation. The Enabling Act specifically states at Section 76-6-105(2), M.C.A., that it "does not diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain pursuant to Title 70, chapter 30, or otherwise and to use land for public purposes." Condemnation actions, if meritorious and taken to full term in the judicial system, will therefore result in termination or partial termination of conservation easement interests, and land trusts would receive monetary compensation for the fair value of the conservation easement interest taken.

Given the fact that the Enabling Act does not permit land trusts to resist legitimate condemnation actions, land trust practice in Montana has been to agree to negotiate settlements in lieu of condemnation as the most efficient way to protect and preserve the public interest, rather than forcing state or federal agencies to litigate "sure win" takings cases fully(and courts

to expend scarce judicial resources).[2] In some cases, such settlements will result in payment of monetary compensation for the value conservation easement lost. In other cases, however, land trusts may be able to negotiate amendments to the easements that are condemned by replacing the lost conservation values with conservation lands acquired elsewhere.

3. Complex Easement Amendments: Outside Approaches and Montana's Enabling Statute.

Turning to more complicated conservation easement amendments which propose to alter the original terms and conditions and conservation purposes of easements, few issues have been as controversial in land trust legal circles. Everyone knows that land trusts have a duty and responsibility to held and enforce conservation easements in perpetuity. No one knows exactly what that means if a perpetual conservation no longer provides significant public value. There is no question that the problem is real and profound: Inevitably, land trusts will have to face difficult amendment questions as conservation easements become outdated, as the laws governing easements change, or as original purposes of the easements become less relevant (or even become irrelevant) to the public interest.

Approaches to Complex Conservation Easement Amendments in Other States. As the inevitable need to amend many conservation easements has become more apparent, various approaches have been proposed to give land trusts, agency officials, courts, and the general public guidance in how to evaluate and implement complicated conservation easement amendment problems. Some states, including Maine and New Hampshire, have taken legislative or administrative steps to define when and how conservation easements may be comprehensively amended to change their conservation purposes or to change the mix of conservation values provided by easements. Maryland courts have weighed in based on common law considerations. Vermont is considering the establishment of state public review boards to review and approve of such amendments.

The approach most popular among academics argues that in many states conservation easements represent restricted charitable gifts, which are impressed with a charitable trust by operation of common law, upon the moment of their creation. Advocates of the charitable trust approach contend that significant amendments of conservation purposes or deviation from clear administrative terms generally require attorney general endorsement and judicial approval. Moreover, charitable trust law allows changes to charitable trusts only if the original purposes for which the grantor created the trust is impossible or impractical to achieve. That is, in the conservation easement context, the purposes and intentions of conservation easement grantor are paramount, even if the conservation easement that is held in trust could be reformed to serve the public interest better and even if the land trust had intentions and purposes that deviated from the intentions of the grantor when the conservation easement was accepted and received by the land trust. Finally, in reforming charitable purposes under the charitable trust approach, the courts typically follow the *cy pres* doctrine which requires that the trust be reformed to serve the grantor's original intentions as closely as possible.

[2] Land trusts in other states have also recognized that settlements in lieu of condemnation of conservation easements are appropriate to avoid the need to litigate a condemnation action to full term.

In recent years, Maryland courts have applied the charitable trust doctrine to conservation easement cases, citing Maryland common law, and with the help of the state's attorney general, Maryland land trusts and quasi-governmental easement holders have achieved success in preventing conservation easement amendments that would have eroded protection of the original conservation purposes of conservation easements. The New Hampshire attorney general has also opined that all conservation easements in the state create charitable trusts and conservation easements may not be bilaterally amended by land trusts and landowners; attorney general review and approval is necessary, along with judicial authorization of the modification. Finally, the Commentary to the Uniform Conservation Easement Act (UCEA) was changed several years ago to suggest that amendments of conservation easements created in states that have adopted the UCEA in whole, or in substantive part, may be appropriately guided by charitable trust principles.

Despite the limited adoption of some aspects of charitable trust law and the fervor among some academics and attorneys for universal application in all states of the charitable trust doctrine to conservation easements, others in land trust legal circles have been decidedly less enthusiastic. In Vermont, for example, proposals are under consideration to require review of, and approval of, significant changes to conservation easements by administrative review panels. Maine has modified the charitable trust doctrine legislatively to emphasize the primacy of the public interest in weighing the acceptability of conservation easement amendments, but continues to require judicial approval of amendments that change the terms of conservation easements.

