

# Conservation Easements for Agriculture in Alberta

---

*A Report on a Proposed Policy Direction*



MIISTAKIS  
INSTITUTE

*Prepared by the Environmental Law Centre and the Miistakis Institute  
Cindy Chiasson, Kimberly Good, Guy Greenaway and Jason Unger  
March 2012*

## Table of Contents

---

<b>TABLE OF CONTENTS .....</b>	<b>2</b>
<b>TABLE OF FIGURES.....</b>	<b>4</b>
<b>INTRODUCTION .....</b>	<b>5</b>
Private land conservation .....	5
Conservation easements for agriculture in Alberta.....	5
Role of this report.....	6
A note about terminology.....	7
<b>REVIEW OF LEGISLATION AND POLICY IN ALBERTA.....</b>	<b>7</b>
<b><i>Alberta Land Stewardship Act and Regional Plans .....</i></b>	<b>7</b>
Lower Athabasca Regional Plan .....	8
South Saskatchewan Regional Plan .....	10
<b><i>Agricultural Operation Practices Act .....</i></b>	<b>11</b>
Agricultural land and operations .....	11
Conservation easements for agriculture and the right to farm .....	12
Potential interaction between conservation easements for agriculture and AOPA.....	13
<b><i>Municipal Government Act .....</i></b>	<b>15</b>
<b>Affected provincial and municipal agencies .....</b>	<b>15</b>
Alberta Agriculture and Rural Development.....	16
Natural Resources Conservation Board .....	17
Municipalities.....	18
Agricultural stakeholders.....	19
<b>Associated federal programs .....</b>	<b>20</b>
Agriculture and Agri-Food Canada.....	20
Canada Revenue Agency.....	21
<b>Canadian Ecological Gifts (EcoGifts) Program.....</b>	<b>22</b>
<b>Defining <i>Agricultural Land</i> .....</b>	<b>23</b>
<b>REVIEW OF CONSERVATION EASEMENTS FOR AGRICULTURE IN OTHER JURISDICTIONS .....</b>	<b>26</b>
<b>Legislation and implementation of conservation easements for agriculture in the United States.....</b>	<b>26</b>
How agriculture or agricultural land is defined .....	26
How legislation/policy is framed .....	27
Program delivery.....	28

<b>Legislation and implementation of conservation easements for agriculture in Canada .....</b>	<b>28</b>
Legislation and/or policy framework .....	29
Application of Conservation Easements for Agriculture .....	29
<b>Charitable Purpose in Common Law Jurisdictions .....</b>	<b>30</b>
<b>EXAMINATION OF POTENTIAL PURPOSES FOR CONSERVATION EASEMENTS FOR AGRICULTURE.....</b>	<b>31</b>
<b>Advisability of Refining the Purpose for Conservation Easements for Agriculture .....</b>	<b>31</b>
Goals for agricultural land conservation vary .....	31
Conservation easements for agriculture could be considered non-charitable by the Canada Revenue Agency ...	31
Alberta’s private land conservation community will seek further direction .....	32
Conservation easements may be legally fragile without a strong policy foundation .....	32
Contribution of CEs for agriculture to agricultural land conservation will be difficult to measure .....	32
May be a perception that conservation easements for agriculture are being misused .....	33
Agriculture is a land use not an outcome .....	33
<b>Why Conserve Agricultural Land .....</b>	<b>33</b>
How do other jurisdictions approach the ‘purpose’ conundrum?.....	34
Where do other jurisdictions articulate their CE for agriculture purposes?.....	35
What are the potential purposes for conservation easements for agriculture? .....	36
<b>Analysis .....</b>	<b>38</b>
Relevance to agricultural issues in Alberta: .....	38
Relation to the public interest: .....	38
Ability to support legally robust CEs: .....	38
Potential for conflict with other purposes:.....	39
Capacity for delivery: .....	39
Conclusion:.....	39
<b>REVIEW OF DELIVERY MECHANISMS FOR CONSERVATION EASEMENTS FOR AGRICULTURE ..</b>	<b>44</b>
<b>Eligible holder requirements.....</b>	<b>44</b>
Government entities .....	44
Charitable organizations .....	45
<b>Organizational and capacity challenges .....</b>	<b>46</b>
Current conservation easement activity in Alberta .....	47
Who is likely to use conservation easements for agriculture .....	47
<b>RECOMMENDATIONS .....</b>	<b>51</b>
<b>Policy ‘Purposes’ for Conservation Easements for Agriculture .....</b>	<b>51</b>
Supporting Recommendations .....	52
<b>Conservation Easement Structure.....</b>	<b>53</b>
Potential content of a conservation easement agreement for agriculture .....	54
Conservation Easement for Agricultural (or Mixed) Purpose Template .....	59
<b>Capacity for delivery .....</b>	<b>66</b>

Clarify and articulate the policy intent .....	66
Consult with land trusts and key municipalities in developing the policy .....	66
Identify pilot projects that exemplify Government of Alberta goals .....	66
Confirm interest/lack of interest with other agencies.....	67
Catalyze development of an Alberta-based agricultural land trust .....	67
Quantify capacity by land use region.....	67
Actively explore an analogous program to the federal EcoGifts program.....	67
Maintain the requirement for non-government qualified organizations to be charitable.....	68
<b>Policy Direction.....</b>	<b>69</b>
Articulate a clear policy direction for conservation easements for agriculture .....	69
Emphasize Public Benefit in Suggested Purposes.....	71
Define or clarify key terms.....	71
<b>Guidance Document Outline.....</b>	<b>71</b>
<b>RESOURCES .....</b>	<b>73</b>

## Table of Figures

---

Table 1: Agricultural Easement purposes for select states.....	27
Table 2: Conservation easements for agriculture ‘purposes’ analysis matrix.....	40

## Introduction

---

### Private land conservation

Conservation easements (CEs) are the cornerstone tool of the private land conservation community. This community – which consists of land trusts and conservancies, municipalities, and individual landowners – focuses on how to protect the conservation values of private lands. In Alberta, those values may be ecological, scenic, or agricultural.

The approach of this community is a voluntary, non-regulatory one; landowners choose to be involved or not. However, the tools they use – such as conservation easements – are enabled through the regulatory process, giving them stability and legal certainty.

The *conservation easement* is a legal contract between a qualified private land conservation organization (or government agency) and a private landowner, whereby certain rights or opportunities are granted away by the landowner in order to protect the identified conservation values. The resulting land use restrictions are registered on title and run with the land regardless of the owner.

### Conservation easements for agriculture in Alberta

Conservation easements have been legislatively enabled in Alberta since 1996, and since that time restricted to the purposes of supporting conservation of *biological diversity*<sup>1</sup> and/or *natural scenic* values. In 2009, with the proclamation of the *Alberta Land Stewardship Act*, the Government of Alberta took the step of expanding Alberta’s 13-year-old conservation easement provisions to include agriculture. More specifically, it added the following purpose to the existing environmental and aesthetic purposes:

- “the protection, conservation or enhancement of agricultural land or land for agricultural purposes” (*ALSA*, Sec 29(1)(c))

Though the wording changes were minor (the rest of the CE legislation remained largely unchanged), the implications were significant. There is little direction contained within *ALSA* as to the intent and possible applications of conservation easements for agricultural land. Despite the oft-expressed desire for conservation easements with such a purpose, there is little sense of the capability of existing land trusts and municipalities to implement this new twist on an old tool.

---

<sup>1</sup> The current legislation, the *Alberta Land Stewardship Act*, has changed the “biodiversity” purpose for CE’s to “the environment”.

## Role of this report

In 2011, the Environmental Law Centre and the Miistakis Institute, at the request of the Government of Alberta's Land Use Secretariat, undertook an applied research project seeking to better understand the limitations of the current policy in order to inform a more robust policy. More specifically, this project sought to understand:

- The legal and policy context surrounding the application of CEs for agriculture in Alberta;
- The experience of other jurisdictions in Canada and the United States with legally enabling and applying CEs for agriculture;
- Refinements needed in government policy around the *purposes* for CEs for agriculture; and
- Challenges and opportunities for program delivery for CEs for agriculture in Alberta.

This analysis of the existing policy and practice of CEs for agriculture in Alberta and around North America forms the basis of a series of policy-related recommendations for the Government of Alberta on addressing questions of purpose, structure, and delivery for CEs for agriculture.

The purpose of this report was not to draft a policy for CEs for agriculture. Rather, the object was to gather the relevant background information, then form a series of recommendations that would assist the Government of Alberta in addressing the identified gaps in policy, and articulating a more comprehensive vision of the role of CEs for agriculture. This would then better ensure that conservation easements for agriculture would contribute to the conservation of agricultural land in Alberta.

It was also not the purpose of this report to address the much-larger question of what needs to be done to conserve agricultural land in Alberta. CEs for agriculture are only one tool, and it would be disingenuous to suggest a report on one tool was a report on all facets of addressing this issue.

The recommendations developed by the authors were aimed at a high level, and organized into five categories:

- *Determining Purpose* – suggesting the best approach to take in addressing the question of determining a purpose(s) for conservation easements for agriculture, and reflecting that in regulation and policy;
- *Conservation Easement Structure* – proposing a legally-structured conservation easement for agriculture with consideration of the unique considerations of this new purpose of conservation easement;
- *Capacity for Delivery* – suggesting how best to plan for and promote the capable delivery of conservation easements for agriculture in Alberta;

- *Policy Direction* – suggesting a comprehensive policy approach which would integrate purpose, structure and capacity considerations in a cohesive policy framework; and
- *Guidance Document Outline* – suggesting the form and structure of an informational document that would make clear the proposed conservation easement template.

## A note about terminology

This document uses the convention of “CEs for agriculture” or “conservation easements for agriculture” as opposed to “agricultural conservation easements.” Although the latter term is in common use across North America, the authors make this distinction intentionally for the following reason.

In some jurisdictions, agricultural conservation easements are separate tools from conservation easements for other purposes. In these cases, they may be enabled in different pieces of legislation, and overseen by different government agencies. In some cases, they are programmatically defined, such as the common PACE, or Purchase of Agricultural Conservation Easement, programs.

In Alberta, this is not the case. There is only one conservation easement, which is enabled under the *Alberta Land Stewardship Act*. There are, however, three allowable broad purposes under that legislation for which conservation easements can be used:

- Environment;
- Natural scenic or aesthetic values; or
- Agricultural land or land for agricultural purposes.

In each of these cases, the legal basis is the same, the structure is fundamentally the same, and the eligible organizations are the same. The authors, therefore, felt it important not to suggest that there were multiple conservation easement tools, and chose terminology to reflect that.

## Review of Legislation and Policy in Alberta

---

There are existing legislation and policies within Alberta which will affect, and be affected by, the application of conservation easements for agriculture. This research involved identifying the most applicable and significant of these, and summarizing the relevant connections.

### *Alberta Land Stewardship Act and Regional Plans*

While conservation easements have been empowered by Alberta legislation since 1996,<sup>2</sup> their application to agricultural land has only been in place since enactment of the *Alberta Land*

---

<sup>2</sup> *Environmental Protection and Enhancement Amendment Act, 1996*, S.A. 1996, c. 17.

*Stewardship Act (ALSA)*.<sup>3</sup> Section 29 of *ALSA* provides that the purposes of conservation easements can include “protection, conservation and enhancement of agricultural land or land for agricultural purposes”. However, neither “agricultural land” nor “agricultural purposes” are defined in *ALSA* or any of the regulations currently in effect under *ALSA*.<sup>4</sup> The same wording is used in s. 49 of *ALSA*, which deals with transfer of development credit schemes.

By comparison, different wording is used in relation to conservation directives; s. 37 provides that a regional plan may “permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural *values*” (emphasis added) by use of a conservation directive. There is nothing in *ALSA* or related documents giving a reason for the difference in wording; one possibility may be that the conservation directive is a tool, available only to the provincial government, that can be used in relation to land not owned by the government, while both conservation easements and transfer of development credit schemes will directly involve the property owners.

While there is no written support documentation, through various discussions over the course of this project the Land Use Secretariat has communicated specific views about the intended application of conservation easements for agriculture. This approach would focus on the environmental and conservation values of cultivated land, including its key ecological service of food production, and would allow conservation easements on agricultural land to protect all environmental attributes of the land without requiring the conversion of cultivated land back to its native condition.

### *Lower Athabasca Regional Plan*

Agriculture and agricultural land use have been addressed in the process to develop the Lower Athabasca Regional Plan (LARP). The advice provided to the government by the Lower Athabasca Regional Advisory Council (LARAC) includes agriculture as one of its five suggested land-use classifications for the region.<sup>5</sup> It further discusses a focus on the most productive

---

<sup>3</sup> S.A. 2009, c. A-26.8.

<sup>4</sup> There are currently two regulations in effect under *ALSA*: the *Conservation Easement Registration Regulation*, A.R. 129/2010, which sets out procedural requirements for registering conservation easements; and the *Alberta Land Stewardship Regulation*, A.R. 179/2011, which establishes administrative processes for reviews and variances of regional plans and compensation related to regional plans. Neither regulation provides any definition of either “agricultural land” or “agricultural purposes”.

<sup>5</sup> Lower Athabasca Regional Advisory Council, *Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region* (Edmonton: Government of Alberta, 2010), online: Land-use Framework

<https://landuse.alberta.ca/Documents/LARP%20RAC%20Lower%20Athabasca%20Regional%20Advisory%20Council%20Advice%20to%20the%20Government%20of%20Alberta%20Report-P2-2010-08.pdf> (“LARAC Advice”).



agricultural areas of the region,<sup>6</sup> and the identification, designation and protection of “high quality primary production lands”.<sup>7</sup> There is a clear intent on the part of LARAC that agricultural land use in the region should take into account and support biodiversity, wildlife diversity and water quality and that best management practices should play a role in agricultural land stewardship and management.<sup>8</sup> The LARAC advice excludes country residential development as part of agricultural land use, referring to it as an “other use” that could be permitted when consistent with provincial and municipal policies.<sup>9</sup>

By comparison, the government’s draft regional plan touches on agriculture and land use only in relation to regional economic diversification.<sup>10</sup> It effectively mirrors, with minor modifications, the provisions on agricultural lands set out in the 1996 provincial *Land Use Policies*.<sup>11</sup> The responsibility for protection of agricultural land is centered in municipalities, which are “encouraged” to:<sup>12</sup>

- Identify areas where agricultural activities should be the primary land use;
- Limit fragmentation of agricultural lands and their “premature conversion” to non-agricultural uses;<sup>13</sup>
- Direct non-agricultural subdivision and development to areas that will not constrain agricultural activities or areas of “lower quality agricultural lands”; and
- Use setbacks and other mitigation tools to minimize conflicts between intensive agricultural operations and other land uses.

Other than the reference to “lower quality agricultural lands”, which would seem to relate to the attributes of land in relation to suitability for agriculture, these provisions focus on the activity of agriculture on the land base.

It appears that the draft regional plan only sees limited agricultural activity as part of what may occur on public land “conservation areas”. Provisions of the draft plan deal with “conserved land”, which includes “public land use zones managed for one or more conservation purposes

---

<sup>6</sup> LARAC Advice, *ibid.*, 3.1.1, p. 26.

<sup>7</sup> *Ibid.*, obj. 1.4(a), p. 10.

<sup>8</sup> *Ibid.*, see obj. 1.4(e), p.10; obj. 4.1(g), p. 17; obj. 4.3(d), p. 18; and 3.1.1, p. 26.

<sup>9</sup> *Ibid.*, 3.1.1, p. 26.

<sup>10</sup> Government of Alberta, *Draft Lower Athabasca Regional Plan 2011-2021* (Edmonton: Government of Alberta, 2011) p. 39; online: Land-use Framework [https://www.landuse.alberta.ca/Documents/LARP\\_Draft\\_Lower\\_Athabasca\\_Regional\\_Plan-2011-08.pdf](https://www.landuse.alberta.ca/Documents/LARP_Draft_Lower_Athabasca_Regional_Plan-2011-08.pdf) (“Draft LARP”).

<sup>11</sup> *Land Use Policies*, O.C. 522/96 (Alberta), online: Alberta Municipal Affairs <http://www.municipalaffairs.alberta.ca/documents/ms/landusepoliciesmga.pdf>.

<sup>12</sup> Draft LARP, *supra* note 10, pp. 39-40.

<sup>13</sup> Use of the term “premature conversion” would seem to imply that agricultural land should not be kept for such use indefinitely and/or that it will lose its utility for agriculture over time.

and declared under the *Public Lands Act*.<sup>14</sup> “Conservation purposes” are stated to include the purposes for conservation easements set out under *ALSA*, but specifically exempt the agricultural purposes of cultivation, clearing and range improvements as defined under the *Public Lands Act*.

