

EASEMENT STAGE

DEVELOPMENT & EXECUTION

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A. CONSERVATION EASEMENT

A.1 Overview

The conservation easement is the official document that conveys cropping, grazing and other land control rights to the state and requires the landowner(s) to establish and maintain the conservation practices that have been agreed to and identified in the conservation plan. The easement cites BWSR's authority to acquire and enforce the easement, and specifies the obligations of the current and future landowners. Please familiarize yourself with the language of the easement.

A.2 Steps to Developing the Conservation Easement

The three required steps to develop and execute the conservation easement are:

- 1) Obtaining title insurance on behalf of the state (see item B.3 of this section)
- 2) Preparing the easement document
- 3) Finalizing the document (landowner signatures and recording)

B. TITLE INSURANCE

B.1 Definitions

Some of the commonly referred to terms associated with property titles and title insurance are listed below.

Abstract of Title - a condensed history or summary of all the transactions affecting a particular tract of land. It is not a title.

Abstract Property - property for which the history of all transactions affecting the land are summarized in a cumulative list that forms the abstract of title (see above). Thus, it is possible to trace the chain of title to the abstract property. (Contrast with Torrens property definition below). Most RIM/PWP applications involve abstract property.

Access - the right to enter (ingress) and leave (egress) the enrolled lands. This includes the right to cross over lands not enrolled in the program to reach the easement area from a public road.

Chain of Title - a term applied to the past series of transactions and documents transferring the title to a particular parcel of land.

Clear Title - a title not subject to objectionable liens or encumbrances.

Clouded Title - an title with one or more encumbrances.

Deed - a document by which the ownership of land is transferred from one owner to another.

Encumbrance - a parcel of land subject to a lien or charge such as, but not limited to, a mortgage or delinquent taxes.

Endorsement - a written agreement by the title insurance company to remove or change an exception or other item from the title insurance commitment or final policy.

Exceptions - items listed in the *Schedule B* of the title insurance commitment or the final policy which are identified as being excluded from the policy's coverage.

Lien - a creditor's hold, a claim or a charge against the debtor's land held as security for repayment of a debt.

Marketable Title - a clear title free from reasonable doubt (see Clear Title).

Mortgage - an instrument used to encumber land as security for a debt.

Title - the evidence or right which a person has to the ownership and possession of land.

Title Insurance - insurance against the loss or damage resulting from defects or failure of title to a particular parcel of real property.

Title Insurance Commitment - the title insurance company's agreement to issue a final title insurance policy. It is treated as an initial title report on the property.

Title Search - an examination of public records to disclose the current facts regarding ownership of real estate.

Torrens or Registered Property - property that the landowner has registered through a judicial proceeding in order to clarify the public records on ownership of the property. A certificate of title is issued to show the current owner and outstanding encumbrances against the property. Most RIM/PWP land is *not* Torrens or registered property.

B.2. Title Insurance Overview

Title insurance is purchased by the state to ensure that the seller of real estate has a marketable title to the property being sold. The company issuing the policy defends and/or compensates the state if any title problem not excepted from coverage arises that affects the state's ability to enforce the terms of the easement. Title insurance is purchased by the state because it:

- ❖ supplies the required legal review and examination of the property title;
- ❖ identifies any existing liens and other encumbrances on the property;
- ❖ verifies that the applicant owns the legally described easement area;
- ❖ avoids the expensive process of sending bulky, valuable, and fragile property abstracts back and forth in the mail; and
- ❖ minimizes attorney general staff review time by identifying the important legal items that need attention.

Once the state is satisfied that the title is (or will be) cleared of objectionable encumbrances, a conservation easement will be generated by the state and forwarded to the SWCD for execution.

B.3. Steps to Obtaining Title Insurance

Steps required to obtain title insurance:

- ❖ Update the abstract
- ❖ Order title insurance
- ❖ Review title insurance commitments
- ❖ Resolve problems
- ❖ Obtain final policy

B.4 Updating the Property Record (Abstract or Torrens Certificate)

Ownership of a tract of land is recorded in a document called an abstract, or, less commonly, on a certificate of title if the property is Torrens (registered). These documents list all of the transactions that have occurred involving the legally described tract of land, including the sale or subdivision of the land (abstract property only), as well as the placement of mortgages, liens, judgments or other encumbrances on the land. Updating the abstract or certificate of title makes the state aware of *most* encumbrances on the land prior to finalizing the easement. Note, however, that the title insurance agent will need to check the most current public records for taxes, judgments and other liens that may have attached to the property since the abstract or certificate of title was issued.

Updating the property record is the responsibility of the seller in the typical real estate transaction. Likewise, the landowner is required to incur the expenses associated with updating the property's abstract (except in the case of flowage easements). The updating process should be initiated after the landowner receives the finalized conservation easement agreement. It is important not to update the abstract too far in advance of requesting title insurance because transactions may be missed, and the agent may require another update before proceeding. The landowner should promptly deliver the updated abstract or certificate of title to the SWCD (or designated title agent). When leaving the abstract with the SWCD, a landowner should be provided with acknowledgment that the document was received (i.e., make a copy of the abstract face, write the date it was received and sign it as the SWCD representative).

B.5 Ordering Title Insurance Documents

The SWCD should complete a [Title Insurance Request Form](#) and deliver it, along with the updated abstract, to the title agent. Information required to complete the form includes:

- ❖ the correct amount of title insurance which is the total of the conservation easement payment plus the conservation plan payment as shown on the conservation easement agreement;
- ❖ the correctly spelled name(s) of the easement applicant(s) as shown on the conservation agreement form; and
- ❖ the legal description from the conservation easement agreement.