In any case, a common theme runs among many of the approaches that have been floated to deal with proposals to change "perpetual" easements: The public or representatives of the public – judges, attorneys general, and state appointed administrative review panels, for example – should have a direct voice in conservation easement amendment approval. In absence of legislative guidance, this approach is understandable for many reasons, including the political cover that such public review gives to land trusts.

Montana's Open Space Land and Voluntary Conservation Easement Act. The fact is, however, that Montana's Enabling Act renders moot much of the academic debate and discussion about complex conservation easement amendments in Montana. Our statute pre-empts the common law of charitable trusts, for example, by affirmatively stating that if there are other laws that conflict with the Enabling Act, the provisions of the Enabling Act govern; and our statute sets forth a statutory scheme – not an administrative process -- that guides land trusts in Montana when they consider the need to make significant and substantial change to conservation easement terms.

Legislative History. To understand how our Enabling Act treats major changes to conservation easements, a review of the Act's legislative history is important. Our Enabling Act was first passed in 1969 as the "Open-Space Land Act," without a conservation easement component. This preliminary act authorized state and local government to acquire open spaces for parklands and to facilitate community development. Acquisition of land along the Clark Fork River in Missoula was primary impetus behind the legislation, and the act was shepherded

through the legislature by members of the Five Valleys River Parks Association – the predecessor to Five Valleys Land Trust.

The 1969 Open-Space Land Act was modeled directly on similar laws existing in Virginia at the time, then and now also called the "Open-Space Land Act." That statute, first passed in 1950, remains codified as Section 10.1-1700 of the Code of Virginia. The Montana legislature adopted many provisions of the Virginia Code verbatim, including Section 62-605(1), R.C.M (1947), which was predecessor statute to Section 76-6-107(1), M.C.A. This original Montana code provision in the 1969 Open-Space Land Act – drawn word for word from Virginia – stated in relevant part:

> "No open-space land, the title to, or interest or right in which has been acquired under this act or which has been designated as open-space land under the authority of this act shall be converted or diverted from open-space land use unless the conversion or diversion is determined by the public body to be (1) essential to the orderly development and growth of the urban area, and (2) in accordance with the program of comprehensive planning for the urban area in effect at the time of the conversion or diversion . . . . "

See also Section 10.1-1704A, Code of Virginia (2009).

In 1975 and 1976, group of ranchers from the Blackfoot Valley, working with The Nature Conservancy, sought to pass a comprehensive conservation easement law that would allow private land conservation by state and local government and by qualified private non-profit organizations (land trusts). The effort failed in 1974, but succeeded in 1975. The approach taken in the 1975 Montana legislature was to amend the existing 1969 Open-Space Land Act and change it into the "Montana Open-Space Land ***and Voluntary Conservation Easement*** Act" (emphasis supplied). As the Act's new title suggests, the legislation grafted private land conservation provisions onto the prior law that had allowed protection of open-space land only by public entities. The original bill to amend the provisions of the existing Open Space Land Act was introduced into the Montana House on January 27, 1975 as House Bill 341.

The minutes of the hearings in the 1975 legislature, the structure of the new Act, and the recollections of the chief author and leading advocate of the legislation, Robert M. Knight, all memorialize the intention of the Act's sponsors and of the legislature to create a system of privately administered, privately held land conservation rights, without public or governmental oversight. For example,

- Hank Goetz testified on March 14, 1975 before Senate Natural Resources and Fish and Game Committee in favor of HB 341: "This is a voluntary conservation easement program, *which imposes no Federal or State requirements on the landowner*."
- Joe McDowell testified in the same hearing that "It is entirely voluntary, and *it doesn't involve any action by the state*."

[Emphasis supplied.]

An opponent from the Wheatland County Preservation Association, Paul Fochs, objected in the House Natural Resources Committee Hearing on February 1, 1975, because:

- "he felt that local planning boards should have more authority – he felt it was defeating the purpose of having a local planning board as this would be setting up another authority to override them."
- In rebuttal, however, Robert M. Knight testified that "since the easement is voluntary . . . the local planning boards should not have absolute veto power."