### *South Saskatchewan Regional Plan*

Agriculture is clearly a more significant land use in the South Saskatchewan region, as compared to the Lower Athabasca. In its advice to the government, the South Saskatchewan Regional Advisory Council (SSRAC) suggests a new land-use classification system, under which agriculture is one of five land-use classes. SSRAC further suggests the agriculture class be divided into two sub-classes: cultivated land (focusing on crop production) and native rangeland (which focuses on livestock grazing and would include tame pasture). The cultivated land sub-class is intended to ensure maintenance of soil productivity, improve agricultural infrastructure and mitigate fragmentation and loss of agricultural land. The native rangeland sub-class is intended to retain lands for livestock grazing and ecological benefits, including water security, biodiversity and habitat connectivity.<sup>15</sup>

The SSRAC advice also makes clearer links between agricultural lands and potentially related ecological benefits, such as biodiversity and wildlife protection, native grassland and vegetation protection and water protection and integrity, including headwaters, wetlands and riparian areas.<sup>16</sup> It sees a clear role for voluntary private stewardship and best management practices.<sup>17</sup>

Similar to the draft Lower Athabasca Regional Plan, the SSRAC advice sees it as the municipalities’ role to address and minimize conversion and fragmentation of agriculture land.<sup>18</sup>

---

<sup>14</sup> Draft LARP, *supra* note 10, p. 44. Also included are parks under the *Provincial Parks Act* and wilderness areas, ecological reserves and natural areas under the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*. Heritage rangelands are not included, but this may be a function of the parameters of that designation, which relate to preservation of grassland ecology, in relation to the predominantly boreal nature of the Lower Athabasca region.

<sup>15</sup> South Saskatchewan Regional Advisory Council, *Advice to the Government of Alberta for the South Saskatchewan Regional Plan* (Edmonton: Government of Alberta, 2011), pp. 47-48, online: Land-use Framework

<https://www.landuse.alberta.ca/Documents/SSRP%20RAC%20Advice%20to%20the%20Government%20of%20Alberta%20for%20the%20South%20Saskatchewan%20Regional%20Plan%20Report-P2-2011-03.pdf>.

<sup>16</sup> *Ibid.*, see recommendations on water protection (5.2.9.9, 5.2.9.11, 5.2.9.16, 5.2.9.17 and 5.2.9.23) and biodiversity (pp. 29-30; 5.3.8, 5.3.14.7, 5.3.14.12 and 5.3.14.16).

<sup>17</sup> *Ibid.*, see pp. 47-48.

<sup>18</sup> *Ibid.*, p. 10.

## *Agricultural Operation Practices Act*

The *Agricultural Operation Practices Act (AOPA)*, which is administered by the Natural Resources Conservation Board, has two legislative functions.<sup>19</sup> *AOPA*'s primary function is the regulation of confined feeding operations of prescribed livestock densities and manure management related to those operations.<sup>20</sup> In addition, *AOPA* is often referred to as “right to farm” legislation as it limits civil claims in relation to nuisances created by agricultural operations and provides a practice review process where a person is affected by a disturbance from an agricultural operation.<sup>21</sup>

### *Agricultural land and operations*

As noted in the *ALSA* section above, neither of the terms “agricultural land” or “agricultural purposes” is defined in *ALSA* or its regulations. In contrast, *AOPA* defines “agricultural land” as:<sup>22</sup>

- (i) land the use of which for agriculture is either a permitted or discretionary use under the land use bylaw of the municipality or Metis settlement in which the land is situated or is permitted pursuant to section 643 of the *Municipal Government Act*,
- (ii) land that is subject to an approval, registration or authorization, or
- (ii) land described in an *ALSA* regional plan, or in a conservation easement, conservation directive or TDC scheme as those terms are defined in the *Alberta Land Stewardship Act*, that is protected, conserved or enhanced as agricultural land or land for agricultural purposes.

*AOPA*'s definition of “agricultural land” is focused on permitted activity. That is to say, *AOPA* approaches the land base as **whatever land** is being used and is authorized to be used for an agricultural operation. It should be noted that “agricultural land” is used in *AOPA* only in reference to the definition of an “agricultural operation”<sup>23</sup>. Within *AOPA*, “agricultural

---

<sup>19</sup> R.S.A. 2000, c. A-7.

<sup>20</sup> *Ibid.*, Part 2.

<sup>21</sup> *Ibid.*, Part 1.

<sup>22</sup> *Ibid.*, s. 1(a.1).

<sup>23</sup> *Ibid.*, s. 1(b). *AOPA* defines an “agricultural operation” as:

an agricultural activity conducted on agricultural land for gain or reward or in the hope or expectation of gain or reward, and includes

- (i) the cultivation of land,

operation” is used mainly in relation to nuisance and practice reviews under Part 1. Neither *AOPA* nor *ALSA* provide that these definitions apply to *ALSA*.

### *Conservation easements for agriculture and the right to farm*

The use of conservation easements for the protection of agricultural lands may reinforce the idea of a right to farm related to a specified land base. This perspective is more likely to be related to perceptions of conservation easements for agriculture rather than specific legal linkages with *AOPA*. More specifically, where a body, whether it be a local authority or another qualified organization, enters into a conservation easement on agricultural lands an implied endorsement of agricultural practices may coincide. This in turn emphasizes the importance of the nature of “agricultural purposes” that may be covered by conservation easements.

*AOPA* does define “generally accepted agricultural practice” as:<sup>24</sup>

a practice that is conducted in a manner consistent with appropriate and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, and without restricting the generality of the foregoing includes the use of innovative technology used with advanced management practices.

It could be argued that the establishment of a conservation easement on agricultural lands reflects an “accepted custom and standard”, however this assessment is likely to be specific to given circumstances, rather than dictated by the presence of a conservation easement. The caveat to this is if there are specific standards of management and operation in the

- 
- (ii) the raising of livestock, including domestic cervids within the meaning of the *Livestock Industry Diversification Act* and poultry,
  - (iii) the raising of fur-bearing animals, pheasants or fish,
  - (iv) the production of agricultural field crops,
  - (v) the production of fruit, vegetables, sod, trees, shrubs and other specialty horticultural crops,
  - (vi) the production of eggs and milk,
  - (vii) the production of honey,
  - (viii) the operation of agricultural machinery and equipment, including irrigation pumps,
  - (ix) the application of fertilizers, insecticides, pesticides, fungicides and herbicides, including application by ground and aerial spraying, for agricultural purposes,
  - (x) the collection, transportation, storage, application, use, transfer and disposal of manure, composting materials and compost, and
  - (xi) the abandonment and reclamation of confined feeding operations and manure storage facilities.

<sup>24</sup> *Ibid.*, s. 1(b.8).

conservation easement regulations, guidelines, and policy, or, if in specific instances, management agreements are created that reflect this aspect of “generally accepted agricultural practice”.

It is interesting to note that several jurisdictions in the United States use right to farm provisions in legislation as a mechanism to incent entering into agricultural preservation programs including easement donations or sales.

### *Potential interaction between conservation easements for agriculture and AOPA*

Fundamental to the discussion of conservation easements for agriculture and *AOPA* is whether these conservation easements may be used to prevent confined feeding operations (CFOs) and more specifically, the implications of conservation easements for managing buffer areas around CFOs. In addition, conservation easements may attempt to restrict the use of land depending on the contents of the easement agreements.

As with conservation easements for other purposes, the general applicability and limitations on lands that are subject to conservation easements for agriculture are a matter of private enforcement as between the landowner (i.e., the grantor and successors) and the qualified organizations. There is no law or policy reason to expect that conservation easements for agriculture will have an impact on government authority related to lands subject to these conservation easements, unless otherwise stated in a regional plan. Specifically, conservation easements for agriculture will not narrow the discretion of government decision makers, but the landowner’s use of land is nevertheless curtailed by the conservation easement’s contents.

*AOPA*’s regulatory requirements cannot be avoided by the use of a conservation easement nor do the regulatory conditions limit the constraints possible through a conservation easement agreement or management agreement conditions. The agreement is made between a landowner and the qualified organization, so where there are additional conditions placed on a conservation easement that are more restrictive than the *AOPA* regulatory framework, other statutory “permissions” will have limited relevance.

Similarly, arguments that the *AOPA* right to farm provisions may be in some way undermined by a conservation easement for agriculture are not likely to be successful. The *AOPA* provisions deal with the actionability at law of nuisances from “generally accepted agricultural practices” as opposed to broader individual rights to undertake farming practices contrary to what are essentially the contractual terms of a conservation easement for agriculture.

Interaction between *AOPA* and planning revolves around the legislative limitation on municipal powers to undertake prohibitions or restrictions in relation to the siting and conditioning of confined feeding operations governed by *AOPA*.<sup>25</sup> Specifically, *AOPA* directs the approval officer

---

<sup>25</sup> This is by operation of s. 618.1 of the *Municipal Government Act*, R.S.A. 2000, c.M-26, and s. 20(1.1) of *AOPA*, *ibid*.

to consider the municipal development plan for the area but the officer may not consider “any provisions respecting tests or conditions related to the construction of or the site for a confined feeding operation or manure storage facility nor any provisions respecting the application of manure, composting materials or compost.”<sup>26</sup> Conservation easements for agriculture are therefore a likely alternative method for managing future siting of these types of agricultural operations. Insofar as municipalities or other qualified organizations may prescribe prescriptive elements in the easement restrictions it is feasible that the future land use will be guaranteed. This assumes conservation easement regulations do not constrain the nature of easement restrictions that may applied to agricultural land.

Section 17(1) of *AOPA* states:

A person may apply to an approval officer or the Board for a variance of the requirements in the regulations respecting confined feeding operations, manure storage facilities or the collection, transportation, storage, application, use, transfer or disposal of manure, composting materials or compost, and an approval officer or the Board may grant a variance if in the opinion of an approval officer or the Board the variance provides the same or a greater degree of protection and safety as that provided for by the regulations.

The wording of this (and subsequent) sections indicate an intent to have variances available at the request of the person who has management and control over the activities governed under *AOPA*, as opposed to third parties. The plain reading of the wording however does not preclude third parties from applying for a variance and this appears to be certainly the case for someone who has an interest in the land, such as that created by a conservation easement. In this regard, a qualified organization that enters into a conservation easement on land which contains a CFO could apply for a variance under this section of the legislation.<sup>27</sup> Whether a qualified organization would choose to place a conservation easement on a CFO remains to be seen. Nevertheless, clarity around where conservation easements for agriculture would apply will minimize any potential confusion around this issue.

Sections 19 and 21 of *AOPA* set out notification requirements related to approvals and registrations. These sections also set out when notification may not be required.<sup>28</sup> The approval officer has broad discretion to determine whether a party is directly affected by a given activity. In instances where a qualified organization holds a conservation easement on CFO land (if allowed) the finding of directly affected would be most likely. Where a qualified organization has a conservation easement on an adjoining piece of land the determination of whether they are “directly affected” will depend on the given circumstances and whether the adjoining land and interests thereon are likely to be affected. In this regard, qualified

---

<sup>26</sup> *Supra* note 19 at s. 20(1.1).

<sup>27</sup> This interpretation is bolstered by the usage of other more specific language in *AOPA*, including “owner” or operator” or “person who applies manure”.

<sup>28</sup> *Supra* note 19, ss. 19(1.1) and 21(1.1).

organizations holding conservation easements will have the discretion to get involved in *AOPA* application and review processes. It should be remembered however that pursuing activities that give rise to these regulatory processes may be prohibited in the first instance under the conservation easement agreement, the enforcement of which would occur through the courts.<sup>29</sup>

### ***Municipal Government Act***

Part 17 of the *Municipal Government Act*, dealing with planning and development, touches on agricultural operations but not specifically on agricultural land.<sup>30</sup> Municipal development plans must contain policies respecting protection of agricultural operations; all municipalities with a population of 3500 or more must adopt a municipal development plan by bylaw, while municipalities below that population threshold may adopt a municipal development plan.<sup>31</sup> Every municipality must prepare a land use bylaw and in doing so, is required to consider protection of agricultural operations unless protection of agricultural operations, agricultural land or land for agricultural purposes has been required by a regional plan made under *ALSA*.<sup>32</sup> The *Municipal Government Act* adopts the *AOPA* definition of “agricultural operation”.<sup>33</sup>

It is possible that municipal land use bylaws or municipal development plans may contain requirements that will intersect with conservation easements for agriculture. Given the provisions’ focus on “agricultural operations” rather than “agricultural land”, it is also possible that there may be conflicts or inconsistencies between land use bylaws or municipal development plans and conservation easements for agriculture.

### **Affected provincial and municipal agencies**

In this section, “affected agencies” refer to those agencies or organizations most likely to administer legislation or have developed policy positions that might provide direction on the likely scope and application of the agriculture purpose for conservation easements. Research and interviews have not revealed any particular policy position, document or paper that led to the enabling of conservation easements for agriculture in *ALSA*. A significant driver appears to have been concerns about fragmentation and conversion of agricultural land.

---

<sup>29</sup> The circumstances discussed in this paragraph will likely be applicable to other similar provincial regulatory processes, such as those before the Energy Resources Conservation Board and Alberta Utilities Commission. The applicability in any instance will depend on the application being brought before the regulatory body and the particular circumstances of the specific case.

<sup>30</sup> R.S.A. 2000, c. M-26.

<sup>31</sup> *Ibid.*, s. 632.

<sup>32</sup> *Ibid.*, ss. 639-639.1.

<sup>33</sup> *Ibid.*, s. 616(a); see also *supra* note 23.

## *Alberta Agriculture and Rural Development*

In 2002, Alberta Agriculture, Food and Rural Development prepared an extensive report titled *Loss and Fragmentation of Farmland*.<sup>34</sup> The report provided a snapshot of Alberta concerns and issues on this topic, described Alberta systems at the time for land-use planning and agricultural land protection, made an extensive review of rural municipal bylaws and summarized an opinion survey of rural municipality development officers and elected officials. It also surveyed agricultural land protection systems in other jurisdictions (U.S. and Canada). The report made no recommendations for future steps to protect agricultural land in Alberta, but made several observations which may be useful to current work on conservation easements for agriculture:

- In the 25 years leading up to the report, Alberta lost a small net percentage of farmland, but much of the higher quality agricultural land taken out of production was replaced by lower quality land.<sup>35</sup>
- The review of rural municipal bylaws and municipal development plans included an examination of approaches to defining agricultural land and criteria for identifying better quality land. While nearly one-third of bylaws/plans examined did not have any such definitions, the remainder tended to rely on the Canada Land Inventory Rating.<sup>36</sup>
- The opinion survey identified a desire for clearer policy direction from the provincial government in relation to agricultural lands:<sup>37</sup>

The elected municipal officials and the Development Officers that were surveyed identified a need for clearer provincial guidelines that would create definitions of agriculture lands, and criteria for prioritizing land uses relative to agriculture. In addition, they would like assistance in locating primary uses for agriculture, i.e. the 'best use' areas for agriculture within their municipalities.

Interviews were also carried out with Alberta Agriculture staff involved in the LUF/ALSA initiative; interviewees were:

- Roger Bryan, Environmental Program Specialist, Land Use Section;
- Karen Cannon, Senior Manager, Policy Coordination; and
- Jason Cathcart, Manager, Land Use Policy.

---

<sup>34</sup> Alberta Agriculture, Food and Rural Development, *Loss and Fragmentation of Farmland* (Edmonton: Alberta Agriculture, Food and Rural Development, 2002).

<sup>35</sup> *Ibid.*, p. i.

<sup>36</sup> *Ibid.*, p. 44 and Appendices C.1 and C.2.

<sup>37</sup> *Ibid.*, p. 48.



All interviewees referenced the Land-Use Framework’s conservation and stewardship working group as a potential source of policy direction in relation to legislated protection of agricultural land under *ALSA*. A review of the working group’s final report revealed no recommendations specifically directed to agricultural land protection, but soil quality was identified as a feature of sustainable ecosystems that should be included in establishment of science-based monitoring protocols.<sup>38</sup>

The interviewees were all consistent in their perspective that no one specific policy had driven the inclusion of agricultural land protection in *ALSA*, with one indicating that the ministry of Agriculture and Rural Development does not have a stated policy position on fragmentation and preservation of agricultural land. It was suggested by one interviewee that the intent of conservation easements for agriculture is to “prevent development”.

In discussing the inclusion of agricultural land protection under *ALSA* with Morris Seiferling, Land Use Secretariat, he concurred with the view that there was not a specific policy document driving this development. He suggested that cultivated land was a main focus, based on a wish to protect agricultural land that would not, due to its cultivation, qualify for protection under the pre-*ALSA* conservation easements and that it would be the attributes of land that make it suitable for agriculture that would qualify it for protection under a conservation easement for agriculture.

Alberta has a long history of recognizing the value of conserving cultivated land. Historically the threat has been the loss and/or deterioration of soil. As a result the *Soil Conservation Act* was first drafted in the mid 1930’s.<sup>39</sup> This Act requires that all landholders manage land in a manner that prevents the loss or deterioration of soil. In an effort to help farmers maintain healthy soils, Alberta’s agricultural government agencies and the agricultural industry have provided research and education on soil conservation techniques and technologies. A large majority of farmers have voluntarily adopted these tools. Not a greater threat to cultivated land but certainly one that is gaining significant interest in many parts of Alberta is the conversion of currently cultivated land to other land uses. Conservation easements designed to protect cultivated land from conversion to other uses are a way farmers can voluntarily respond to this threat.

### ***Natural Resources Conservation Board***

In addition to *AOPA* (discussed above), the Natural Resources Conservation Board (NRCB) administers the *Natural Resources Conservation Board Act*, which establishes a review process for specified natural resource projects to determine whether such projects are in the public interest.<sup>40</sup> Reviewable projects under this Act include:<sup>41</sup>

---

<sup>38</sup> *Conservation and Stewardship Working Group Final Report* (Edmonton: Government of Alberta, 2007); see p. 132.

