



MEMORANDUM

TO: ROUTT COUNTY PURCHASE OF DEVELOPMENT RIGHTS PROGRAM &
ROUTT COUNTY COMMISSIONERS

FROM: MOLLY FALES, CCALT STAFF ATTORNEY

CC: ERIK GLENN, MEGAN KNOTT, JOHN GIOIA, LARRY KUETER, DAVID KUETER

DATE: JUNE 2, 2023

SUBJECT: **IRS Notice 2023-30: SAFE HARBOR AMENDMENTS**

Summary

- In December 2022, the Secure Act 2.0 of 2022, referred to as the Charitable Easement Program Integrity Act, was signed into law, introducing a time-limited provision allowing donors to amend conservation easements by adopting safe harbor language for two common deed terms that the IRS has challenged.
- The IRS issued Notice 2023-30 on April 2023, starting a 90-day window for grantors to record an amendment to take advantage of the safe harbor. The 90-day window ends on July 24, 2023. (See attachment 2).
- CCALT has notified potentially impacted landowners (both CCALT and YVLT) of the notice and is asking those interested in taking advantage of the safe harbor to notify us by June 30, 2023.
- To facilitate the amendment process, CCALT has prepared a template amendment and will help landowners complete the amendments before the deadline. (See attachment 3).
- Routt County must approve any amendment to a deed of conservation easement in which Routt County Purchase of Development Rights funds were utilized.
- CCALT urges Routt County to provide blanket approval for all safe harbor amendments due to the high volume of expected requests and the tight timing deadline.

The remainder of this memo provides more detailed information related to this issue and CCALT's plan for working with landowners who would like to take advantage of the safe harbor.

Federal Deduction for Qualified Conservation Easement Contributions

Conservation easement grantors are eligible for a federal deduction for the donated value of the conservation easement, less the value of any State tax credits received for

the donation. Since 2006, grantors have been allowed to utilize the federal deduction in the year of the donation and carry it forward for the next 15 years. To create a federal deduction, the conservation easement must be consistent with § 170(h) of the I.R.C. and the Treasury Regulations adopted pursuant thereto, including the requirement that the conservation easement be granted in perpetuity. Failure to comply with the necessary requirements may result in an Internal Revenue Service (“IRS”) denial of the deduction.

Charitable Easement Program Integrity Act (December 2022)

The IRS successfully challenged the deductibility of conservation easements with frequently utilized proceeds/extinguishment and boundary line adjustment language that the IRS believes fails to meet the perpetuity requirement¹. The Secure 2.0 Act of 2022 (the “Act”), which was signed into law on December 29, 2022, provided a time-limited cure provision allowing donors to amend conservation easements by adopting safe harbor language. Utilizing the safe harbor language safeguards the conservation easement donor’s deduction from a possible IRS denial of the deduction. The Act directed the IRS to create safe harbor language for the proceeds/extinguishment and boundary line adjustment clauses, contained a specific timeframe for the IRS to develop the safe harbor language, and mandated a 90-day window within which donors could amend their conservation easements to include the safe harbor language. On April 24, 2023, the IRS issued Notice 2023-30 (the “Notice”²). The Notice provided guidance on the implementation of the safe harbor language and started the 90-day window within which the safe harbor language can be adopted. The 90-day window requires that any grantor wishing to utilize the safe harbor language must record an amendment by July 24, 2023.

Landowner Notification

On May 30, CCALT notified original easement grantors that granted a conservation easement to CCALT or the Yampa Valley Land Trust (YVLT) since January 1, 2006. CCALT delivered a similar notification to grantors and attorneys and accountants that frequently work with conservation easement donors via email. CCALT has requested that any grantor wishing to pursue a safe harbor amendment notify CCALT by June 23, 2023. CCALT cannot give landowners financial, tax, or legal advice. Therefore, if a landowner would like to complete a safe harbor amendment, CCALT will endeavor to help them complete the amendment by the July 24th deadline.

Completing a Safe Harbor Amendment

The Notice requires that the original grantor and grantee sign the amendment. Further, for the amendment to be valid, it must be signed by the current landowner and current holder, if ownership of the property has changed since the conservation easement has been completed or the conservation easement has been transferred.

¹ More details on the Proceeds/Extinguishment and Boundary Line Adjustment language at issue can be found in Attachment 1.

² The Notice is included as Attachment 2.

Any necessary subordination must be obtained if there is a deed of trust impacting the property. Finally, third-party funders with approval rights in the conservation easement must approve the amendment.