As Mr. Knight, recollected a few years ago, the "overriding concern" among the proponents and drafters of the 1975 bill was to enact:

> "a viable methodology to effect protection through private contract, enforceable in Montana as vested real property interests . . . . [O]ur goal was to achieve a legal framework which would entitle private parties to negotiate the terms of a private contract restricting the exercise of elements of the bundle of rights inherent in real property ownership for legitimate long-term conservation purposes. . . ."[3]

The structure of the provisions of HB 341 bears out Mr. Knight's recollections. With respect to the "conversion" and "diversion" statute in the 1969 Open-Space Land Act, for example, the legislative history reveals that the first bill draft -- LC 0570 which was introduced and passed in 1975 as HB 341 – amended the existing law (Section 62-605(1), R.C.M (1947)), as follows:

> "(1) No open-space land, the title to, or interest or right in which has been acquired under this act ~~or which has been designated as open-space land under the authority of this act~~ shall be converted or diverted from open-space land use unless the conversion or diversion is: ~~determined by the public body to be (1) essential to the orderly development and growth of the urban area, and (2) in accordance with the program of comprehensive planning for the urban area in effect at the time of the conversion or diversion~~ (a) necessary to the public interest; (b) not in conflict with the program of comprehensive planning for the area; and (c) permitted by the conditions imposed at the time of the creation of the conservation easement . . . ."

These draft changes survived House and Senate hearings intact, and they were ultimately enacted in to law.

It is critically important to note that the changes to the Open-Space Act proposed in HB 341, adopted in 1975, and retained to this day in the Enabling Act, specifically eliminated the requirement that conservation easement "conversions" and "diversions" must be "determined" to be acceptable by a "public body." The legislation eliminated the requirement of public review and approval of conservation easement amendments and reforms. Under Montana law, therefore, conversions and diversions of conservation easements – including conservation

[3] E-mail from R. Knight to author February 12, 2008 (original in author's files).

easement amendments and significant reforms – are not subject to review and approval by a governing public body. Our statute is clear and unambiguous, especially when read in light of the Enabling Act's legislative history.

Furthermore, other new provisions of the Open-Space Land *and Voluntary Conservation Easement Act*, originating in HB 341 in 1975, are consistent with the legislature's intention to endorse Montana's conservation easement laws as private property interests. For example, the language of Section 76-6-211(1), M.C.A., pertaining to the enforcement rights of conservation easements was adopted without any change whatsoever, from Montana's original real property 1895 Field Code provisions generally governing to enforcement of easements and servitudes. Section 76-6-211, M.C.A., states:

> **Who may enforce easement.** (1) The owner of any estate in a dominant tenement or the occupant of such tenement may maintain an action for the enforcement of an easement attached thereto.
>
> (2) Public bodies holding conservation easements shall enforce the provisions of these easements.

The "owner of the dominant tenement" is the owner of the conservation easement. (The "occupant of such tenement" is inapposite in the context of conservation easement law, because conservation easements are non-possessory interests and do not have occupants.) Under the Enabling Act, only the "owners" of conservation easements are empowered to enforce easements. As such, Montana's conservation easement laws do not provide any independent authority or standing whatsoever for the state Attorney General, or the public, or conservation easement grantors and their successors to enforce conservation easements.

Similarly, like any other real property right in the State, conservation easements held by land trusts or state agencies may be condemned if just compensation is paid. Section 76-6-105(2), M.C.A., which again originated in HB 341, states:

> "(2) . . . . This chapter does not diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain pursuant to Title 70, chapter 30, or otherwise and to use land for public purposes."

Consistent with private property laws, the "conversion" and "diversion" statute retained the original Open-Space Land Act's requirement for compensation at fair value of lost conservation easement rights. See Section 76-6-107(2), M.C.A.

Finally, HB 341 made it clear that conservation easement grants, in and of themselves, do not create charitable trusts under Montana law. Again, Section 76-6-105(1), M.C.A, first enacted in 1975, states:

> **"76-6-105. Construction of chapter.** (1) To the extent that the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter are controlling . . . ."

In other words, Montana's Open-Space Land and Voluntary Conservation Easement Act pre-empts other state laws which may be asserted to challenge the validity of any Section of the Enabling Act. This pre-emption unequivocally extends to the trust laws of Montana, including charitable trust laws. Charitable trust law requires attorney general participation and judicial approval in trust reformations, for example, but the Enabling Act at Section 76-6-107, M.C.A., has no such requirement for reform of conservation easements. The charitable trust laws are therefore inconsistent with Montana's conservation easement laws and, in such a case, the provisions of the Enabling Act govern.