<sup>39</sup> R.S.A. 2000, c. S-15.

<sup>40</sup> R.S.A. 2000, c. N-3, s. 2.

- Specified projects for which an environmental impact assessment report has been ordered:
  - Forestry industry projects (pulp, paper, newsprint or recycled fibre manufacturing facilities; lumber, veneer, panelboard or treated wood production facilities);
  - Mines or quarries for metallic or industrial mineral recovery;
  - Recreational or tourism facilities; and
  - Water management projects (dams, reservoirs, barriers or other water storage; water diversion structures or canals);
- Any other project prescribed by regulation;<sup>42</sup> and
- Specific projects prescribed by the provincial Cabinet.

Due to the pre-condition that an environmental impact assessment report has been ordered for the specified projects, it is usually large-scale projects that will be subject to review. It is unlikely that conservation easements for agriculture will be encompassed in any of these reviews, unless prescribed by regulations or by the Cabinet. However, it is possible that a qualified organization holding a conservation easement could be directly affected by a proposed project, giving it the right to participate in an NRCB review and hearing.<sup>43</sup>

An interview with Peter Woloshyn, chief executive officer of the NRCB, indicated that conservation easements for agriculture have not arisen as an issue or item of discussion in NRCB proceedings. NRCB staff have heard some conceptual presentations on conservation tools at cross-government committee meetings dealing with ALSA.

### *Municipalities*

The Alberta Association of Municipal Districts and Counties (AAMDC) published the issue backgrounder *Loss and Fragmentation of Agricultural Land in Alberta* in 2005.<sup>44</sup> The document identified concerns and provided background on issues, trends and data, but did not take any specific position or make any recommendations regarding protection of agricultural land. The backgrounder discusses much of the same data as the AAFRD report referred to above, but provides more detail in relation to soil quality, as well as in-depth data on conversion.

As well as the overarching guidelines of the 1996 provincial *Land Use Policies* created by Municipal Affairs, municipalities are required to consider agricultural operations in their Municipal Development Plans. Section 632(3) of the *Municipal Government Act* requires that a

---

<sup>41</sup> *Ibid.*, s. 4.

<sup>42</sup> No other project classes have been prescribed by regulation under the *Natural Resources Conservation Board Act* as of the date of this paper.

<sup>43</sup> *Supra* note 39, s. 8.

<sup>44</sup> Alberta Association of Municipal Districts and Counties, *Loss and Fragmentation of Agricultural Land in Alberta* (Edmonton: Alberta Association of Municipal Districts and Counties, 2005).

municipal development plan must contain policies respecting the protection of agricultural operations, but not agricultural land specifically.

It should be noted that the AAFRD report, draft LARP and SSRAC advice are all quite consistent in seeing a key role for municipalities in protection of agricultural land and a role for the province in providing policy direction. Anecdotally, municipalities seem to be showing greater interest in conservation tools for protection of agricultural lands; both the Environmental Law Centre and the Miistakis Institute have been contacted by rural municipalities and NGOs working on land use planning issues, seeking further information and precedent documents for conservation tools.

### *Agricultural stakeholders*

The Agriculture and Food Council carried out a nine year initiative, which ended in 2009, dealing with environmental policies and issues related to Alberta's agri-food industry. Its report *Land Use Policy and the Agri-Food Industry in Alberta* made a range of recommendations, including support for the preservation of agricultural land: "The protection of agricultural land and its natural capital value should be one of the priorities of a balanced land use planning and policy framework."<sup>45</sup> The report gives significant focus to the link between agricultural land and natural capital and recognizes the complexity of land-use management. Of note are the definitions used in the report for both agricultural land and natural capital:<sup>46</sup>

- "For the purposes of this discussion, agricultural land is defined as cultivated land, native grassland or bush, rivers, creeks, riparian areas, and wetlands owned and managed by private landowners."
- With respect to natural capital, the report adopts the definition provided by Canada West Foundation in its report *Western Canada's Natural Capital*:

...including resources such as minerals, timber, and oil and gas...It also includes the land and water resources that anchor our quality of life and support economic activity such as agriculture, forestry, tourism and recreation. Natural capital also includes living ecosystems – grasslands, oceans and forests – that cleanse fouled air and water, reinvigorate soil and contribute to a predictable, stable climate.

The Agri-Environmental Partnership of Alberta (AEPA) is a partnership of agriculture industry organizations, government and Ducks Unlimited that works to develop policies and programs related to the agriculture industry and environmental matters. AEPA has various briefing and

---

<sup>45</sup> Agriculture and Food Council, *Land Use Policy and the Agri-Food Industry in Alberta* (Nisku, AB: Agriculture and Food Council, 2005), p. 24.

<sup>46</sup> *Ibid.*, p. 9.

position documents related to the LUF/ALSA; its document on fragmentation and conversion of agricultural land states the following position:<sup>47</sup>

Provincial policy establishes a consistent, credible, detailed process, after consultation with the agriculture industry (i.e. regional advisory land council), to help determine which and how agricultural lands should be protected. Regional and municipal plans would be required to use this system.

### Associated federal programs

Responsibility for agriculture in Canada belongs to both provincial and federal levels of government. In an effort to help clarify how conservation easements for agriculture may be used the research team looked to provincial and federal departments. Agriculture and Agri-Food Canada was reviewed for agricultural land conservation purposes and the Canada Revenue Agency (CRA) to understand the tax benefits related to donations of conservation easements.

#### *Agriculture and Agri-Food Canada*

Agriculture and Agri-Food Canada is mandated to provide information, research and technology, and policies and programs to achieve an environmentally sustainable, innovative, and competitive agriculture, agri-food and agri-based products sector that proactively manages risk. The Government of Canada and the provincial and territorial governments working with the Canadian agriculture and agri-food industry created an Agricultural Policy Framework (APF) in 2001. This was done in an effort to [create](#) common goals for food safety, innovation and environmentally-responsible production in agriculture. The APF was updated in 2008 to create Growing Forward 2008-2013. Growing Forward 2 is now being designed with programs targeted to address at least one of the following key core outcomes:

- Profitable and competitive industry;
- Ability to retain or capture domestic and international market opportunities;
- Prepared for and able to respond effectively to emergencies;
- Able to manage risk effectively.

The discussion document for Growing Forward 2 considers Global Agriculture and Food Trends and recognizes that:

- **Growth in agricultural and agri-food production is affected by natural resource constraints (for example, land and water).** Per-capita arable land has been declining

---

<sup>47</sup> Agri-Environmental Partnership of Alberta, *Advice to Regional Advisory Councils: Fragmentation and Conversion of Agricultural Land* (Edmonton: Agri-Environmental Partnership of Alberta, 2010).

globally, primarily due to population growth and urbanization. In general terms, global water resources are currently sufficient; however they are unevenly distributed and requirements are expected to increase by 40 percent over the next 20 years. Competition by other users of land and water will increase pressures to use resources more efficiently in the future.

While this statement may suggest that there is a need to exercise conservation/protection of natural resources including land there is little else throughout the current discussion documents that refer to land conservation.

The current Growing Forward 2 discussion document also includes a section called Challenges and Opportunities for the Canadian Sector. This section suggests that environmentally-conscious consumers are more and more interested in how agricultural products are produced. While Growing Forward 2 does not suggest this, conservation easements could be used to indicate certain management activities/requirements, providing the consumer a level of confidence in the product they are buying.

At the time this report was being researched, Growing Forward 2 was in the ‘engagement phase’. From a first round of discussions with representatives of Canadian agriculture, agri-food and agri-based processing sectors two broad outcomes and two key drivers had emerged as being central to the continuing success of the industry from now until 2020, and beyond. The second broad outcome (Adaptability and Sustainability) relates more to land conservation than the first (Competiveness and Market Growth). While CE’s could provide some sustainability benefits, they may be seen as a negative when it comes to “Adaptability” particularly as most conservation easements in Canada are perpetual and depending on how the document is written could be quite restrictive with respect to future land uses. The *Alberta Land Stewardship Act* allows for conservation easements to be registered for a term shorter than perpetuity. Depending on the objective of the conservation program a term easement may be useful as a legal backstop in testing management practices or community acceptability. One thing to consider is that the conservation easement term should be as enduring as the intent.

### *Canada Revenue Agency*

Under the *Alberta Land Stewardship Act*, a qualified non-government holder of a conservation easement must be a registered charity.<sup>48</sup> It is, therefore, important to look at what the Canada Revenue Agency (CRA) considers to be charitable in the context of potential holders of conservation easements for agriculture.

---

<sup>48</sup> *Supra* note 3, s. 28.

There is no federal law specifically governing charities in Canada.<sup>49</sup> A ‘charity’ is briefly described in the *Income Tax Act*, but the regulation is primarily left to a number of policy statements of the Canada Revenue Agency.

The Canada Revenue Agency makes a distinction between a *Non-Profit Organization* and a *Charity*, and dictates that a given organization can only be one of these.<sup>50</sup> Though there are many similarities, charities must meet a Public Benefit Test. This test requires an organization to show that:

its purposes and activities provide a measurable benefit to the public ... and the people who are eligible for benefits are either the public as a whole, or a significant section of it. The beneficiaries cannot be a restricted group or one where members share a private connection; this includes social clubs or professional associations.

CRA policy views these latter organizations as being established for “private benevolence,” and therefore not charitable.<sup>51</sup> This excludes several well-known types of non-profit organizations from becoming charities, such as trade associations, industry groups, and recreation groups.

It is also important to note that the charitable nature of conservation easements has not been a result of engineering them to fit a legal definition of ‘charitable’. Rather, they are recognized as charitable initiatives because of their inherent aim of bettering society as a whole.

### Canadian Ecological Gifts (EcoGifts) Program

Recognizing that habitat loss and degradation are the greatest threats to biodiversity in Canada and that many key habitats are on private land, the EcoGifts Program was established to provide incentive and recognition for landowners who to protect their ecologically sensitive land.<sup>52</sup> By participating in the program, landowners who donate title or an easement on ecologically sensitive land are eligible for special tax benefits. Ecologically sensitive land includes:

- Areas identified, designated, or protected under a recognized classification system;

---

<sup>49</sup> Richard Bridge, *The Law of Advocacy by Charitable Organizations: The Case for Change* (Vancouver: Institute for Media, Policy and Civil Society, 2000).

<sup>50</sup> Canada Revenue Agency, *Income Tax Interpretation Bulletin IT-496R: Non-Profit Organizations*.

<sup>51</sup> Canada Revenue Agency, *CPS-024: Guidelines for Registering a Charity: Meeting the Public Benefit Test*.

<sup>52</sup> Canadian Wildlife Service, *Canadian Ecological Gifts Program handbook: A Legacy for Tomorrow* (Ottawa: Canadian Wildlife Service, 2011); online:

<http://www.ec.gc.ca/Publications/B426E1B0-BA44-452C-A0FB-3BD2427E70D5%5CTheCanadianEcologicalGiftsProgramHandbook2011.pdf>.

- Natural spaces that are significant to the environment in which they are located;
- Sites that have significant current ecological value or potential for enhanced ecological value as a result of their proximity to other significant properties;
- Private lands that are zoned by municipal or regional authorities for the purpose of conservation;
- Natural buffers around environmentally sensitive areas such as water bodies, streams or wetlands; and
- Areas or sites that contribute to the maintenance of biodiversity or Canada’s environmental heritage.

The definition provided by the EcoGifts program is fairly broad but most definitely targeted at land to be protected for ecological purposes. There are EcoGifts easements in Canada that include a portion of land that has an agricultural purpose. These parcels of land also have an ecologically sensitive feature that is linked to the agricultural piece by being on the same land title. There are other circumstances where land has not been accepted into the program when the entire portion of the land associated to the land title is cultivated. It is not likely that any land with more intensive types of agriculture have ever applied to the program since the purpose is so clearly ecological. There is some limited potential to apply the EcoGift program to land that is encumbered with a CE for agricultural purposes if the land also has appropriate ecological features.

### Defining *Agricultural Land*

A main question for this report is to understand what is meant by “agricultural land and land for agricultural purposes”. As most readers are likely aware agriculture is a broad term that can be applied to extensive production (e.g., crops and grazing livestock) to more intensive production (e.g., greenhouses, confined feeding operations) up the value chain to the range of food processing.

“Agricultural land and land for agricultural purposes” are terms that are not defined specifically at a federal level. Canada Revenue Agency and Statistics Canada provide related definitions included below. Alberta Agriculture does define “agricultural land” in the *Agricultural Operation Practices Act*. However, it is what many would describe as a circular definition in that it defines agricultural land by saying it is what other pieces of legislation or documents identify it as without actually providing a definition.

Excerpt from *AOPA*:

(a.1) “agricultural land” means

- (i) land the use of which for agriculture is either a permitted or discretionary use under the land use bylaw of the municipality or Metis settlement in which the land is situated or is permitted pursuant to section 643 of the Municipal Government Act,
- (ii) land that is subject to an approval, registration or authorization, or

(iii) land described in an ALSA regional plan, or in a conservation easement, conservation directive or TDC scheme as those terms are defined in the Alberta Land Stewardship Act, that is protected, conserved or enhanced as agricultural land or land for agricultural purposes;

(b) “agricultural operation” means an agricultural activity conducted on agricultural land for gain or reward or in the hope or expectation of gain or reward, and includes

- (i) the cultivation of land,
- (ii) the raising of livestock, including domestic cervids within the meaning of the Livestock Industry Diversification Act and poultry,
- (iii) the raising of fur-bearing animals, pheasants or fish,
- (iv) the production of agricultural field crops,
- (v) the production of fruit, vegetables, sod, trees, shrubs and other specialty horticultural crops,
- (vi) the production of eggs and milk,
- (vii) the production of honey,
- (viii) the operation of agricultural machinery and equipment, including irrigation pumps,
- (ix) the application of fertilizers, insecticides, pesticides, fungicides and herbicides, including application by ground and aerial spraying, for agricultural purposes,
- (x) the collection, transportation, storage, application, use, transfer and disposal of manure, composting materials and compost, and
- (xi) the abandonment and reclamation of confined feeding operations and manure storage facilities.

The CRA, for the purposes of income reporting, defines “farming income” as income earned from the following activities:

- Soil tilling;
- Livestock raising or showing;
- Racehorse maintenance;
- Poultry raising;
- Dairy farming;
- Fur farming;
- Tree farming;
- Fruit growing;
- Beekeeping;
- Cultivating crops in water or hydroponics;
- Christmas tree growing;
- Operating a wild-game reserve;
- Operating a chicken hatchery; and
- In certain circumstances:
  - Raising fish;
  - Market gardening;



- Operating a nursery or greenhouse;
- Operating a maple sugar bush.

For Statistics Canada purposes the federal government asks “agricultural operators” to fill out a Census for Agriculture questionnaire. Agricultural operators are defined as a person responsible for the management and/or financial decisions made to produce agricultural commodities with the intention of selling them. Agricultural operations are those that grow/produce the following:

- Crops
  - Hay and field crops
  - Vegetables
  - Sod, nursery products and Christmas trees
  - Fruits, berries or nuts
  - Seed
- Poultry
  - Laying hens and pullets
  - Layer and broiler breeders
  - Broilers, roasters and Cornish
  - Turkeys
  - Other poultry
  - Commercial poultry hatcheries
- Livestock
  - Cattle and calves
  - Pigs
  - Sheep and lambs
  - Other livestock
- Animal products
  - Milk or cream
  - Eggs
  - Wool
  - Fur
  - Meat
- Other agricultural products
  - Greenhouse products
  - Mushrooms
  - Maple products
  - Bees owned (for honey or pollination)

As one can imagine each of the activities/items/products described in these lists use and will impact land in different ways and may or may not qualify for conservation easements for agriculture depending on the policy direction provided by the province.

## Review of Conservation Easements for Agriculture in Other Jurisdictions

---

Alberta is not the first jurisdiction in North America or Canada to legislatively enable conservation easements for agriculture. This research involved exploring the lessons to be learned from other programs regarding how agriculture was defined, how legislation/policy was framed, how programs were delivered, and how projects were evaluated.

### Legislation and implementation of conservation easements for agriculture in the United States

The review of American jurisdictions using conservation easements for agricultural purposes considered legislation and programs in California, Colorado, Delaware, Hawaii, Iowa, Massachusetts, Michigan, New Hampshire, and Ohio, as these jurisdictions reflected divergent approaches to both conservation easements for agriculture, and to the scope and scale of the application of easements. A detailed review of the approaches to agricultural easements taken in Colorado, California and Delaware is provided at Appendix A.

Conservation easement programs in the United States focused on agricultural lands can be characterized by having a clear focus on preserving productive lands and soils and preventing development of those areas to foster social, environmental and economic outcomes. This clear policy outcome however is not often reflected in any overly restrictive policy statement regarding the type of lands where agricultural easements will be granted but is flexibly defined to allow broad local planning goals and initiatives to be undertaken.

#### *How agriculture or agricultural land is defined*

The general policy intent of conservation easements for agriculture in the reviewed jurisdictions focus on the preservation of agricultural outcomes related to social, economic, and environmental goals. Some jurisdictions, such as Colorado, focus more on environmental and open space conservation, with agricultural lands contributing to these outcomes.