To facilitate the amendment process, CCALT will ask grantors wishing to pursue a safe harbor amendment to provide current proof of ownership of the property and signature authority if the property is owned by an entity. CCALT has drafted a template amendment³. Language is included within the template for transactions that received funding from the Natural Resource Conservation Service (“NRCS”) as NRCS will only consider amendments to the boundary line adjustment safe harbor. No negotiation of the CCALT template amendment will be permitted. Once CCALT has received all required documentation from the necessary parties, including the amendment drafted by CCALT and signed by the necessary parties, CCALT will sign and record the safe harbor amendment.

Approval by Routt County Purchase of Development Rights & the Routt County Board of County Commissioners

Routt County has the right to approve any amendments to conservation easements that received funding from the Routt County Purchase of Development Rights Program. This right of approval extends to approval of all safe harbor amendments. Due to the expected number of safe harbor amendment requests, CCALT requests that Routt County provide a blanket approval for all safe harbor amendments.

The safe harbor amendments will not alter any other aspects of the conservation easements. CCALT will provide Routt County with a list of requested safe harbor amendments no later than June 30, 2023, and a copy of all recorded safe harbor amendments no later than August 1, 2023.

Given the requirement to record the safe harbor amendments no later than July 24, 2023, CCALT believes a blanket approval of safe harbor amendment requests is the only way to adequately ensure that all grantors wishing to complete a safe harbor amendment can meet the required deadline.

³ CCALT’s template is included as Attachment 3.

ATTACHMENT 1

Proceeds/Extinguishment

Under the Treasury Regulations, the extinguishment of a conservation easement requires that any proceeds from the extinguishment of a conservation easement must be shared between the donor and CCALT based on the proportionate value the conservation easement bears to the value of the unrestricted property. This ratio is determined by an appraisal at the time the conservation easement is completed. For example, if a conservation easement appraisal determined that the conservation easement reduced the value of a property by 30%, then the land trust would be entitled to 30% of a condemnation award and the landowner would receive the remaining 70%. The land trust is obligated to use its portion of the award to further the conservation purposes of the conservation easement. The IRS considers the failure of the land trust to receive its portion of the award as a failure of the easement's perpetuity requirement.

CCALT has always utilized the appropriate ratio in our conservation easements. However, for a period of time CCALT included language that would reduce the proceeds received by CCALT by: 1) the satisfaction of prior claims; 2) by the value of improvements, like houses, added after the conservation easement was in place; or 3) after expenses of obtaining the condemnation award. These reductions were included by many land trusts in the interest of fairness. There was no case law or other indication that their inclusion was contrary to the regulations. However, in 2018 the IRS successfully challenged the deductibility of a conservation easement containing these provisions. Consequently, and conservation easement grantor who's conservation easement contains language reducing the land trust's share of the proceeds for satisfaction of prior claims, the value of after added improvements, or expenses of obtaining the condemnation award may want to complete a safe harbor amendment.

Boundary Line Adjustment

Similarly, the IRS has challenged conservation easements that permit boundary line adjustments for failing to uphold the perpetuity requirement. Most CCALT conservation easements have a subparagraph addressing "boundary line adjustments" included in the subdivision paragraph. CCALT's language permits a grantor to request approval to convey a portion of the property to another owner in conjunction with the resolution of a boundary line issue or agricultural reconstitution. Under CCALT's language, the subdivided property remains subject to the conservation easement and no adjustments to what land is subject to the conservation easement are allowed. However, the IRS may not recognize a distinction between the CCALT language, which permits additional subdivision of the property while remaining subject to the conservation easement, and the IRS prohibition on the adjustment of the boundaries of what is conserved. The IRS has commented that rights of subdivision are allowed, but when posed with a question describing CCALT's language declined to answer whether or not the language would

invoke the need to utilize a safe harbor amendment. It's possible that having the term "boundary line adjustment" in the easement will be a trigger for audit. Consequently, easement grantor with the boundary line adjustment provision may wish to complete a safe harbor amendment.

ATTACHMENT 2
IRS NOTICE 2023-30

[IRS NOTICE 2023-30 INCLUDED ON THE FOLLOWING PAGES]

**ATTACHMENT 3
CCALT TEMPLATE SAFE HARBOR AMENDMENT**

*[CCALT TEMPLATE SAFE HARBOR AMENDMENT INCLUDED ON THE FOLLOWING
PAGES]*