The validity of the Enabling Act's pre-emption is also explicitly echoed by Montana's current trust code provisions. Section 72-33-103, M.C.A., states that statutorily created interests (like conservation easements) supersede the common law of trusts (including the common law of charitable trusts). Moreover, Section 72-22-202, M.C.A., also provides that "a trust is created only if the trustor properly manifests an intention to create a trust." So, the *only* way a conservation easement in Montana could constitute a charitable trust, enforceable by the Attorney General and by the Courts, is if the grantor of the easement expressly manifests the grantor's intention to create a charitable trust in plain terms in the conservation easement itself. Such an intention is rarely, if ever, manifest in conservation easements granted in Montana.

Based on the testimony presented and the broad legislative support for the private property approach to private land conservation, HB 341 was unanimously supported in both House and Senate Committees and enacted into law by the full legislature and Governor in 1975. Although the Enabling Act has been amended from time to time since 1975, the essence of the Act remains firmly embedded in the general law of servitudes, easements, and real property.

IV. Reforming Conservation Easements Under Montana's Statutory Scheme.

The foregoing analysis of the legislative history of Montana's Enabling Act leads to one conclusion: Montana's conservation easement laws are truly unique. Virginia, for example, has not amended its original Open-Space Land Act, and interests acquired by public agencies under its purview are therefore subject to public review and approval.[4] Moreover, when Virginia passed its conservation easement laws to enable land trusts to hold conservation easements, the legislature did not attempt graft conservation easement provisions into its Open-Space Land Act. Instead, Virginia passed a stand alone conservation easement statute modeled on the Uniform Conservation Easement Act. See Section 10.1-1009 Va. Code Ann. (2009). So, Virginia's experience gives MALT members and Montanans no guidance whatsoever how to interpret and apply Section 76-6-107, M.C.A, in the context of conservation easement reform.

[4] Documents memorializing public hearings and testimony in the context of "conversions" and "diversions" considered by the Virginia Outdoors Foundation are readily available on the internet (*search term*: "10.1-1704"). See also, for example:
http://www.pecva.org/aux/ass/library/96/virginia-outdoor-foundation.pdf
http://www.clarkecounty.gov/docman/31_supervisors/34_bos_minutes/view_category.html (09-01-20 BOS_Minutes_Regular_Meeting).

So, what are MALT members to make of our Enabling Act's conservation easement reform provisions, which set forth a skeletal framework to govern appropriate "conversions" and "diversions" of conservation easement rights? The balance of this report and Section VI of the Model Policy, explain an approach to interpretation of Section 76-6-107, M.C.A., that is grounded in the plain terms of the statute itself, the policies and purposes of the Enabling Act, and the duties and responsibilities of land trusts as tax-exempt organizations that are "qualified" to hold perpetual conservation easements.

The "plain meaning" of the Montana reformation statute. Section 76-6-107(1), M.C.A., provides that conservation easements (as interests in "open-space land" that have been acquired under the Act) may be "converted" or "diverted" from open-space land uses only if:

> "(a) necessary to the public interest;
> (b) not in conflict with the program of comprehensive planning for the area; and
> (c) permitted by the conditions imposed at the time of the creation of the conservation easement, in the terms of the acquisition agreement, or by the governing body resolution."

What do the words "conversion" and "diversion" from "open-space land uses" mean in the context of the Enabling Act? The terms "conversion" and "diversion" are not defined by statute, but common definitions that have the most bearing on conservation easement amendment questions include:

Convert: *To change in form, character, or function.*
Compact Oxford English Dictionary Online
http://www.askoxford.com/concise_oed/convert?view=uk

1. To change from one form or function to another.
2. To alter for more effective utilization.
Merriam-Webster's Online Dictionary
http://www.merriam-webster.com/dictionary/convert

Divert: *1. To cause to change course or take a different route.*
2. To reallocate (a resource) to a different purpose.
Compact Oxford English Dictionary Online
http://www.askoxford.com/concise_oed/divert?view=uk

To turn from one course or use to another.
Merriam-Webster's Online Dictionary
http://www.merriam-webster.com/dictionary/divert

These definitions are strongly suggestive, of course, that conservation easement reforms and amendments that "reallocate resources" and that change easements in "form and function" are explicitly permitted by Montana law, provided the conditions of Section 76-6-107, M.C.A., are met.

"Open Space land" is defined at Section 76-6-104(3), M.C.A., as "any land which is provided or preserved for:

> (a) park or recreational purposes;
> (b) conservation of land or other natural resources;
> (c) historic or scenic purposes; or
> (d) assisting in the shaping of the character, direction, and timing of community development."