Definitions of agricultural land are typically not strictly defined and are often framed in an inclusive manner, including everything from cropping, to animal husbandry, to, in some instances, farmers markets. However, when one considers the legislative approach to allocating public investments and prioritizing lands of agricultural significance at a national, state and local level, it becomes clear that the programs are focused on the biophysical aspects of land and preserving these lands from development (primarily urbanization). In this regard,

state and county programs are focused on lands evaluated to be of high priority due to their productive soils and other productivity criteria.

A sample of purposes for which agricultural easements have been pursued under state programs is outlined in Table 1.

**Table 1: Agricultural Easement purposes for select states**

State	Purpose for Agricultural Easements
California	Regional, national and world food supply Sustaining rural communities Agricultural sustainability Planning and urban development “balance” Economic vitality
Colorado	One aspect of the state’s “open space” program Maintaining and restoring wildlife habitat Protection of “open space” heritage
Delaware	Protection of viable and productive farm land Public utility of agriculture in the state Sustaining a viable agricultural industry for future generations
Ohio	Sustaining food production Scenic and heritage preservation Environmental protection/wildlife benefits Sustaining family farms Renewable energy

### *How legislation/policy is framed*

Policy and legislation at the state level can be categorized as enabling, both through providing the requisite recognition of easements in gross for agricultural purposes and in providing for granting and funding mechanisms that facilitate local easement programs. Legislated granting programs and state-based tax regimes have been used to facilitate the program delivery at the municipal or county level, targeting the preservation of high “value” or “priority” agricultural lands. Indeed, the primary purpose of agricultural easements in many states, the avoidance of conversion of valued agricultural lands, becomes readily apparent through the structure of state and county programs and related funding mechanisms.

In the United States, programs for conservation easements for agriculture typically deal with the following factors in state legislation and in county ordinances:

- eligibility of land;
- restrictions on land use (if any);
- assessment of easement value;
- funding of easements (and other acquisitions);
- criteria guiding the funding/approval process;
- process of review and termination of easement; and
- linkages with municipal/local planning processes.

### *Program delivery*

The focus of program delivery for agricultural land preservation in the reviewed jurisdictions is on municipal and county planning and preservation programs facilitated by state-run grant programs.

Agricultural land eligibility and prioritization is a central focus of the enabling state and municipal legislation. This prioritization system focuses primarily on several criteria reflective of a host of policy intents, with a focus on preservation of the biophysical and economic sustainability of agriculture in a region.

Policy and program application is also heavily based on geographic extent and location of agricultural land. A jurisdiction's prerequisite of prescribed parcel size that may "qualify" for an easement is often a proxy for sustainability goals, in terms of establishing a threshold for economic viability. Some states have minimum areas of agricultural land ranging from as low as 5 acres (Michigan) to 40 to 50 acres (Ohio and Pennsylvania respectively) to 200 acres (Delaware) and 320 acres (Boulder County, Colorado). Often these parcels must be contiguous acres, with some allowances for smaller parcels where they are adjoining preexisting agricultural preserves, are proximal to markets, or have increased productive value.

Upon identification of priority lands incorporation of those lands into a specific program track may occur. Restrictions on land use are also mandated by legislation in some instances, limiting the flexibility to negotiate easement agreement terms in some circumstances.

### **Legislation and implementation of conservation easements for agriculture in Canada**

Nine provinces and the Yukon Territory have conservation easement legislation. Newfoundland and Labrador has a piece of legislation (the *Heritage Resources Act*) that can be used to enact an easement for the purpose of heritage conservation, which some have interpreted could include land. All were enacted between 1995 and 2001.

### *Legislation and/or policy framework*

Many provinces have specific Conservation Easement Acts while others have included a Conservation Easement section in other pieces of related legislation (e.g. *Land Titles Act* in British Columbia, *Wildlife Conservation Act* in PEI or the *Alberta Land Stewardship Act*). Each of the Acts includes similar components such as who can hold a CE, is notice required, by and to whom, term of agreement, termination and assignment of agreement, etc. They also all include a section about the purposes for which a conservation easement can be registered on a property. The wording varies but essentially the main purpose of all CEs defined in provincial legislation is to conserve, protect, restore or enhance natural landscapes or landscape features. Two provinces specifically include conservation of land for an agricultural purpose – Ontario and Alberta. While Saskatchewan and New Brunswick do not include “agricultural land” as a purpose, they do include the conservation of soil.

### *Application of Conservation Easements for Agriculture*

Even though only two provinces specifically name conservation of agricultural land as a purpose, the use of conservation easements within an agricultural context in Canada is more complex than the presence of enabling legislation. Some provinces without agricultural purposes in their CE legislation have farms with conservation easements; land trusts with ‘agricultural conservation’ as a mandate purpose are common across the country; farmland conservation land trusts may or may not use conservation easements; and agricultural land trusts may hold conservation easements for ecological purposes.

While the authors are aware of a number of municipalities active in applying conservation easements for environmental purposes and other land trusts that work in agricultural landscapes, there are two examples of land trusts that are primarily focused on protecting agricultural land with conservation easements. These land trusts are HelioTrust (a sub-group of the Eco-Action Centre) in Nova Scotia and the Ontario Farmland Trust. Both of these groups were formed in reaction to seeing high quality food producing land being converted to different land uses (especially what can be referred to as rural and urban sprawl). Beyond protecting land so it can grow food both land trusts also speak to the broader benefits of protecting agricultural land.

HelioTrust states on its website: “Farmland Conservation Easements, where a farmer is paid to sign a legal document preventing them from selling off good farm land for development, helps both the retiring farmer and the new farmer by removing any speculative value distortions on farm land.”

Ontario Farmland Trust includes the following as reasons they protect farm land:

- **Food Security and Local Food Supply**

Preserving farmland helps ensure a continued supply of locally grown produce as a growing number of consumers are revealing their preference for and supporting the provision of local sources of farm products.

- **Economic Benefits**

The Ontario farm and food processing sector generates over \$30 billion in sales - more than 35 percent of Canada's Agri-Food sector gross domestic product - and employs 700,000 people.

Saving farmland also provides fiscal stability for local governments. New development requires services such as schools, roads and fire/police protection, whereas privately owned and managed agricultural land requires very few services. Cost of Community Services studies in both the U.S. and Canada show that farmlands more than pay for the municipal services they require, while taxes on residential use, on average, fail to cover costs.

- **Protection of the Environment**

Well-managed agricultural land supplies important non-market goods and services for our environment. Farmlands provide food and habitat for wildlife, help control flooding, protect wetlands and watersheds and maintain air quality. They can absorb and filter wastewater and provide groundwater recharge.

## Charitable Purpose in Common Law Jurisdictions

As Alberta is a provincial and federal common law jurisdiction, it is instructional to look at other similar jurisdictions for insight as to how charitable purposes are legally framed, especially as the policy of charities has begun to evolve in recent years. These pieces of legislation outline the specifics and the principles behind what gifts are considered charitable.

Great Britain passed a new *Charities Act* in December 2011 which consolidated and clarified several existing pieces of legislation. Although their explicit list of purposes contains “environmental protection or improvement”, it contains no purposes related to agriculture.<sup>53</sup>

Canada has refined its definition of charitable gifts<sup>54</sup> to include ecological gifts in recent years.<sup>55</sup> However, although agricultural or farmland could be donated as personal-use property, it would be a donation in fee simple, as there is no mention of agricultural or farm land in the context of conservation easements.

---

<sup>53</sup> *Charities Act 2011*, (U.K.), c. 25, s. 3.

<sup>54</sup> Canada Revenue Agency, *P-113: Gifts and Income Tax 2010*.

<sup>55</sup> As noted above, there is no definition of “charitable” in the *Income Tax Act*, so direction comes from the Canada Revenue Agency’s policy and interpretation documents.

In the United States, for a gift associated with agricultural land to be considered charitable, it can be farmland, but it must be “exclusively for conservation purposes”. Conservation means it is perpetual, and in the case of farmland, it is a sub-set of ‘open space’, and it must be for scenic enjoyment or pursuant to government policy, and must provide a “significant public benefit.”<sup>56</sup>

## Examination of Potential Purposes for Conservation Easements for Agriculture

---

### Advisability of Refining the Purpose for Conservation Easements for Agriculture

After conducting the reviews described above, the authors conclude that there is currently no focused policy direction for conservation easements for agriculture in Alberta.

There are Government of Alberta policies around agriculture broadly, but these tend to focus on agri-business and the agricultural industries, rather than on agricultural land. The 1996 Municipal Affairs *Land Use Policies* do encourage consideration of fragmentation, but the goal is to support the industry, not the land. Although many Government of Alberta programs (especially those of Alberta Agriculture and Rural Development) could be said to have an agricultural land conservation intent, there are no agricultural land conservation goals laid out by the Government of Alberta in policy, which might have been used to give direction on the desired outcomes sought from the use of conservation easements for agriculture.

The authors suggest that that this represents a significant policy gap for the Government of Alberta, and a serious threat to the successful use of this tool, for at least the following reasons:

#### *Goals for agricultural land conservation vary*

The motivations for conserving agricultural land vary considerably, especially between agriculturalists and non-agriculturalists. Some of these goals can be in direct conflict, especially those that tend towards maximizing annual production versus those tending toward maximizing ecological function.

#### *Conservation easements for agriculture could be considered non-charitable by the Canada Revenue Agency*

As noted above, depending on the intended purpose, the use of conservation easements to conserve agricultural lands may be considered non-charitable by the Canada Revenue Agency.

---

<sup>56</sup> *Internal Revenue Code*, U.S.C. 26, § 170(h).

There are strict rules on what qualifies as a charitable activity, and equally strict rules on who qualifies as a charitable organization. The *Alberta Land Stewardship Act* requires non-government holders of CEs to be charities. As charities, those groups are strictly limited in the actions they may or may not undertake. If the purposes for conservation easements for agriculture as laid out in policy are seen as supporting specific interests rather than the public interest, there would be a domino effect which would effectively remove land trusts' ability to hold CEs for agriculture.

More broadly, the traditional intent of conservation easements in general is a societal one, serving the public interest. The charitable guidelines could be said more to *reflect* the charitable intent of CEs rather than *dictate* it.

### ***Alberta's private land conservation community will seek further direction***

There is an active private land conservation community in Alberta, many of whom already seek to reconcile ecological and agricultural goals within their work. These organizations and municipalities, when they begin to explore this new dimension to an old tool, will seek direction as to how to address conflicts. As well, the new agricultural purpose to conservation easements will encourage new players into the land trust community, who will arrive with these fundamental questions.

### ***Conservation easements may be legally fragile without a strong policy foundation***

In the United States, with over 100 years of experience with conservation easements, the perspective is that legal challenges are a question of 'when' not 'if'. When one considers that these devices are generally perpetual, that makes sense – within a hundred years, someone will be disenchanted with the easement. For that reason, land trusts are increasingly looking at what makes a CE robust versus what makes it fragile.

The source of legal fragility in conservation easements generally springs from the inability to connect *restrictions* in the CE with the stated *purpose* of the CE. If government policy encourages conservation easements for agriculture purposes which cannot rationally be supported by a suite of specific restrictions, it may unintentionally make the CEs vulnerable to legal challenge.

### ***Contribution of CEs for agriculture to agricultural land conservation will be difficult to measure***

The contribution of conservation easements for agriculture to the success of the Government of Alberta's broader agricultural land conservation goals will be difficult to assess if there is no articulation of the goals CEs for agriculture are intended to support. The conception of the regional plans is that they will describe a suite of desired outcomes, and the conservation and



stewardship tools will help Albertans achieve those outcomes. A lack of clarity on the policy intent of the tools (like CEs for agriculture) will make it difficult to know how these tools can be used to support the various outcomes.

Refining the purpose of CEs for agriculture will contribute to meeting the *ALSA* legislative purposes. These purposes include means to plan for the future, and recognizing the “reasonably foreseeable needs of current and future generations”<sup>57</sup> and enabling “sustainable development”<sup>58</sup>. Agricultural purposes, properly articulated in policy, will contribute to meeting these *ALSA* purposes.

### *May be a perception that conservation easements for agriculture are being misused*

In the absence of clearly articulated policy goals, there may be a perception that the CE for agriculture tool is being misused, potentially undermining the tool. The authors’ conversations with those in the agriculture and conservation communities found a high level of support for the CE for agriculture tool. However, opinions on how the tool should be used were varied and tended to assume a certain application. For example, while some saw it as an ideal tool to protect agricultural operations from encroaching residential developments (e.g., creating a buffer around intensive livestock operations), others saw it as a way to protect land and water resources from intensive agriculture. The salient point is that, though the current policy articulation could support either, each of these people would see the other’s use as a *misuse* of the tool they supported.

### *Agriculture is a land use not an outcome*

From 1996 to 2009, the purposes for conservation easements in Alberta (biological diversity and scenic beauty) were framed as outcomes, with no reference to land use. Essentially, one could pursue any land use practice on a CE property, so long as the outcome of environmental protection or aesthetic protection was achieved.

The 2009 introduction of agriculture into the CE legislation added not just a new purpose, but a new *type* of purpose – a land use rather than an outcome. This left a conceptual hole in that it was unclear as to the desired *outcome*, and the conservation goal has to be inferred from the context around it.

## **Why Conserve Agricultural Land**

Although not exactly the same, the question of ‘why should we conserve agricultural land’ is at the base of the question of ‘what should be the policy goal of conservation easements for

---

<sup>57</sup> *Supra* note 3, s. 2(b).

<sup>58</sup> *Ibid.*, s. 2(d).

agriculture.’ The former is not a new question and it has been addressed by several agricultural conservation initiatives, laws, land trusts, and CE templates around the continent. Many of these draw from similar landscapes, legal structures, commodity markets, and community conservation issues to those we face in Alberta.

Reviewing the myriad of farm and agricultural land protection rationales is like a shopping list of purposes from which you can choose those which match your specific policy purpose. The task of transitioning from the full list of agricultural land conservation purposes to appropriate purposes for CEs for agriculture in Alberta involves filtering through the existing policy landscape in Alberta, clarifying the *policy* need.

To that end, there are a number of needs and circumstances (many reflected in the observations above) that define the space an Alberta policy needs to occupy. These include:

- Ensuring private land conservation organizations can match their purposes to the purposes of the CE for agriculture tool;
- Distinguishing/combining/reconciling agricultural goals with environmental and scenic goals;
- Distinguishing from ‘Right-to-Farm’ policies;
- Reconciling charitable and non-charitable purposes;
- Preventing unintentional structural flaws in the CE;
- Identifying requirements and options;
- Addressing needs/contributions of different agricultural operations (especially cropland and rangeland);
- Explicitly recognizing different components of ‘agriculture’ (production, processing, marketing, inputs);
- Reconciling food production and agri-business policies; and
- Coordinating with other conservation, land use planning and agriculture promotion policy initiatives.

### *How do other jurisdictions approach the ‘purpose’ conundrum?*

There is no question that stating the policy purpose for conservation easements for agriculture is a challenge for all jurisdictions. A review of several approaches indicates there is no standardized method to doing so. However, the different approaches can be categorized and it is useful to do so to assess if one type of approach is most appropriate for Alberta.

#### **MIXING PURPOSES**

This is a very common approach, where ecological, cultural, scenic, open space, and/or other purposes are combined in one policy statement, one organization, or one conservation easement. The integration of these purposes is very mediagenic, but in

practice the purposes can confound each other. The approaches least likely to see conflict are those that state explicitly how the purposes relate and what to do if they do conflict.

#### ***DEFINING FARMLAND***

Several policy statements and state laws define what farmland or agricultural land is. Some of these are specific to the point of identifying farms in terms of precise acreage, economic outputs, crops, and ownership structure. The question of the *purpose* is subsumed in the precise definition of what is being conserved. For example, a goal to control fragmentation of farmland is addressed by defining a farm as being greater than X acres.

#### ***REFERENCING OTHER POLICIES***

In several cases, the policy, statute or directive will make reference to other policies, statutes or directives to provide clarity on aspects of the purpose. For example, this may occur when a land conservation statute leaves it to an agricultural practices statute to define farmland, an agricultural CE law refers to a policy initiative that defines threats to agriculture, a state level statute refers to purposes defined by a local government, or federal level tax law directs what is or is not a charitable purpose.

#### ***DEFERRING TO THE LAND TRUSTS***

In some cases the law or policy is directed at creating the architecture of the tool, but its use is left to the private land conservation organization. While policies around taxation, governance, etc. are still salient, whether the CEs for agriculture protect agri-business, land availability, or rural heritage is left to the mandate of the land trust.

#### ***Where do other jurisdictions articulate their CE for agriculture purposes?***

The policy trail for agricultural land conservation in other jurisdictions travels through several levels from state-level laws to parcel-specific CE documents. Depending on the jurisdiction, the articulation of the purpose of conserving agricultural land may appear at any one of the following levels:

#### ***STATE LAW***

Some state-level governments in the United States have chosen to articulate the reason for conserving agricultural land directly within their statutes.

#### ***LAND TRUST ORGANIZATIONAL PURPOSE***

In many cases, the purpose and associated use of the CE for agriculture tool is most directly reflected in the mission statement of the land trust. The law may be enabling only to the point of creating the opportunity for CEs to exist, but the purposes are defined on a case-by-case basis by each organization using them.

### **CONSERVATION EASEMENT PURPOSE**

Many land trusts hold CEs for various purposes (recreation, ecology, agriculture, heritage, etc.). Often, they have a template CE for each type of CE, each with a set of purpose statements that define what that CE is intended to accomplish. The one for agricultural land conservation articulates a purpose that is different than those for their other types of CEs.