In reading the terms of Section 76-6-107(1), M.C.A., together with the definition of "open space land", therefore, the plain meaning of this statute allows changes in the course, nature, and quality of conservation easement rights from the specific open-space land uses for which the easements were originally acquired to a new mix – a reallocation -- of conservation rights to serve the public interest more effectively.

In summary, amendment of the specific mix of open-pace land conservation rights that are provided by conservation easements are authorized under Montana law, but only if the conditions of Section 76-6-107(1), M.C.A., subparagraphs (a), (b) and (c) are met, and, as required by Section 76-6-107(2), M.C.A., only if there is no net loss to the public of conservation value and financial value as a result of the amendment.

Public Policy Requirements under Section 76-6-107(1), M.C.A. Land trusts which propose to reform conservation easements under the authority of Section 76-6-107, M.C.A., will have little difficulty meeting most of the terms and requirements of the statute if they follow the principles of Sections I-IV of the Model Policy. Section 76-6-107(2), M.C.A., which requires substitution of conservation lands of equal conservation and financial value within three years of reform ("conversion" or "diversion") of the original easement is entirely consistent with Section I-IV of the MALT Model Conservation Easement Amendment Policy. This is because the Model Policy – as well as almost all amendment clauses in conservation easements in Montana -- requires that land trusts may agree to amendments *only* if there is no net loss in conservation value and no conferral of private benefit or inurement. Thus, provided MALT members follow their normal and customary conservation easement amendment practices, their "no-net-loss" in conservation values and their no conferral of private benefit or inurement policies will satisfy the statutory value-for-value requirements for conversion and diversion of easements which is required by in Section 76-6-107(2), M.C.A. Also, because amendments and reforms *immediately* result in a change in the conservation rights provided by a conservation easement upon execution of the amendment document, the 3-year substitution requirements of Section 76-6-107(2), M.C.A., are irrelevant.[5] There is immediate substitution of value for value.

[5] Amendments effect an immediate change in the nature and scope of conservation easements as of the date of their execution and recording, but amendments do not interrupt the stream of benefits provided to the public. Conservation easement terminations, by contrast, result in the complete cessation of conservation benefits enjoyed by the public. Accordingly, Section 76-6-107(2), M.C.A., is much more important in conservation easement termination cases than in amendment cases. With terminations, land trusts must carefully observe the 3-year conservation land substitution requirement, and land trusts must be careful to document the general "equality" in the conservation value of the new conserved land with the conservation value of the land on which the easement was terminated. Similarly, land trusts must also document that the financial value of original parcel on which the

Similarly, most MALT members already have practices and procedures that comply with, or can easily be instituted to comply with, Section 76-6-107(1)(b), M.C.A., and Section 76-6-107(1)(c), M.C.A. To confirm that amendments undertaken pursuant to statute do not conflict with comprehensive planning, as required by Section 76-6-107(1)(b), M.C.A., land trusts should submit their proposed conservation easement reforms for county review, pursuant to Section 76-6-206, M.C.A. As a matter of sound public policy, this practice is appropriate in conversion or diversion of conservation easements under Section 76-6-107, M.C.A, given the change in nature of the original conservation easement terms.

Furthermore, almost all conservation easements in Montana already include amendment clauses that permit conservation easement amendments under certain prescribed restrictions, including assuring compliance with state and federal laws. In addition to providing practical parameters to land trusts about the conditions under which conservation easement amendments are and are not permitted, conservation easement amendment clauses set forth precise "conditions imposed at the time of the creation of the conservation easement" under which amendments, including reform of conservation easements ("conversions" and "diversions"), are allowed, as required by Section 76-6-107(1)(c), M.C.A.

What conservation easement reforms are "necessary to the public interest" under Section 76-6-107(1)(a), M.C.A.? Because the conservation easement amendment policies and procedures already followed by MALT members typically assure compliance with Sections 76-1-107(1)(b) and (c) and with Section 76-6-107(2), the real challenge in developing a conservation easement reform policy for MALT members that complies with the unique provisions of the Enabling Act is to develop a reasonable and defensible definition of what reforms are "necessary to the public interest" under Section 76-6-107(1)(a), M.C.A. Section VI of the Model Policy gives land trusts guidance on these issues.

In developing an operable definition of "necessity" that enables conservation easement "conversions" and "diversions," the Model Policy makes the following critical assumptions about the policies and purposes served by the Enabling Act:

- Conservation easement amendments are not ever "necessary" – and are therefore not authorized by statute -- if the original purposes and terms of the conservation easement may be enforced or achieved, unless the flow of benefits to the public from enforcement of the original provisions of the conservation easement – that is, the public benefits provided by the easement -- are significantly diminished or impaired by changed circumstances.
    - Thus, land trusts' general policies of holding enforcing conservation easements as originally written should continue to govern the vast majority of conservation easement amendment and reform decisions.

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easement was terminated has roughly equivalent financial value to the new conservation tract acquired in substitution.

- Because conservation easements are granted to serve the public interest in perpetuity, land trusts have ongoing legal and fiduciary obligations to protect their conservation easement *rights*, even as conditions of resources and public values may change, to assure that those rights continue to serve the public interest.
    - So, if a land trust's rights are threatened or eroded, conservation easement reform might be "necessary" to protect the public's interest in a continued, perpetual flow of benefits from the conservation easement rights held by a land trust.

- The "public interest" that must be served by conservation easements is defined by the by the terms of the easement itself, of course, but, in addition and more generally, by the Enabling Act's statements of legislative intent and legislative findings in Section 76-6-102, M.C.A., and the purposes of the Enabling Act, as detailed in Section 76-6-103, M.C.A.
    - If a conservation easement no longer serves the public interest, as originally intended or as defined by the Act in Section 76-6-102 and -103, M.C.A., an amendment that restates, or reforms, a land trust's conservation easement rights may be "necessary" to realign the rights held by the land trust with the public policies and purposes of the Enabling Act.

- Amendments may also be deemed "necessary" if federal, state or local conservation policies change, causing the easement to fail to serve new definitions of the public interest and new requirements of law.

Thus the focus of any "necessity" determination in a conservation easement amendment decision, made under the MALT guidance policy, is threefold:

1. **Is the amendment "necessary" to protect the land trust's conservation easement rights to assure that public benefits may be provided in perpetuity?**
2. **Is the amendment "necessary" to assure that the easement remains consistent with and responsive to changes in land conservation easement law and policy?**
3. **Is the amendment "necessary" to enable the land trust to continue to achieve the general conservation goals articulated in the conservation easement?**

Examples of factual situations corresponding to each type of "necessity" are included in the text of the Model Policy at Section VI.

In general, the "necessity" of reform of conservation easements under the statutory framework set forth at Section 76-6-107, M.C.A., relates to changed or unanticipated circumstances. Fact situations that may lend themselves well to reform of conservation easements under Section VI of the Model policy include changes to easement terms made necessary because: (i) a violation of an easement makes the original conservation purposes of the easement impossible or impractical to achieve; (ii) global warming dries protected wetlands, so the actual conservation benefits provided do not match the conservation purposes of the easement; (iii) a local government ordinance *requires* timber harvest on a forever wild easement to protect health and welfare of citizens; (iv) the state adopts a new public policy that affects the

flow of public benefits from the conservation easement;[6] or (v) assumptions made about appropriate land management at the time the conservation easement was granted are determined to unwarranted and potentially harmful to protecting conservation values.

Reconciliation of Montana law with tax laws and other laws. Although Montana's statutory scheme governing "necessary" reform of conservation easements is unique, the principle that the purposes and fundamental terms of conservation easements must sometimes be reformed or restated to better serve the public interest is not unique, or even at all controversial. In fact, conservation easement amendments that are authorized by attorneys general and by the courts under the charitable trust framework in other states offer a very similar type of equitable reformation of the purposes of conservation easements by judges who apply the *cy pres* doctrine. Montana law simply does not require attorney general and judicial participation or other public oversight in the reformation, and, in fact, the history and structure of the Enabling Act suggest that such public oversight is not consistent with the legislature's original intention to lodge conservation easements firmly in the context of Montana's private property laws.

The Model Policy provisions in Section VI are tailored to meet the specific requirements of Section 76-6-107, M.C.A., and are consistent with federal tax laws governing conservation easements and land trusts. As a fundamental principle of federalism, federal tax law may not control and may not impair state property law, including the law of conservation easements. Put another way, the I.R.S. does not have authority to define, modify or interpret state law. In Montana, conservation easement rights are property rights, as detailed above, and these rights may be modified, if necessary, to better serve the public interest under Section 76-6-107, M.C.A. Ever since passage of the Enabling Act in 1975, the I.R.S. has allowed federal income and estate tax deductions for conservation easement laws granted under this statutory framework, including the "conversion" and "diversion" statute. The Model Policy does nothing more than apply Montana's statute to ensure that land trusts' interest in – and the federal taxpayers' subsidies of – conservation easement property rights are protected in perpetuity for public benefit.