### ***What are the potential purposes for conservation easements for agriculture?***

The above sections speak to how other jurisdictions approach *structuring* CEs for agricultural purposes, but not what those purposes are. This section will summarize the range of potential purposes, then categorize them. The intent is to create a framework for analysis and for the recommendations in the next section.

The authors explored several laws, policy statements, analyses, organizational mandates, and conservation easement documents from Alberta, Ontario, Nova Scotia, and federally and from throughout the United States (see Appendices). Ultimately, a broad range of purposes currently underpinning agricultural land conservation efforts was inventoried.

Because no program – and certainly no policy statement – focuses on a single distinct purpose, the authors have gathered like purposes together to create *Purpose Categories*. The authors believe these broad categories are the most appropriate level for the Government of Alberta to articulate a policy statement about the intended purpose of CEs for agriculture. Having said that, the sub-points are critical illustrations of the category, and they are drawn nearly verbatim from various CEs for agriculture and agricultural land conservation initiatives around the continent.

### **ECONOMIC**

Purposes related to the financial and agri-business aspects of conserving agricultural land, which may be at a national, regional, local or farm-specific level. Examples include:

- National economy
- Jobs (regional)
- Agri-tourism
- Economic stability
- Reduce municipal servicing costs
- Regional/farm economy

### **FOOD PRODUCTION**

Purposes related to the production and provision of food, framed in a local to global context, perhaps with reference to security or health issues. Examples include:

- Local sourcing

- Quantity of farmland
- Quality farmland
- Limit dependence on foreign food
- Retain options (ag land bank)
- Healthy food

#### *CULTURE*

Purposes related to the traditional social fabric of a place, with reference to the historical farming community and/or the rural sense of place. Examples include:

- Sense of place
- Rural culture
- Heritage/history
- Family farms
- Rural/farm communities
- Opportunities for new generations

#### *OPEN SPACE*

Purposes related to density of settlement or development relative to adjacent or prevalent land uses, usually referring to low level of built structure, and an associated physical aesthetic. Examples include:

- Scenic beauty
- Recreation
- Thwart sprawl/indiscriminate land conversion
- Low density transportation networks

#### *ENVIRONMENT*

Purposes related to the ecological structure and function of an agricultural landscape, characterized in terms of site-specific features to regional interconnections. Examples include:

- Wildlife habitat
- Riparian areas
- Flood control
- Soil conservation
- Wetlands
- Water quality
- Watersheds
- Native vegetation

## **PRACTICES**

Purposes related to farming and ranching practices undertaken on an agricultural landscape, primarily with reference to those that have a limited or benign impact on the ecological function, sustainability of production, and/or human health benefits. Examples include:

- Organic
- Minimize negative effects
- Grazing
- Fresh food
- Low/no till

## **Analysis**

The central question to this study and to this report is, of the potential purposes for CEs for agriculture, which are appropriate to Alberta at the provincial policy level. To inform that question, the authors took the categories identified in the previous section, and assessed each one based on a series of criteria. The result was a subjective determination of the applicability of each *Purpose Category* as a provincial policy foundation for conservation easements for agriculture.

The assessment was done based on the research described above, as well as the authors' pre-existing knowledge of the policy framework in Alberta, agricultural land conservation issues in Alberta, conservation easement practice and law, the Alberta private land conservation community, ecosystem management, and applicable law across Canada.

Each Purpose Category was assessed based on the following criteria:

### ***Relevance to agricultural issues in Alberta:***

Are the issues that underlie the potential purpose even relevant to Alberta's circumstances with regard to agriculture? If this is not the case, the potential purpose is inapplicable.

### ***Relation to the public interest:***

Does the potential purpose support public and societal issues, or does it support a specific group or interest? Because of the limitations identified above regarding charitable activity in particular, the purpose must support the public interest.

### ***Ability to support legally robust CEs:***

Can the restrictions within a CE be crafted in such a way as to support the purpose in a legally defensible way? As this is difficult to ascertain due to the variety of factors in crafting a CE, this is of lesser importance than the previous two criteria.

***Potential for conflict with other purposes:***

What is the potential for conflict with other CE purposes and goals? A key consideration here is how this might be mitigated by identifying purposes with ‘primacy.’

***Capacity for delivery:***

What is the potential for existing or new organizations and/or government agencies to deliver CEs for agriculture with this purpose? This assessment goes beyond the traditional land trust community, but considers the likelihood of potential ‘new’ players actually engaging.

***Conclusion:***

This is the final assessment of the authors relative to each Purpose Category as to whether it is appropriate as a provincial-level policy foundation for the use of conservation easements for agriculture. As noted above, this is a subjective assessment. The first two criteria must be assessed positively for this conclusion to be positive.

**Table 2: Conservation easements for agriculture ‘purposes’ analysis matrix**

Purpose Category	ECONOMIC	FOOD PRODUCTION	CULTURE	OPEN SPACE	ENVIRONMENT	PRACTICES
Example Purposes	<ul style="list-style-type: none"> <li>National economy</li> <li>Jobs (regional)</li> <li>Agri-tourism</li> <li>Economic stability</li> <li>Reduce municipal servicing costs</li> <li>Regional/farm economy</li> </ul>	<ul style="list-style-type: none"> <li>Local sourcing</li> <li>Quantity of farmland</li> <li>Quality farmland</li> <li>Limit dependence on foreign food</li> <li>Retain options (ag land bank)</li> <li>Healthy food</li> </ul>	<ul style="list-style-type: none"> <li>Sense of place</li> <li>Rural culture</li> <li>Heritage/history</li> <li>Family farms</li> <li>Rural/farm communities</li> <li>Opportunities for new generations</li> </ul>	<ul style="list-style-type: none"> <li>Scenic beauty</li> <li>Recreation</li> <li>Thwart sprawl/indiscriminant land conversion</li> <li>Low density transportation networks</li> </ul>	<ul style="list-style-type: none"> <li>Wildlife habitat</li> <li>Riparian areas</li> <li>Flood control</li> <li>Soil conservation</li> <li>Wetlands</li> <li>Water quality</li> <li>Watersheds</li> <li>Native vegetation</li> </ul>	<ul style="list-style-type: none"> <li>Organic</li> <li>Minimize negative effects</li> <li>Grazing</li> <li>Fresh food</li> <li>Low/no till</li> </ul>
<b>Analysis</b>						
Relevance to agricultural issues in Alberta	<b>Yes</b> Economic issues relative to agriculture at all levels are of high significance to Alberta	<b>Yes</b> Agricultural land quantity, fragmentation, local food, food security are all of high significance to Alberta	<b>Yes</b> Rural heritage and sense of place, and agricultural history are of high significance to Alberta	<b>Yes</b> Although the term is less used in Alberta, the issues of sprawl, aesthetics and transportation network density are of high significance to Alberta	<b>Yes</b> The ALSA, the conservation and stewardship tools, the cumulative effects framework are all keystone examples of the high significance of the environment to Alberta	<b>Yes</b> Environmental farm plans, low tillage, and other BMPs have been a vital element of Alberta’s agricultural policy for decades.
Relation to the public interest	<b>No</b> Only at the highest levels could this case be	<b>Yes</b> The food production element of	<b>Yes</b> Culture defines civil society, and cultural and	<b>Perhaps</b> As open space is a nebulous concept, its relation to the	<b>Yes</b> As a representation of the basic	<b>Perhaps</b> As the practices are generally in support of



Purpose Category	ECONOMIC	FOOD PRODUCTION	CULTURE	OPEN SPACE	ENVIRONMENT	PRACTICES
	made; following the lead of the CRA's description of public interest charities vs. specific interest NGOs, agri-business issues are industry specific, not societal	agriculture is societal in the sense that it is a basic human need	heritage preservation serve society as a whole	public interest depends on its definition; when defined relative to recreation, aesthetics and systems accessible to all citizens, it serves the public interest	processes that support life, the environment represents a fundamental human need	another purpose, not purposes themselves, the relation to the public interest is one step removed
Ability to support legally robust CEs	<b>Perhaps</b> It would be difficult to craft land use restrictions within a CE in support of the economic viability of a parcel of land	<b>Yes</b> Land use restrictions within a CE ensuring the parcel is used for food production would be robust	<b>Perhaps</b> The challenge in defining restrictions in support of a certain character is defining that character; the experience of historical preservation provides solid templates	<b>Yes</b> This is perhaps the easiest purpose to support with CE restrictions as controls on subdivision and buildings are straightforward	<b>Yes</b> There are 16 years of successful experience developing land use restrictions within a CE in support of ecological function	<b>Perhaps</b> CE restrictions generally focus on practices of a sort, but an element of fragility arises when the restriction is based on the practice rather than the purpose
Potential for conflict with other purposes	<b>Yes</b> The classic dynamic of economic development	<b>Perhaps</b> If the focus of food production is one of maximizing output, it is likely	<b>Perhaps</b> Again because explicitly defining the character of a place is slippery	<b>No</b> The potential for conflict is very low largely due to the nebulosity of	<b>Yes</b> The potential for conflict is very high in that several	<b>Perhaps</b> As described in most ag CE programs, practices are

Purpose Category	ECONOMIC	FOOD PRODUCTION	CULTURE	OPEN SPACE	ENVIRONMENT	PRACTICES
	being the trump card over cultural and environmental is highly likely if pursued myopically	adversely to affect rural character and ecological function	the potential for conflicts exists insofar as traditional practices limit economic growth or impact ecological function	this purpose which could allow many purposes	agricultural practices have a significant detrimental impact on ecological systems	generally 'sustainable' practices, which may impact short-term economic goals
Capacity for delivery	<b>No</b> There are numerous industry, commodity, and agri-business groups which focus on economics, but none of these would be deemed charitable and eligible to hold CEs for agriculture	<b>Perhaps</b> Of the numerous commodity, industry, and agricultural conservation groups, some could achieve charitable status and pursue agricultural land conservation, but the number in the short term would be limited; municipal agricultural service boards could conceivably engage as well	<b>Yes</b> Agricultural societies tend to emphasize the cultural side of agriculture in support of the community benefit, and could rationally become qualified organizations; likewise agricultural services boards could conceivably engage as well	<b>Yes</b> Again, the nebulosity of 'open space' would provide opportunities to engage heritage, ecological, and/or municipal organizations	<b>Yes</b> The most significant capacity is in the ecological area as there are already established environmental land trusts, and many municipalities hold CEs already	<b>No</b> It is unlikely that a qualified organization would arise or evolve that would seek to use CEs for ag purely to promote certain practices

Purpose Category	ECONOMIC	FOOD PRODUCTION	CULTURE	OPEN SPACE	ENVIRONMENT	PRACTICES
<b>Summary</b>	Disconnected from public interest because too connected to personal / industry interests; makes this inapplicable for CEs for agriculture	Serves public interest directly in terms of promoting food production, has low potential for conflict and could be legally robust	‘Rural’ and ‘Ag’ are not the same thing, but public interest is clear in protecting cultural values; main reason for ‘yes’ is this is what many people actually mean when they want to conserve agricultural land (make the argument that the ‘rural’ community is largely a function of the low density ag landscape they inhabit)	Agriculture is recognized as a sub-set of open space; the question mark arises from the sense that the purposes in ‘open space’ is already a sub-purpose within ALSA that applies to ecological, scenic and agricultural CEs	Is very connected to the public interest, but (arguably) it is covered already in environmental CE; however, <u>interface</u> of ‘environment’ and ‘ag’ is unique area –there is value in an agri-environmental CE; also, everyone the authors spoke to assumed this was the intended use of CEs for agriculture	These are not purposes, though they are often mentioned. In fact, these are potential practices that could be pursued in support of the purposes (e.g., low till to support soil conservation), so would only be relevant insofar as they support the higher level purposes
<b>Applicable to CE Ag policy in Alberta?</b>	No	Yes	Yes	?	Yes	In support

## Review of Delivery Mechanisms for Conservation Easements for Agriculture

---

### Eligible holder requirements

The *Alberta Land Stewardship Act (ALSA)* defines who is eligible to hold a conservation easement; these bodies are known as “qualified organizations”.<sup>59</sup> Broadly speaking, qualified organizations fall into two categories: government entities and charitable non-government organizations.

#### *Government entities*

In this category, qualified organizations include the Alberta government, provincial government agencies and municipalities. It should be noted that wording changes in the *ALSA* definition of “qualified organization”, as compared to the original definition in the *Environmental Protection and Enhancement Act (EPEA)*,<sup>60</sup> may have implications for the range of organizations that may hold conservation easements going forward.

Under the *EPEA* definition, a government agency was defined as:<sup>61</sup>

- (i) a corporation that is an agent of the Government, or
- (ii) a corporation, commission, board or other body whose members are appointed by an Act of the Legislature, the Lieutenant Governor in Council or a Minister of the Government, or any combination of them.

Under *ALSA*, “government agency” is not defined. The *EPEA* definition points to a requirement for a clear structure and grant of government authority that may not be required under *ALSA*. This could offer greater flexibility to the Alberta government and its related organizations that may wish to hold conservation easements for agriculture or other purposes.

With respect to municipalities, under *EPEA*, the definition of “qualified organization” made reference to a “local authority”, which was also defined in that Act.<sup>62</sup> That definition focuses on the municipality as an entity, referring to the corporation of a city, town, village, summer village, municipal district or specialized municipality, and a Metis settlement. It also included specified cabinet ministers where improvement districts or special areas were concerned.

---

<sup>59</sup> *Supra* note 3, s. 28(c).

<sup>60</sup> R.S.A. 2000, c. E-12, previously s. 22(1)(e), repealed by *ALSA*.

<sup>61</sup> *Ibid.*, s. 1(x).

<sup>62</sup> *Ibid.*, s. 1(jj).

Under *ALSA*, the definition refers instead to a “local government body”, which is separately defined in that Act.<sup>63</sup> That definition focuses on the governance of municipalities and other bodies, referring to governing bodies, boards of directors or trustees and councils. Where this may have the most significance is in relation to internal process municipalities may need to follow to hold conservation easements in a legally sound fashion. The scope of this definition encompasses regional service commissions, which were specifically excluded from holding conservation easements under *EPEA*. In addition, it should be noted that regulations may be made under section 66 *ALSA* to designate any person or entity as a local government body, which could broaden the scope of potential qualified organizations considerably.

### *Charitable organizations*

The other category covered by the definition of “qualified organization” is that of charitable organization. It is important to note that not all charities may be qualified organizations; there are three limitations imposed within the definition:<sup>64</sup>

1. The organization must be a registered charity as defined under the federal *Income Tax Act*.<sup>65</sup> This means it must:
  - have been established in Canada;
  - be based in Canada; and
  - be registered with the federal government as a charitable organization, private foundation or public foundation.
2. One of the organization’s objects, as set out in its incorporating documents, must be to acquire and hold interests in land for purposes “substantially the same” as any of the purposes for which a conservation easement can be granted.<sup>66</sup>
3. The organization’s governing documents (e.g., bylaws) must include a requirement that, if the organization is or plans to be wound up, all conservation easements will be transferred to another qualified organization.

To qualify for registration as a charity under the *Income Tax Act*, an organization must have objects that are solely charitable and carry out activities that support those objects. The organization must be able to show that it uses all its resources, including money, staff, volunteers and property, to carry out these charitable activities. It must also show that its objects and activities provide a measurable benefit to the public as a whole or to a significant

---

<sup>63</sup> *Supra* note 3, s. 2(1)(q).

<sup>64</sup> *Supra* note 3, s. 28(c)(iv).

<sup>65</sup> R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), s. 248(1).

<sup>66</sup> The purposes are set out in s. 29(1) *ALSA*, *supra* note 3.

segment of the public.<sup>67</sup> There is no definition of “charity” or “charitable” in the *Income Tax Act*; common law decisions have been used by courts to determine the meaning. Based on the common law, there are four broad categories of charitable purpose: poverty relief; advancement of education; advancement of religion; and other purposes beneficial to the community.<sup>68</sup>

Non-government organizations that do not fit the limitations above will not meet the requirements for a qualified organization and may find it challenging to modify their structure, operations and activities to be able to successfully register as a charity in accordance with the *Income Tax Act*.

### Organizational and capacity challenges

As the conservation easement is a voluntary tool, it is critical to look at the organizational and capacity challenges – and opportunities – for these groups. Unlike strictly regulatory tools, the success of the CE tool (like all voluntary tools) is based on its acceptability to the potential user. The work of the qualified organization is to conceive their tools in such a way as to create an opportunity for the goals of the landowner to overlap with theirs.

From a policy design perspective, it is also important to recognize that no one is required to use these tools. If the policy maker’s intent is to see these tools used in support of the policy goal, then understanding the degree to which the tool can be utilized by qualified organizations, and removing barriers to its use, becomes critical.

With the expansion of the CE purposes to include agricultural land, a new dimension to this challenge emerges. Although Alberta has an established record of use of CEs, it is difficult to say with certainty which current qualified organizations will seek to use CEs for agriculture, and which non-traditional organizations may come forward seeking to use this tool. The authors believe it is unlikely that the greater use of CEs for agriculture will come from newly-established agricultural land trusts.

This section summarizes the types of organizations the authors anticipate could come forward seeking to use the CE tool for agricultural land conservation. This includes looking at the purpose, capacity, opportunities, and issues inherent in each group.