Because Section VI of the Model Policy only pertains to conservation easement reforms, not conservation easement terminations, the tax law governing extinguishment of conservation easements is irrelevant. See T.R. 1.170A-14(g)(6)(i). Section VI of the Model Policy, if applied by land trusts, will not result in "extinguishment" or terminations of conservation easement rights. In fact, the Model Policy achieves just the opposite: The stream of public benefits provided by the original conservation easement rights will be *perpetuated* in a revised and reformed easement that better serves the public interest. Therefore, Montana law protects the federal taxpayers' investment in land conservation rights held by land trusts in "perpetuity" just as federal tax law requires. After reformation of conservation easement rights, the specific conservation *values* provided by a reformed easement may differ from the original terms of the

[6] For example, New Jersey passed a law (S.B. 1538) that states alternative energy generation (with some limitations) is a use that is deemed consistent with use of farmlands that are protected under New Jersey's land conservation laws. In effect, the state mandated a new conservation value. In such a circumstance, some conservation easements may need to be amended to allow alternative energy generation to comply with state law despite the fact that such a land use might violate the original purposes of the easements.

easement, but *public benefits* subsidized by federal taxpayers of at least equal value as the benefits provided by the original conservation easement will continue unimpaired.

Treasury Regulation 1.170A-14(c)(1) requires conservation easement holders "to have a commitment to protect the conservation purposes of the donation." The conservation purposes of ***any*** conservation easement donation are to protect conservation values in land for the continuing benefit of the public. Accordingly, land trusts have a continuing duty and responsibility to take action to protect the public interest if the original terms of a conservation easement no longer serve the public interest as originally intended. Thus, if the resources that are nominally protected by an easement are degraded by climate change or by a conservation easement violation, for example, and the land trust does nothing to reform or revise that easement, its commitment to protect the conservation purposes of the easement may be harshly questioned by the I.R.S. and by the general public. Section VI of the Model Policy, which allows such conservation easement revisions if necessary to protect the public's interest, therefore ***empowers*** land trusts in their efforts to comply with the requirements of Treasury Regulation 1.170A-14(c)(1).

Finally, some people may characterize the reform of original conservation easement terms as terminations or partial terminations of those terms, which are then subject to the extinguishment provisions of T.R. 1.170A-14(g)(6)(i). This Treasury Regulation allows extinguishments of easements when unexpected changes in conditions surrounding the protected property make "the continued use of the property for conservation purposes impossible or impractical," provided the proceeds from a termination are used by a land trust for conservation purposes consistent with the original grant.[7] This regulatory standard is also the *de facto* standard for amendments in Section VI of the Model Policy, because land trusts will only apply SectionVI of the Model policy if land trusts find it has become "impossible" or "impractical" to provide public benefits of sufficient value without reforming the easement. Furthermore, like the federal standard, Montana's law of termination mandates the perpetuation of conservation rights for public benefit in other substituted conservation property of at least equal conservation and financial value. See Section 76-6-107(2), M.C.A.

Section VI of the Model Policy is certainly unique. No other state land trusts have any policy that is similar to this provision. In the context of Montana's unique Enabling Act, however, especially its firm grounding in the law of private property, the Model Policy is defensible and reasonable, provided it is applied in compliance with other constraints on conservation easement amendments, including:

- Section II of the Model Policy;
- Terms and conditions of conservation easement amendment clauses;

[7] T.R. 1.170A-14(g)(6)(i) is sometimes assumed to ***require*** judicial termination or reform – and ***only*** judicial termination or reform -- of conservation easements in the event of changed circumstances. This understanding is not accurate. The Regulation actually says that in the event of changed circumstances, "the conservation purpose ***can*** nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding . . ." [Emphasis supplied.] The plain language of the Regulation does not mandate termination or reformation by the courts if the conservation purposes have become impossible or impractical to accomplish. The Regulation simply states that judicial termination is one option open to land trusts – a "safe harbor" – but it leaves open the door for other methods of protecting perpetuity in easement extinguishment situations.

- Compliance with federal tax laws, including private benefit and inurement laws;
- Compliance with Montana's non-profit laws; and
- Respect for the rights of third parties (landowners, funders, partners, co-holders, etc.).