---

<sup>67</sup> See Canada Revenue Agency, “What is charitable?”, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pplyng/cpc/wtc-eng.html>.

<sup>68</sup> Canada Revenue Agency, *Guidelines for Registering a Charity: Meeting the Public Benefit Test*, Reference Number CPS-024 (Canada Revenue Agency, 2006), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html#footnote1>.

### *Current conservation easement activity in Alberta*

To set the context, it is important to understand the level of CE activity we have achieved in Alberta since the introduction of the tool in 1996. The Land Stewardship Centre (LSC) reports that there are 1616 conservation easements registered in Alberta (B. Ilnicki, personal communication, November 30, 2011). There are currently twelve charitable private land conservation organizations (land trusts) active in Alberta. These range from national organizations with provincial chapters, to province-wide associations, to regional land trusts, to local land trusts with one or two properties. As of January 2012, thirteen Alberta municipalities held conservation easements (B. Ilnicki, personal communication, January 23, 2012). Some of these held one or two CEs, while others hold hundreds.

### *Who is likely to use conservation easements for agriculture*

#### *EXISTING 'ECOLOGICAL' LAND TRUSTS*

Although the CE legislation allowed two purposes until 2009 – biodiversity and natural scenery – the authors are not aware of any 'scenic' CE in Alberta. Land trusts and municipalities in Alberta have received conservation easements for the protection of ecological systems and features. Many land trusts have a mix of organizational purposes that include cultural, agricultural, and ecological goals.<sup>69</sup> A few land trusts have also threaded agricultural goals into CE agreements either by naming specific ecological features in an agricultural parcel (e.g., wetlands) or by targeting agricultural uses that align with ecological purposes (e.g., protection of native range).

As noted above, there are currently very few land trusts in Alberta, relative to similar landscapes across Canada and the U.S. This is due to a variety of factors: low population, early predominance of large cross-province land trusts, low levels of environmental funding, and others. Few land trusts have a robust staff complement, and financial sustainability is a continuing challenge. Like land trusts elsewhere on the continent, on-going stewardship is necessary, but it increases with the complexity of the CE restrictions; focusing organizational attention and resources on this issue has been steady but slow.

Existing land trusts represent several key opportunities for conservation easements for agriculture. First, even for small land trusts, CEs are part of a land conservation program, so the critical step of articulating a conservation goal/need is undertaken deliberately. Second, they have access to – and are targeted by – networks and resources. These include the Alberta and Canadian Land Trust Alliances, and the national *Canadian Land Trust Standards and Practices*.

---

<sup>69</sup> Although most land trusts work extensively with agricultural landowners, only three have an explicit agricultural land conservation purpose in their mission: Foothills Land Trust, Southern Alberta Land Trust Society, and Western Sky Land Trust.

This causes them to be part of a private land conservation community almost by default. Third, for the reasons above, they have a high level of experience and expertise in structuring and managing conservation easements.

The main issues they face in embracing the new agricultural purpose for conservation easements are the potential pitfalls they face in mixing purposes for conservation easements, their low capacity, and their limited experience as a group with non-ecological agricultural conservation issues.

### *MUNICIPALITIES*

As noted above, municipalities have the ability to hold conservation easements, a mandate related to agricultural conservation, and significant experience with conservation easements.

Municipalities use conservation easements in a wholly different way compared with land trusts. Municipal conservation easements come about almost exclusively as the result of a proposal for development; a development proponent is either offered or asks for the option of using a CE as part of their application. Municipalities are required in their municipal development plan (MDP) to consider conservation of agricultural operations, but not agricultural land, though virtually all tend to speak at least nominally to the agricultural land base.

The level of capacity that a municipality has to devote to a CE program is actually more dependent on its goals than its staff complement and budget. Conservation easements with numerous and complex restrictions have a proportionately complex and time-consuming responsibility to monitor, enforce and defend; conservation easements that simply restrict subdivision, for example, are simple and particularly easy to monitor for a municipality because those applications come through them. Potentially larger questions surround who would be responsible for the operation and promotion of a CE for agriculture program. Planners and protected areas staff traditionally play a significant role in conservation easements for biodiversity, but agricultural fieldmen and agricultural service boards, for example, would likely play a bigger role in conservation easements for agriculture. The change in how municipalities are described within the definition of “qualified organization”, as discussed in “Eligible holder requirements”, above, may also involve municipal councils to a greater extent than was the case for pre-ALSA CEs.

Municipalities have significant advantages over other potential qualified organizations in several respects. Their statutory documents require them to articulate goals which can be a base for agricultural conservation goals. A challenge for effective conservation easements is they are perpetual raising questions about the sustainability of the holder; municipalities are, for all intents and purposes, perpetual. Municipal conservation easement programs can complement other CE-based programs such as Transfer of Development Credits. And despite being a private, voluntary tool, the overall effectiveness of CEs depends on how they are



accepted by a community. Municipalities are already structured to establish those two-way conversations.

There are also a variety of issues for municipalities pursuing CEs for agriculture programs. Municipal conservation programs are subject to political pressure through their council<sup>70</sup>. Monitoring of CEs has been a problem for municipalities, raising questions about the effectiveness of their programs. Possibly related is that municipalities as a whole are not tied into the private land conservation resources and networks that land trusts are. At a base level, a municipality is not established solely to conserve natural resources, so different parts of the corporation may be working at cross purposes. Finally, although conservation easements for agriculture will for the most part avoid this issue due to agriculture generally being taxed at the lowest rate, property taxation of conservation lands is a concern for many who feel that the foregone revenues are not sufficiently offset by the public good provided.

### *AGRICULTURE GROUPS*

Various non-government (or even quasi-government) agriculture groups represent the biggest unknown in terms of potential new groups and their capacity. These are groups that have an interest or stake in agricultural conservation issues, but may have played little or no role in private land conservation thus far.

Broadly, possibilities might include the irrigation districts, commodity groups, agricultural advocacy groups, forage associations, food security/local food groups, and agricultural societies. Some specific examples might include Agriculture and Food Council of Alberta, Action for Agriculture, Northeast Edmonton Agriculture Producers, Agri-Environmental Partnership of Alberta, the Greywooded and Foothills Forage Associations, and others.

This group is the one that will likely require the most explicit direction as to the policy intent of the conservation easement for agriculture. Despite all being involved in some aspect of agricultural conservation, their purposes are very wide-ranging, and include industry promotion, agri-business development, agri-cultural preservation, policy advocacy, and others.

These organizations represent significant capacity, both in terms of staff complement and financial resources. Because they are already connected to networks and constituencies, they represent a considerable mobilizing force. They are keenly aware of agriculture and many are familiar with at least some aspects of threats to agriculture in Alberta.

The issues range from structural to mandate. Several of these groups have an existing not-for-profit structure, but are not charitable, which would disqualify them from being qualified

---

<sup>70</sup> Again, this may become more of a concern given the modifications to how municipalities are described in the definition of “qualified organization” and the clear possibility of increased council involvement.

organizations. Because they serve a limited group, they would likely not qualify for consideration as a charity. Few are focused on agricultural “land” conservation, and tend to focus on industry, agri-business, and heritage. Even fewer are those that are familiar with private land conservation.

#### *AGRICULTURAL OPERATORS*

In many ways this is the key group that needs to be engaged, as these are the people who would voluntarily enter into conservation easements for agriculture. The challenge to manage will be that this is also arguably the group most likely to press the government for conservation easements for agriculture that are based on individual right-to-farm bases rather than societal food production bases. This could happen either individually or through their commodity associations.

#### *OTHER QUALIFIED ORGANIZATIONS*

This last group is somewhat of a “catch-all”, and though the authors do not see them as engaging in a significant way, it is important to understand how and why they might seek to engage around conservation easements for agriculture.

*Government agencies* – Any provincial government agency is a qualified organization. The most obvious ones that might engage in conservation easements for agriculture would be the Land Use Secretariat and Agriculture and Rural Development. Other possibilities might include Municipal Affairs, the Farmers Advocate Office, and the Natural Resources Conservation Board (NRCB). In our discussions with some senior agency staff, none gave any indication that these ministries/agencies would be seeking to do so.

The *Alberta Land Stewardship Act* gives “local government bodies” the status of qualified organizations.<sup>71</sup> The Act’s definitions elaborate what are local government bodies, and (as well as municipalities, covered above) include the following:

*Regional services commission* – The authors found no indication that any regional services commission would engage in conservation easements for agriculture. As most deal with wastewater and water management (with a few for transit, planning, emergency, and airport) they have no specific agriculture mandate.

*Metis General Council and the council of a settlement* – Metis settlements have not engaged in private land conservation tools thus far, and seem unlikely to do so in the foreseeable future.

---

<sup>71</sup> *Supra* note 3, s. 28(c)(iii).

*Irrigation Districts* – In recent years, irrigation districts have expanded their initiatives like the Eastern Irrigation District’s “Purchasing irrigation acres back from landowner”<sup>72</sup> project, which indicates the willingness of irrigation districts to enter into land-based contracts with landowners.

*Drainage Districts* – Similar to Irrigation Districts, the authors have no indication that Drainage Districts would engage in conservation easements for agriculture. However, they do have a role to play in managing water for agriculture, and as a qualified organization, may seek at some time to understand the limits of that opportunity.

*Management body established under the Alberta Housing Act* – Housing Act management boards have no agricultural mandate.

## Recommendations

---

### Policy ‘Purposes’ for Conservation Easements for Agriculture

Based on the research conducted, and the analysis above, this section presents the authors’ conclusions and recommendations as to which purposes should drive the development of a Government of Alberta policy on conservation easements for agriculture. Supporting recommendations are also offered which would need to be in place to make the ‘Purpose’ recommendations viable, as they address the high potential for conflict between purposes.

Of the six possible Purpose Categories, environment, food production, and culture should be the basis of the Government of Alberta policy on conservation easements for agriculture. To put those into the context of “the protection of agricultural land and land for agricultural purposes”, the following articulation is proposed:

1. *Sustainable agriculture* – protection of the lands where Alberta’s agricultural and environmental systems positively intersect;
2. *Food production* – conservation of Alberta’s food growing capacity; and
3. *Agricultural heritage* – preservation of Alberta’s agricultural heritage and associated rural culture.

---

<sup>72</sup> <http://www.eid.ca/purchasing-irrigation-acres-back-from-landowner/> accessed March 14, 2012

### *Supporting Recommendations*

Because of the high potential for conflict between purposes, the following supporting recommendations are offered.

#### *PROMOTE “SUSTAINABLE” AGRICULTURE*

The basis of the *agri-environmental system* is a commitment to sustainable agriculture, and this should be actively promoted. As noted above, in all conversations where this dynamic tension was discussed, there was an assumption that CEs for agriculture would be used to protect agricultural land and operations which focused on environmental sustainability. It should also be noted that the CEs for agriculture tool exists within ALSA’s “conservation and stewardship” tools, a clear indication of the intended use. For these reasons, the policy direction should make clear that the proposed three purpose categories are not of equal weight, and that ***where sustainable agriculture and food production or agricultural heritage purposes conflict, primacy is given to sustainable agriculture.***

#### *FOCUS ON CROPLAND AND TAME PASTURE*

As indicated earlier, the Land Use Secretariat’s reported intent, supported by feedback from Alberta Agriculture and Rural Development, is that conservation easements for agriculture would focus on cropland (M. Seiferling, personal communication, March 8, 2012).

The authors support this direction. When looking at the range of agricultural land uses, conservation of cropland and tame pasture tend to slip through the cracks in the original conservation easement purposes. This clarification of intent should be clearly articulated in a policy statement around conservation easements for agriculture. As well, it should be clear that the intent is not to convert these landscapes back to a native or more natural state, but rather to:

- 1) protect these landscapes from conversion to non-food-producing land uses, and
- 2) promote sustainable agriculture (see above).

Although the suggested focus is cropland and tame pasture, it is recommended that both native range and ecological features associated with cropland/tame pasture NOT be excluded from any policy statement on conservation easements for agriculture. Landowners, land trusts and municipalities could well look to protect these land uses and features through the use of a conservation easement for agriculture, and should not be prevented from doing so.

#### *SUPPORT MIXED-PURPOSE CONSERVATION EASEMENTS*

Despite the cautions given about the potential for conflict when mixing purposes, there is great value in this when done thoughtfully. The authors suggest that the policy direction should facilitate (or at least not prevent) the development of conservation easements which achieve multiple purposes. Many existing private land conservation organizations in Alberta already

have mandates that span environmental, cultural, scenic and agricultural purposes; it would expedite their work to ensure they could negotiate one CE, rather than three in these cases. The key to making this work without fatal conflict is ensuring there is a hierarchy in the purposes (as articulated above).

#### ***DRAFT THE CE FOR AGRICULTURE POLICY WITH REFERENCE TO THE EXISTING SUB-PURPOSES IN ALSA***

Several of the purposes used in other agricultural conservation easement programs are already enabled in the CE provisions within *ALSA*, and that should be kept top of mind. Subject to maintaining the integrity of the three CE types allowed under *ALSA* (environmental, scenic, and agricultural), a CE can support any of the following land uses:

- Recreational use;
- Open space use;
- Environmental education use; and
- Use for research and scientific studies of natural ecosystems.

#### ***KEEP GOVERNMENT OF ALBERTA POLICY AT A HIGH LEVEL***

The key to promoting innovation, and reducing inconsistencies between policy and application, is to keep the Government of Alberta CE for agriculture policy direction at a high level. Individual municipalities, land trusts, etc. can wield the CE for agriculture tool to greater effect with a good measure of flexibility. We encountered instances where very specific policy direction at the state level would confound the ability of CE for agriculture programs to adapt to unique and evolving circumstances.

### **Conservation Easement Structure**

There is no strict, one size fits all, template for conservation easement agreements. This fact is true for conservation easements regardless of purpose and is likely heightened in instances where a conservation easement agreement for agricultural purposes is written to accommodate other purposes as well. It is anticipated that some conservation easements for agriculture may be quite simple and straightforward in their approach, merely restricting subdivision on the subject lands, while others will have multiple purposes and be more prescriptive in the types of land use contemplated. As with all conservation easements the agreement should be tailored to the specific intents of the grantor and grantee and legal advice should be obtained to ensure that those intents are reflected in the agreement.

Consideration of the conservation easement structure is set out in two parts. First, a summary of potential content and general comments about the relevance of each section of the agreement is presented. Second, a general template with sample language is set out to provide examples of provisions that may be used for agricultural purposes.

## Potential content of a conservation easement agreement for agriculture

### PREAMBLE

The preamble presents a narrative regarding the inception and intent of granting the conservation easement. It reflects an executive summary of why the agreement was made and may be used by a court (or arbitrator) to inform interpretation of the agreement. For conservation easements for agricultural purposes it will be highly relevant to identify if there is more than a single purpose for entering into an easement and whether one purpose is viewed as being paramount over the other(s).

- Introductions to the Grantor and Grantee
  - Indicating their legal ability to grant and accept easements.
- Location of land subjected to easement
  - The short legal land description and more general geographic location of the land that is subject to the agreement.
- Area of agricultural land
  - A general articulation of the extent of agricultural land on the easement and its character.
- Importance and purpose of easement
  - An articulation of the public or community benefit that is derived by the entry into the agreement (particularly if the Grantee is a charitable land trust).
  - An articulation of the purpose for which the easement agreement is being entered into. This may reflect agricultural, social and environmental outcomes that are the goals of entering the agreement.
  - Multiple purposes
    - If there are multiple purposes and values to the land base any paramountcy of land values should be articulated.
    - If land values are of equal benefit.
  - Relevance of entering into the agreement to meet national, provincial or municipal planning goals (if applicable). This in turn may be tied to community and public benefit.
- Relevant areas of easement by purpose - (e.g. X acres of “prime” agricultural land and Y acres of wetlands) with reference to maps in schedules to the agreement.
- Statutory foundation
  - Articulation of the basis under which the easement is formed (i.e., the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 (ALSA) at s.29.)

### DEFINITIONS

The inclusion of definitions is standard and is important for clear interpretation and enforceability of the easement agreement. Many standard definitions of a conservation easement will be relevant, and express incorporation of relevant ALSA definitions should be

made by reference. Depending on the intent of the qualified organization it is likely that additional definitions will be relevant for conservation easements for agriculture. These may include defining or incorporation of relevant statutory definitions for:

- Agricultural purpose
- Agricultural land or productive agricultural land
- Traditional agricultural practices
- Sound agricultural practices
- Agricultural standards
- Management plan
- Nutrient management plan
- Conservation plan
- Transferable development credits
- Offsets
- Municipal development plans
- Developable area
- Residence/agricultural buildings
- Allowable development
- Ecologically significant lands
- Agricultural trails
- Beneficial/best management practices

#### *GRANTING OF EASEMENT*

The main intent of this section of the agreement is to indicate clearly and concisely the granting of the conservation easement from the grantor to the grantee.

- Transfer of rights
  - Establishment of the ability of the grantor to convey the conservation easement (fee simple title and legal land description).
  - Express granting of the conservation easement from the grantor to the grantee.
- Term of easement
  - Express articulation of the term of the easement or an indication that the easement is granted in perpetuity.
- Specific easement area
  - A legal description (or reference to attached schedule) of the area that is the subject of the easement(s).
  - An articulation between geographic areas subjected to each easement purposes if the agreement is entered into for mixed purposes.

The specific geographic area to which the easement pertains may be included at this point or may be better suited under definitions or in provisions dealing with land use restrictions and permitted uses (particularly where there are mixed uses).

### **PURPOSE**

The purpose provisions of the agreement are highly relevant to establishing the intent of entering into the agreement. Where there are mixed purposes for entering into a conservation easement this section will be of heightened relevance. To highlight the importance of this concept, some land trusts are also having landowners write a “letter of intent” to further support this section of the conservation easement as a separate document.

- Conservation or preservation of productive agricultural lands.
- Prevent use of property that would impair or interfere with the viability of agricultural land.
- Other purposes:
  - Natural aesthetic;
  - Environmental.
- If applicable, the hierarchy between purposes.

### **RIGHTS RESERVED BY GRANTOR**

The rights reserved by the grantor are often articulated as fee simple entitlement to their lands as augmented by the remainder of the conservation easement agreement. Depending on the scenario some landowners may wish to articulate a scope of agricultural practice that is allowed under the agreement. This will provide additional clarity to the agreement particularly where the issue of the type of agricultural practice is not otherwise dealt with in the agreement.

- Fee simple ownership.
- Agricultural practices exclusion.

### **IMPLEMENTATION & RESTRICTIONS/PERMITTED USES**

The permitted uses, or conversely, the restrictions placed on conservation easements for agriculture are likely to be significantly different from those of conservation easements that have been applied in Alberta thus far. Land trusts and municipalities may however wish to pursue more prescriptive terms and conditions, particularly where a mixed purpose scenario exists. Provisions may include land use restrictions and related permissions regarding:

- Limits on subdivision.
- Farming practices (nature of).
- Forestry practices if applicable.
- Number of dwellings - family/farm labour.
- Number and nature of outbuildings/agricultural structures and improvements.
- Nature of or restrictions on allowable commercial/industrial activities.
- Fencing.
- Soil conservation (to meet or exceed requirements of the *Soil Conservation Act*).
- Recreational and educational uses.
- Management of water bodies and water courses (limits on alteration).



- Farm infrastructure - trails, roads & utilities.
- Limits on mining (gravel) extraction.
- Use of pesticides (general or specific).
- Management of agricultural “waste” (as defined).
- Management of vegetation (and timber harvest).

Many restrictions may be waived in specific instances with the consent of the Grantee (as negotiated).

#### **MANAGEMENT AND ADMINISTRATION OF EASEMENT**

This section deals with how the land base is to be measured and monitored and how the agreement will be enforced. It provides for the nature and process requirements around monitoring and enforcing of the easement, including any requirements for notice, available remedies, and enforcement process (such as binding arbitration).

- Measurement and recording of baselines.
- Rights of inspection, monitoring and enforcement by Grantee (and/or Grantee’s delegate).
  - Notice provisions.
  - Remedies – injunctive relief, damages.
  - Right of enforcement.
- Transfer of lands.
- Amendments to easement and/or management plans.
- Legal nature of consents.
- Termination.
- Warranties and indemnification.
  - Environmental warranty.
  - Free of encumbrances or allowable encumbrances.

#### **OBLIGATIONS OF GRANTEE**

This section outlines the requirements placed on the grantee and reflects statutory requirements to transfer easements upon winding up. There may also be obligations created for the grantee regarding notice and any other preconditions to assignment of the conservation easement to another qualified organization.

- Assignment of easement.
  - General.
  - Upon winding up.

#### **OTHER MATTERS**

- Responsibility for taxes.
- Severability.
- Applicable laws.

- Option to purchase (Grantee rights).

## Conservation Easement for Agricultural (or Mixed) Purpose Template

*NOTE: This template is provided as an example of a possible conservation easement for agricultural or mixed purposes and is not intended to provide legal advice or to be used as a legally binding agreement. Independent legal advice should be sought when creating and entering into a conservation easement grant and agreement.*

### CONSERVATION EASEMENT GRANT AND AGREEMENT

BETWEEN:

**Insert name**

(the "Grantor")

And

**Insert name**

(the "Grantee")

Effective, the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

WHEREAS:

- A. The Grantor is the registered owner in fee simple of land located at **[legal land description]**, in the **[geographic location]**. The land constitutes the easement "Property", described in the survey attached hereto as Schedule A.
- B. The Grantee is a qualified organization as defined in the *Alberta Land Stewardship Act* and has, as its objectives the preservation of agricultural heritage, the fostering and promotion of the community and environmental benefit of food grown in Alberta, and recognizes the need to preserve agricultural land from conversion to non-agricultural uses.
- C. The Property contains **[x]** acres of agricultural land that is highly productive generating public and community benefits through support of local and regional food production.
- D. The Property also has land of non-agricultural preservation values including wetlands and forested lands that are important for watershed function and wildlife habitat.
- E. The Grantor and Grantee have the mutual aim of preserving the agricultural and ecological values of the Property for future generations of Albertans, in perpetuity.
- F. The Grantor and Grantee agree that the preservation of the Property is best achieved by limiting the use of the land to agricultural uses as defined by the agreement herein.

**[Paid easement]** In consideration of **[value/\$]** paid by the Grantee to the Grantor, and in consideration of the agreement and terms herein, the Grantor and the Grantee hereby agree as follows.

**[Gift]** In consideration of the Grantor’s desire to preserve the agricultural nature of the Property in perpetuity, the Grantor grants and conveys a conservation easement without monetary compensation, the Grantor and the Grantee hereby agree as follows.

**[by way of TDC or municipal planning program]** the Grantor, in compliance with and pursuant to **[relevant provisions of provincial regulation, municipal bylaws or resolutions]** enters into this agreement with the Grantee and hereby agrees as follows.

**1. Definitions** (examples of specific definitions for conservation easements for agriculture)  
**[other definitions to be included by reference or express inclusion of ALSA statutory definitions]**

- (a) Agricultural Land – means the land as described by survey and attached as Schedule B that has as its primary purpose, agricultural use.
- (b) Agricultural use– means the production of crops, livestock or livestock products as prescribed by section 5 of the conservation easement agreement.
- (c) Developable area –means the area of the Property prescribed in Schedule B to this agreement where farm related residence, outbuildings and ancillary buildings are allowed pursuant to section 5.
- (d) Ecologically Significant Lands - means the area of the Property prescribed in Schedule C to this agreement where agricultural use and other uses pursuant to section 6 are prohibited.
- (e) Property – means the land with the legal land description of **[X]**, including Agricultural Land, Developable Area and the Ecologically Significant Land, as prescribed in Schedules A-C.

**2. Granting of conservation easement**

The Grantor grants to the Grantee, and the Grantee accepts, a Conservation Easement to run with the land in perpetuity. The land that is the subject of the conservation easement (the “Property”) is described in the detailed survey attached to this agreement as Schedule A. The Grantor grants and gives this conservation easement to the Grantee freely, voluntary, without any consideration or condition, under seal, by way of gift. The Grantor agrees that each of the following covenants, agreements and restrictions constitutes an element of the conservation easement granted to the Grantee.

**3. Purpose**

The conservation easement is granted for mixed purposes in relation to the Property. The primary purpose for those lands surveyed and attached as Schedule B is to be used for agriculture. The primary purpose for those lands surveyed and attached as Schedule D is for

ecological and education values. Insofar as allowed by this agreement the purpose and use of lands in Schedule B and D may overlap. In interpreting the relevant sections of this agreement the primary purpose related to the property in question will govern.

#### **4. Rights Reserved by Grantor**

The Grantor reserves the right to exclusive use, possession and enjoyment of the Property, and the right to sell, transfer, lease, mortgage or otherwise encumber the Property or any part thereof, except to the extent these rights are constrained by this agreement. The Grantor has the right to exclude any member of the public from entering onto the property.

#### **5. Permitted Uses**

(a) Developable area (farm complex)

All existing structures and improvements related to the use of the Agricultural Land may be maintained, repaired, removed, enlarged or replaced within the Developable Area. New structures and improvements may be constructed or placed in the Developable Area except as provided by this section. Any new structure or improvement to the developable area must be in furtherance of the agricultural use. A maximum of **[X]** personal residences **[as defined]** are permitted on the Property, one of which may be located outside the Developable Area, with the express written consent of the Grantee.

(b) Agricultural Lands

The production of crops, the raising of livestock and other animal husbandry practices are permitted on the Agricultural Land. Ancillary and related agricultural use of lands, including soil management, fertilization, water management, and pesticide use are permitted uses on the Agricultural Lands so long as they are conducted in compliance with the laws of Alberta and Canada. Livestock densities are not to exceed restrictions set out in s.6 of this agreement.

(c) Ecologically Sensitive Lands

Recreational use, including hunting, is permitted on the Ecologically Sensitive Lands, except to the extent constrained by restrictions in s.6.

#### **6. Restrictions**

(a) Restrictions on use of Property

i. Subdivision of Property

The Grantor shall not conduct, pursue or permit any application or otherwise seek to have the Property subdivided.

ii. Excavations and Mining

The Grantor shall not undertake nor permit any third party to undertake the excavation or mining of sand, gravel, rock or other materials on the Property.

iii. Timber harvesting

The Grantor shall not conduct, pursue or permit the cutting, removal or destruction of trees on the Property except with the prior express written consent of the Grantee.

Where a Timber Management Plan approved by an Registered Professional Forester has been agreed to and executed by the Grantor and Grantee the need for written consent under this part is waived. Upon execution of the Timber Management Plan, the terms, covenants and conditions of the plan are included as part of this agreement by reference and form an enforceable part of this conservation easement agreement.

iv. Waste management

The Grantor shall not dump or release or permit the dumping or release of trash, non-compostable garbage or any hazardous or toxic substance on the Property.

v. Roads

The Grantor shall not construct any roads **[as defined]** or related infrastructure on the Property except with express written consent of the Grantee.

(b) Restrictions on use of Agricultural Lands

i. Limitation of animal density in Agricultural Lands

Notwithstanding section 5, the Grantor shall not permit, undertake or otherwise allow more than **[X]** animal units per acre on the Agricultural Lands.

ii. Limitation on developments in Agricultural Lands

The Grantor shall not construct, permit or allow the construction of any buildings on the Agricultural Lands.

iii. Limitation on releases on Agricultural Lands

The Grantor shall not permit the release of a substance onto Agricultural Lands in a manner which allows the substance to travel, escape, or move onto the Ecologically

Sensitive Lands. **[A buffer for pesticides and nutrients around the Ecologically Sensitive Lands may be prescribed]**

(c) Restrictions on use of Ecologically Sensitive Lands

- i. Drainage or alteration of a water body occurring on the Ecologically Sensitive Lands

The Grantor shall not undertake any activity that results in the drainage of water or alteration of a water body **[as defined]** on the Ecologically Sensitive Lands.

- ii. Disturbance of vegetation on Ecologically Sensitive Lands

The Grantor shall not conduct, pursue or permit the cutting, removal or destruction of vegetation, including trees, shrubs, grass or forbes, on Ecologically Sensitive Land except as required by law or with the prior express written consent of the Grantee.

- iii. Trail construction on Ecologically Sensitive Lands

The Grantor shall not undertake any activity that results in the creation of a trail in the Ecologically Sensitive Lands except with the prior express written consent of the Grantee or as prescribed in Schedule D.

- iv. Motorized access on Ecologically Sensitive Lands.

The Grantor shall not use nor permit the use by any third party of motorized vehicles in the Ecologically Sensitive Lands except with the prior express written consent of the Grantee

## **7. Conservation easement management and administration**

(a) Baseline condition

Attached to this Agreement as Schedule E is a baseline condition report, as agreed to by both parties, regarding the biophysical and hydrological aspects of the Property which constitutes evidence of the condition of the land at the time of the grant so as to facilitate monitoring and enforcement of the conservation easement.

(b) Enforcement and rights of entry and inspection

- i. The conservation easement may be enforced by the Grantee, or by such other person appointed in accordance with section 30 of the *Alberta Land Stewardship Act*.

- ii. The Grantee or its authorized representative may enter upon the Property to access the Conservation Easement Area or monitor compliance with this agreement at any time with the Grantor's permission, or otherwise, at reasonable times, upon two-day written notice to the Grantor.
  - iii. The Grantee may, without reasons, determine not to enforce any or all of the covenants herein but the non-enforcement of this agreement shall not constitute a waiver or abrogate any of the covenants of this agreement.
  - iv. The Grantee may pursue the following remedies in relation to this Agreement:
    - (a) The Grantee may apply for injunctive relief if the Grantee believes that default under this agreement is likely to occur, to prevent default or the continuance of default.
    - (b) The Grantee is entitled to apply and obtain all legal and equitable remedies.
- (c) Amendments to this agreement (and schedules attached hereto)

This Agreement and the Schedules attached hereto may only be amended, suspended or terminated, except as provided by the Laws of Alberta, by express agreement between the Grantor and Grantee.

#### **8. Grantor's obligations, indemnity and warranties**

- (a) The Grantor agrees to maintain the Ecologically Significant Lands except as otherwise provided in this Agreement, and promptly repair any damage caused by breach of this agreement, and shall bear all costs and liabilities relating to the operation, upkeep, maintenance, restoration, and repair of the Ecologically Significant Lands, so damaged.
- (b) The Grantor shall provide the Grantee written notice of the intent to sell, transfer or otherwise convey an interest in the Property, in whole or in part, to a third party, at least (30) days prior to said sale, transfer or conveyance.
- (c) The Grantor warrants that the Property is free of any contamination, environmental or otherwise, that may adversely impact the Agricultural or Ecologically Sensitive Land.
- (d) The Grantor indemnifies and holds harmless the Grantee, its employees, contractors, employees, agents and successors and assigns from any and all actions arising by the act or omission to act on behalf of the Grantor, its agents or employees in carrying out obligations or meeting the covenants of this agreement or otherwise..

#### **9. Obligations of Grantee**

- (a) Assignment of easement



The Grantor may advise the Grantee at any time of his or her preference for a substitute qualified organization, in the event that the Grantee assigns the conservation easement. The Grantee shall take into account any such preference of the Grantor in the event the Grantee decides to assign this conservation easement.

(b) Upon windup

The Grantee will identify a qualified organization that will be transferred this conservation easement in the event that the Grantee ceases to be able to hold the easement for any reason, including winding-up.

## 10. General matters

(a) Responsibility for taxes

The Grantor agrees to pay all real property taxes and assessments levied by a competent authority against the Property.

(b) Severability

The provisions and elements of this agreement are enforceable jointly and severally. In the event that a court order, judgment or statute invalidates a provision of this agreement the remainder of this agreement remains in full force and effect.

(c) Encumbrances

Any further encumbrance of the Property is subject to this Agreement and shall include a provision indicating that this is the case. **[Include express language regarding how any other dispositions are subject to the CE]**

**[Signed/executed in the presence of a witness]**

## Capacity for delivery

If the Government of Alberta wants to ensure there is capacity within the private land conservation community to effectively use the CE for agriculture tool, there are a number of concrete steps they can take. It should be noted that many of these depend on the Province articulating a policy goal for conservation easements for agriculture.

### *Clarify and articulate the policy intent*

Perhaps the most important action the Government of Alberta can take to allow organizations to efficiently pursue CEs for agriculture is to clarify for them the Government of Alberta's goal for this tool. Whether an existing land trust, new agricultural land trust, municipality, or 'inappropriate' group, this clarity will motivate action, and reduce wasted effort. The Guidance Document envisioned later in this chapter would aid in this effort to clarify the policy goal.

### *Consult with land trusts and key municipalities in developing the policy*

The authors intend that this report should give some direction as to a desirable purpose for CEs for agriculture, and around the goals of interested land trusts and municipalities. However, the relevant private land conservation parties were not consulted regarding their views on the Government's policy. To ensure alignment with the delivery agents of this tool with the Province's goals, it is recommended that all land trusts, relevant municipalities and potentially interested parties be engaged in a conversation about this policy. This could potentially take the form of a symposium to discuss needs, capacity and goals.

### *Identify pilot projects that exemplify Government of Alberta goals*

With how broadly conservation easements for agriculture are currently framed, the first CEs done in Alberta specifically for agriculture will set the tone for subsequent ones. It seems likely that the first efforts will come from existing land trusts with secondary agricultural purposes and from municipalities seeking to satisfy programmatic agricultural conservation goals. The authors also feel there is a strong possibility that initial CEs for agriculture could also be ones where the margins of the possible are explored. Though following the letter of the policy, these efforts may send an unintended signal to those considering using CEs for agriculture that this is the intended 'norm.' The Government of Alberta's central goals for the use of this tool for agricultural land conservation may consequently be subverted or delayed. To avoid this possible derailment, it is recommended that the Government of Alberta identify pilot projects for CEs for agriculture that exemplify their stated goals, and support these projects coming to fruition.

### *Confirm interest/lack of interest with other agencies*

In the course of this research, not all agencies, municipalities and local government bodies were contacted. Therefore, the authors' suppositions on which groups would not be interested should be tested further. This would be particularly important once a Government of Alberta policy for CEs for agriculture was articulated, and other agencies could respond regarding their interest to a concrete idea. In particular, the authors feel that the Land Use Secretariat should check with Alberta Agriculture and Rural Development, Municipal Affairs, the Farmers Advocate Office, and the NRCB to determine if they or any of their associated partners are likely to pursue CEs for agriculture.