V. Conservation Easement Amendment Procedures

Amendment procedures tend to vary from organization to organization, depending on board and committee structure, staffing, and the size and resources of MALT members. Because of these factors, creating universally applicable guidelines is not appropriate. Nevertheless, policies and procedures often go hand-in-hand, so Section V of the Model Policy sets forth procedural steps that MALT members may want to consider adopting or that they might find useful.

Section V includes a special caveat, however, that land trusts may want to consider including in their conservation easement amendment policies: While conservation easements created under the Enabling Act do not automatically create charitable trusts under Montana law for the reasons explained above, a grantor of a conservation easement may affirmatively choose to create a charitable trust in the easement by manifestly expressing an intention to do so in the terms of the easement. See Section 72-22-202, M.C.A. A charitable trust may be impressed upon a conservation easement, for example, if a grantor expressly states that she is granting the conservation easement as a restricted charitable gift, and that she intends that the specific purposes and terms of the grant will be enforced by the land trust forever.[8]

In the case of a restricted gift of a conservation easement, Section V suggests that attorney general review of, and concurrence in, a proposed amendment is mandatory, and, in some cases, the amendment must be approved by a court.

VI. Conclusion.

Although aspects of the Model Policy, especially Section VI, may seem to be a radical departure from conservation easement amendment policies adopted elsewhere, it is radical only to the extent that Montana's Open-Space Land and Voluntary Conservation Easement Act is radical. Perhaps the most unsettling conclusion in this report is that land trusts which hold conservation easements typically do not have to seek public review and approval of their substantive conservation easement reform decisions. In some other states, in most academic commentary about conservation easement law, and in many recommended approaches to amendments published by LTA and others, the assumption is typically that public review and approval of amendments is essential to ensure that land trusts fulfill their responsibilities to hold and enforce conservation easements for public benefit.

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[8] Most Montana conservation easements, by contrast, are granted "as absolute, unconditional, unqualified, and voluntary gifts," not as restricted gifts, and land trusts are granted affirmative rights to "***identify***, preserve, and protect in perpetuity the Conservation Values . . . ." [Emphasis supplied.] When a grantor invests the land trust with the right to "identify" conservation values, such a grant is inconsistent with a retained right in the Grantor, or any public officials for that matter, to assert control over changes that a land trust may seek in the terms of a conservation easement under Section 76-6-107, M.C.A.

Montana has chosen a different path, however. The Montana Open-Space Land and Voluntary Conservation Easement Act authorizes conveyances of conservation easements as private property rights that are held by qualified organizations with duties and responsibilities to hold and administer their conservation rights for the public benefit. Our state law assumes that land trusts will act responsibly to follow their missions, to respect the terms of the easements they hold, and to adhere to state law, which requires land trusts to administer their easements for public benefit. Neither the attorney general nor any other governmental agency or officials, including the judicial branch, are empowered by the Enabling Act to enforce or interpret or administer the terms of land trusts' *specific* easements or to second-guess land trusts' findings that *specific* conservation easement amendments or reforms serve the public interest. In short, Montana's state government is not empowered to micro-manage land trusts' conservation easement portfolios, including land trusts' amendment decisions.

Of course, if a land trust systematically or egregiously abuses the discretion that the Enabling Act confers to it by approving amendments that do not serve the public interest -- for example, by conferring prohibited private benefit or by amending easements in ways that diminish land conservation benefits -- the Montana Attorney General has the right and authority to sanction the land trust by virtue of the Attorney General's position as supervisor of charitable organizations in the state. The exercise of such Attorney General investigations and the imposition of sanctions in cases of systematic or egregious abuse of a land trust's duties and obligations should be welcomed by MALT Members.

Furthermore, even though the Enabling Act does not require public review of conservation easement amendments, except for non-binding reviews of the local planning authority under Section 76-6-206, M.C.A, land trusts may voluntarily seek public input from the Attorney General or other appropriate governing bodies, whether formally or informally, to ensure that the land trust's calculus of the public benefits of a proposed amendment aligns with the views of public servants. In large measure, obtaining this type of reassurance lies behind The Nature Conservancy's policy of seeking attorney general review of all of its amendment proposals in Montana, no matter how straightforward they may seem. This policy of voluntary consultation with governing bodies is certainly a provision that a land trust may choose to add to the Model Policy when it adopts its own conservation easement amendment policies, but it is certainly not required by Montana law.