### *Catalyze development of an Alberta-based agricultural land trust*

Though there are existing land trusts that have agricultural purposes, as we noted above, these tend to focus where agriculture and environment align well. There is currently no organization that is ideally suited to become a land trust with a chiefly-agriculture focus. Such an organization would play a critical role in promoting and testing the use of the CE tool for agriculture. Similar to the recommendation above regarding pilot CE for agriculture projects, the authors recommend the Government of Alberta take an active role in catalyzing the development of a land trust that would seek to protect cultivated land for the purposes of protecting food production. The authors do not suggest that the Government of Alberta should play an active role in the organization once established, but rather provide support for the start up.

### *Quantify capacity by land use region*

The assessments of capacity in this report are anecdotal and very rough. If the Government of Alberta wants to truly see the CE tool play a role in helping accomplish agricultural conservation in Alberta, it needs to better quantify the capacity of organizations to play the role of delivering on that tool. The authors recommend that as each regional plan is developed, there is an effort to quantify the capacity in that region to pursue CEs for agriculture, and use that information to realistically assess the role this modified tool can potentially play in achieving the goals set out in the regional plans.

### *Actively explore an analogous program to the federal EcoGifts program*

The federal EcoGifts program greatly enhances the capacity of private land conservation organizations working in the environmental realm. The increased tax benefits and guarantee of the appraisal have become critical factors in the ability of land trusts to engage landowners in CE agreements. The authors recommend that the Land Use Secretariat actively explore the possibility of a similar program for CEs for agriculture. There is work already underway, and our conversations indicate the federal government may be receptive to the idea. It would be critical

to coordinate with Ontario Farmland Trust, HelioTrust (Nova Scotia), and the Canadian Land Trust Alliance, as well as Agriculture and Agri-Food Canada, Environment Canada, and Alberta Agriculture and Rural Development.

### *Maintain the requirement for non-government qualified organizations to be charitable*

The authors anticipate there will be pressure to modify the CE-related legislation and/or regulations to soften the requirement that non-government qualified organizations be registered charities. This is anticipated because so much of the agricultural conservation and promotion work is not charitable, and thus neither are the groups, and thus non-charitable groups looking to use the tool may express a frustration with this “bureaucratic” requirement. The authors recommend that the Act and/or regulations not be adjusted to allow this for the following reasons.

First, there is a tremendous amount of oversight and assessment that is done by the federal government on charities in terms of charitable intent, financial management, reporting, and others. All charities are subject to a comprehensive application which requires them to publicly articulate and maintain a societal interest focus. They must report several dimensions of their organizational operations annually through a T3010 process, which are recorded and made publicly available by the Canada Revenue Agency. To be considered as a charity, organizations must first commit to an organizational structure that requires an annual financial audit<sup>73</sup>. Removing the charitable requirement would require recreating these oversight mechanisms at the provincial level.

Second, the financial implications of this for the CE transaction would be very significant in that transactions deemed to be non-charitable would not be eligible for tax receipts. This will be a major barrier to participation for most groups and the landowners with whom they work.

Third, and perhaps most importantly, the philosophical basis of conservation easement work assumes a contribution to the public interest. This has been severely strained by the inclusion of the *agricultural land* purpose which is a specific land use rather than a societal outcome. Much existing agricultural protection and promotion work is targeted at promoting the interests of an industry or group of individuals. Maintaining the charitable requirement helps ensure the conservation activity is undertaken in the interest of society as a whole.

---

<sup>73</sup> *Societies Act*, R.S.A. 2000, c. S-14; *Companies Act*, R.S.A. 2000, c. C-21, Part 9; *Canada Corporations Act*, R.S.C. 1970, c .C-32, s. 132; *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23.

## Policy Direction

The authors believe a clear policy direction is needed if conservation easements for agriculture are to be maximally effective in Alberta. The following section lays out the rationale behind that recommendation, and suggestions for how to pursue it. It should be clear that it is not the purpose of this report to draft such a policy statement, but rather to make recommendations regarding how it might be formed.

### *Articulate a clear policy direction for conservation easements for agriculture*

#### *CURRENT POLICY DIRECTION*

As noted above, *ALSA* is very terse regarding the new agricultural purpose of the conservation easement tool: “the protection, conservation and enhancement of agricultural land or land for agricultural purposes.” Additionally, whereas the existing CE purposes focused on the desired outcome regardless of the land use, this new purpose focuses on the *land use*, rather than on the desired *outcome*.

Currently, the policy direction available to those planning to use the new agricultural purpose of the conservation easement tool is limited to three sources:

1. A limited set of agricultural land conservation policies of the Government of Alberta (most such policies focus on protection of agricultural operations);
2. The surrounding context of the Alberta Land Stewardship Act, specifically Part 3, the Conservation and Stewardship Tools; and
3. The verbal direction of senior Government of Alberta staff.

#### *PITFALLS OF AN UNCLEAR POLICY*

In general, an unclear policy intent has the potential to create problems arising from confusion, but conservation easements for agriculture have at least the following specific challenges:

- Conservation easements are legally-binding contracts between two parties, signed in good faith based on a shared conservation intent. Problems have tended to arise in cases where subsequent landowners who do not share that conservation intent have acquired a parcel subject to a CE, and have sought to have the easement removed. A common technique is to legally challenge the CE’s ability to accomplish its stated purpose; a task made easier when the policy foundation of that purpose is unclear.
- Prudent participants in CE agreements – private land conservation entities and landowners alike – will consult their professional advisors (including legal counsel)

before proceeding. Those advisors will base their advice on what is formally articulated through legislation, precedent and policy.

- Uncertainty regarding the purposes for which a CE can be established will likely lead to a hesitancy to take part. The authors have seen that hesitancy when other issues have clouded participants' sense of how and under what circumstances a CE can be established; these have included uncertainty in the capital gains tax implications, uncertainty regarding the validity of CE appraisals, and uncertainty regarding the sustainability of qualified organizations.
- When the intended purpose of a CE for agriculture is unclear, it is likely that uses which the Government of Alberta deems inappropriate will arise. During discussions with agency, agricultural and private land conservation personnel as part of this research, there was quick and unanimous agreement that CEs for agriculture should not be used for conservation of confined feeding operations nor of food processing facilities. However, consideration of 'backyard' agriculture, manure spreading lands, and land not zoned for agriculture did not elicit the same unanimity. These grey areas, while unclear in these discussions, are certainly not prohibited by the current policy direction.

#### *FEATURES OF A CLEAR POLICY DIRECTION FOR CONSERVATION EASEMENTS FOR AGRICULTURE*

It is recommended that the articulated policy direction have the following features:

*Focus on Outcomes* – the policy direction should focus on the outcomes the Government of Alberta desires from the use of the conservation easements for agriculture. A comprehensive prescribed list of desirable agricultural activities, land uses or practices will likely not be as informative as stating what outcomes are being sought, especially as agricultural practices evolve and change over the years.

*Articulation from Agriculture and Rural Development and the Land Use Secretariat* – Although the responsibility for agricultural conservation is shared between several agencies, potential users of the CE tool for agriculture will look to Agriculture and Rural Development (as the centre of agricultural policy) and the Land Use Secretariat (as the commission responsible for the CE tool) in particular. It is recommended that these two agencies articulate either a joint policy or explicitly complementary policy statements. The authors fully recognize the challenges in doing this. One approach may be to issue complementary "interpretations" or "guidance." While not drawing a clear line around the intent behind the tool, this approach would at least highlight the purposes most supported by the Government of Alberta. This would give a message of certainty to potential participants that at least this short list of purposes is supported by the agencies.

### *Emphasize Public Benefit in Suggested Purposes*

The key thread running through the ‘purpose’ recommendations, above, is a focus on providing a *public benefit*. This both matches the philosophy of the conservation easement as it has existed over the last century, and maximizes opportunities for Alberta’s private land conservation organizations, municipalities and landowners by satisfying the criteria of *charitable*.

More specifically, this approach has the following benefits:

- For the grant or gift of the CE for agriculture, it would match the popular expectations of a CE, would qualify as a charitable gift, and would more likely satisfy an AgriGifts program if one were to be established;
- For the land trust, this allows them to establish/operate as a charity (with their work fully charitable), and provide tax receipts for the gifts of CEs for agriculture, which is critical;
- For the municipality, as they are qualified donees they benefit in the same way as charities, and this provides a public benefit lens to the tool where the political imperative to satisfy private interests might otherwise override; and
- For the landowner, they receive assurance this is being done in the public interest, and they have access to the tax benefits of charitable transactions.

For these reasons, the authors recommend that any policy statement or direction for conservation easements for agriculture be based on the three purposes identified above (*Sustainable agriculture, Food production, and Agricultural heritage*), as well as the associated sub-recommendations.

### *Define or clarify key terms*

There are at least two terms upon which hangs the whole intent of the conservation easements for agriculture. These are “agricultural land” and “agricultural purposes.” This clear articulation of a policy direction should provide definitions of these terms. There are many ways to approach defining these terms, but this should be done narrowly in the context of conservation easements for agriculture.

### **Guidance Document Outline**

While this paper has focused on the new conservation easement purpose of “protection, conservation and enhancement of agricultural land or land for agricultural purposes”, the

authors believe that there would be benefit in the development of guidance documentation dealing with conservation easements for any and all of the purposes authorized under *ALSA*. Much of the guidance material on conservation easements currently available to Albertans is dated; for example, the *Conservation Easement Guide for Alberta*<sup>74</sup> was published in 1997, shortly after initial legislative enabling of conservation easements in the *Environmental Protection and Enhancement Act*. Development of new guidance documentation would be able to encompass the lessons learned by qualified organizations and landowners over 16 years of conservation easement practice in Alberta; address land conservation in the context of the Land-use Framework, *ALSA* and regional plans; and use new technologies and formats to put guidance information in the hands of Albertans wanting to engage in private conservation.

### Suggested product

The authors suggest that new guidance documentation be developed as a series of Internet-based modules, focused on reaching landowners and qualified organizations. These modules would be developed in two stages:

1. Materials to meet immediate needs related to two sets of circumstances: the creation of new, solely agricultural purpose conservation easements and the modification of pre-*ALSA* conservation easements to address agricultural purposes.
2. More detailed materials, developed based on a needs assessment, target audience consultation and government policy direction, that incorporate Alberta's past conservation easement experience and knowledge and new directions in public and private conservation.

A specific timeline has not been provided, as timing, scope of work and necessary resources are dependent in part on policy direction the authors anticipate the provincial government will develop following receipt and review of this paper. The authors are willing and prepared to work with the Land Use Secretariat to fully develop a proposal and agreement for this work in a timely and mutually agreeable fashion.

### Suggested content/topics

For the materials to meet immediate needs:

#### *New agricultural purpose conservation easements*

- What are conservation easements?
- The effects of having a conservation easement on your land.
- Basic conservation easement process (high-level).

---

<sup>74</sup> Arlene Kwasniak, *Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre, 1997).



- Finding a qualified organization.
- Being a qualified organization.

#### *Modifying existing conservation easements to address agricultural purposes*

- Adding the agricultural purpose.
- Process to amend/modify an existing conservation easement.
- Do existing qualified organizations need to change their status to deal with agricultural purposes?

For the more detailed materials:

- Single purpose conservation easements.
- Mixed purpose conservation easements.
- Creating a conservation easement: process with real-life examples.
- Amending or modifying an existing conservation easement: process.
- Pre-ALSA conservation easements: pros and cons of creating a new agricultural purpose conservation easement vs. amending/modifying an existing conservation easement to address multiple purposes.
- Qualified organizations
  - Distinctions between the different types of qualified organizations (government & non-government).
  - How to find qualified organizations.
  - How to deal with qualified organizations.
  - How to become a qualified organization.
- Protecting yourself: when do you need professional assistance and how to find it.
- Intersection of conservation easements and other conservation tools.
- The effects of having a conservation easement on property; tax and other regulatory implications.
- Enforcement.

## Resources

---

Agriculture and Food Council, *Land Use Policy and the Agri-Food Industry in Alberta* (Nisku, AB: Agriculture and Food Council, 2005).

*Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7.

Agri-Environmental Partnership of Alberta, *Advice to Regional Advisory Councils: Fragmentation and Conversion of Agricultural Land* (Edmonton: Agri-Environmental Partnership of Alberta, 2010).

Alberta Agriculture, Food and Rural Development. 2002. *Loss and Fragmentation of Farmland*. Prepared by the Resource Planning Group, Policy Secretariat. Government of Alberta, Edmonton, AB

Alberta Agriculture, Food and Rural Development. 2004. *Growing Alberta's Agri-Food Industry Together: The Provincial Government's Response to Ag Summit*. Edmonton, AB.

Alberta Agriculture, Food and Rural Development. 2005. *A Place to Grow: Alberta's Rural Development Strategy*. Government of Alberta, Edmonton, AB.

Alberta Agriculture, Food and Rural Development. 2007. *Report on Progress: Alberta's Rural Development Strategy*. Government of Alberta, Edmonton, AB.

Alberta Association of Municipal Districts and Counties, *Loss and Fragmentation of Agricultural Land in Alberta* (Edmonton: Alberta Association of Municipal Districts and Counties, 2005).

*Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8.

*Alberta Land Stewardship Regulation*, A.R. 179/2011.

Alberta Municipal Affairs. 1996. *Land Use Policies*. Established by Lieutenant Governor In Council Pursuant to Section 622 of the Municipal Government Act Order in Council 522/96. Government of Alberta, Edmonton, AB.

Brewer, Richard. 2003. *Conservancy: The Land Trust Movement in America*. University Press of New England, Lebanon, NH, USA.

Bridge, Richard. *The Law of Advocacy by Charitable Organizations: The Case for Change* (Vancouver: Institute for Media, Policy and Civil Society, 2000).

*Canada Corporations Act*, R.S.C. 1970, c. C-32.

*Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23.

Canada Revenue Agency, *P-113: Gifts and Income Tax 2010*.

Canada Revenue Agency, *Guidelines for Registering a Charity: Meeting the Public Benefit Test*, Reference Number CPS-024 (Canada Revenue Agency, 2006).

Canada Revenue Agency, *Income Tax Interpretation Bulletin IT-496R: Non-Profit Organizations*.

Canada Revenue Agency, "What is charitable?", online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pplyng/cpc/wtc-eng.html>.

Canadian Wildlife Service, *Canadian Ecological Gifts Program handbook: A Legacy for Tomorrow* (Ottawa: Canadian Wildlife Service, 2011).

*Charities Act 2011*, (U.K.), c. 25, s. 3.

Commonwealth of Massachusetts. *Agricultural Preservation Restriction with Option to Purchase at Agricultural Value*. Downloaded from <http://www.glynwood.org/files/previous/pdfs/>.

*Companies Act*, R.S.A. 2000, c. C-21.

*Conservation and Stewardship Working Group Final Report* (Edmonton: Government of Alberta, 2007).

*Conservation Authorities Act*, R.S.O. 1990, c. C.27

*Conservation Easement Registration Regulation*, A.R. 129/2010.

*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

*Environmental Protection and Enhancement Amendment Act, 1996*, S.A. 1996.

Gorsuch, Wanda and Scott, Ramona. 2010. *A Review of Farmland Trusts: Communities Supporting Farmland, Farming, and Farmers*. Prepared for The Land Conservancy of BC and Farm Folk/City Folk, Victoria, BC.

Government of Alberta, *Draft Lower Athabasca Regional Plan 2011-2021* (Edmonton: Government of Alberta, 2011).

Government of Alberta. *Land Use Framework* (Edmonton: Government of Alberta, 2008).

Hamilton, Blair. 2005. *Agricultural Land Trusts: Preserving Small Farm Heritage*. Dungannon Consulting Services, Arnaud, MB.

*Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), s. 248(1).

*Indian Act*, R.S.C., 1985, c. I-5

*Internal Revenue Code*, U.S.C. 26, § 170(h).

Kwasniak, Arlene. *Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre, 1997).

LaBelle, Judith and Jill Rubin. 2008. *Land Trusts and Agricultural Land: Protecting Farmland or Farming?* Glyndon Centre, Cold Spring, NY, USA.

*Land Use Policies*, O.C. 522/96 (Alberta).

Lawless, Greg. 1994. *The Community Land Trust Model Applied to Farmland: A Case Study of the Wisconsin Farmland Conservancy*. Thesis. U of Wisconsin-Madison, Madison, WI, USA.  
Downloaded from <http://www.wisc.edu/uwcc/staff/lawless/thesis/thesch1.html>

Levin, Robert H. 2010. *A Guided Tour of the Conservation Easement Enabling Statutes*. Land Trust Alliance, Washington, DC, USA.

Lower Athabasca Regional Advisory Council, *Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region* (Edmonton: Government of Alberta, 2010).

*Municipal Government Act*, R.S.A. 2000, c. M-26.

*Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3.

*Societies Act*, R.S.A. 2000, c. S-14.

*Soil Conservation Act*, R.S.A. 2000, c. S-15.

Sokolow, Alvin D. and Anita Zurbrugg. 2003. *A National View of Agricultural Easement Programs*. A Joint Project of American Farmland Trust and Agricultural Issues Center.

South Saskatchewan Regional Advisory Council, *Advice to the Government of Alberta for the South Saskatchewan Regional Plan* (Edmonton: Government of Alberta, 2011).

*Uniform Conservation Easement Act*. 2007. National Conference of Commissioners of Uniform State Laws.