Please make sure that the title company you are working with has a copy of the *State of Minnesota, Conservation Easement Program, Title Insurance Procedures* and a copy of the *Specimen Policy*. The title insurance agent will first prepare a commitment to insure the title. This will be treated as a report on the condition of the title and will be reviewed by the SWCD, BWSR and attorney general's office representative. Once the commitment has been reviewed and is acceptable to the state, a final title policy will be requested in conjunction with the recording of the conservation easement.

B.6 Title Insurance Commitment - Schedule A

The Schedule A is part of the commitment for the title insurance document that conveys the general information of the policy, such as the policy type, effective date, insured party, property title and description.

The district's review of Schedule "A" should focus on identifying problems prior to submitting the commitment to the BWSR for review:

Fee title holder(s)

If the landowner's names (fee owner) of the property are listed differently from what is shown on the signed conservation easement agreement form, call the BWSR realty staff for assistance to correct the problem.

Name of insured and interest to be insured

The name of the insured party shown on the commitment must be stated as *The State of Minnesota, Board of Water and Soil Resources*. The interest to be insured must be identified as a *conservation easement*. This is often done incorrectly because agents are used to writing policies for home buyers. If either of these items are not correct the SWCD should immediately ask the agent to issue an endorsement to the commitment showing the correction before it is submitted to BWSR to avoid processing delays.

Amount of title insurance coverage

The correct amount of title insurance coverage must be the **sum** of the **easement** and the **conservation plan** payment amounts. Be sure to indicate the correct amount when requesting title insurance (should be the same as the amounts shown on conservation easement agreement form).

Legal description

It is preferred that the legal description shown on the commitment match the legal description on the conservation easement agreement to avoid exceptions unrelated to the easement area from appearing on the commitment. At the very least, the commitment legal description must include all of the easement area.

B.7 Title Insurance Commitment - Schedule B

The title agent's examination of the updated abstract and other pertinent records determines the items that are too great a risk for the company to insure. Items that will not be covered by the insurance policy will be listed as an exception (see definitions - B.1) in Schedule B of the commitment.

The title insurance commitment Schedule B can be modified by doing the work necessary to convince the title insurance company that the exception is no longer a problem. When a title company is satisfied that an exception is no longer a problem (i.e., a utility company has released the area from their blanket easement) they issue an endorsement (see definitions - B.1). BWSR realty staff will work with the SWCD and the landowner to obtain all necessary endorsements to pertinent exceptions.

There are many types of exceptions that can be listed on the Schedule B. Not all exceptions will preclude the state from acquiring the conservation easement. However, any exception that adversely affects the conservation easement, or will be adversely affected by the easement, must be satisfactorily addressed. If an objectionable exception cannot be resolved, the BWSR may not be legally able to complete the easement acquisition.

Various methods can be employed to address Schedule B problems:

- ❖ Obtain a release whereby the other party relinquishes its interest in the land covered by the conservation easement.
- ❖ Obtain a consent whereby the other party agrees that its interest will be subordinate to the conservation easement.
- ❖ The BWSR and other party with an interest in the land enter into "non-disturbance" agreement whereby both parties agree not to adversely affect the other party's interest in the land.
- ❖ Exclude the acreage where the problem exists from the conservation easement legal description.
- ❖ Do not take the easement because the risk is too high that the easement area will be adversely affected.

Below is a list of exceptions frequently listed on the commitment, along with general guidelines on how to handle the exception. If an exception appears that is not listed below please contact the BWSR realty staff for instructions on how to address it.

Financial Encumbrances - Mortgages, Assignments, etc

Prior to developing the agreement, the SWCD or landowner should have contacted any lending institutions with a mortgage on the property (see [Agreement Stage, Conservation Easement Agreement](#) section). Upon receiving the commitment the SWCD should check the Schedule B exceptions and make sure that each mortgage loan listed as an exception has a consent or subordination from the lender that made the loan. The BWSR has drafted a Mortgagee's Consent for a Conservation Easement form to use if the lender chooses. There are two versions of this form. Most mortgages are held by corporations. Therefore, the [Consent to Conservation Easement, Corporation](#) version of the form is the one most frequently used. Some lenders may choose to use consents or subordinations that they have drafted, although lenders are encouraged to use the State's forms as they are preapproved by the Attorney General and most all title companies.

If the lender has provided a consent contingent upon their name being listed as a co-payee on the easement check, and they were not listed as such on the agreement, please send a letter from the landowner indicating that the state must include their name on the easement check.

The central office cannot proceed with developing the easement if a consent is missing. ***Consents are recorded with the easement. Retain the original for recording and send only copies to the central office.***

A Schedule B exception for a contract for deed does not require a consent. Instead, all parties to the contract for deed must sign the easement as grantors. If the contract for deed was listed as a Schedule B exception it will have to be removed from the title insurance commitment (e.g., obtain endorsement) before the easement process can continue.

Mineral Rights

Mineral rights are part of the total ownership of a piece of property. If the mineral rights have been severed from the surface rights (i.e., the mineral rights belong to someone other than the fee title landowner), then the mineral rights holder may be able to destroy the surface of the land without compensating the landowner. The only mineral rights reservations that are never a problem are those owned by the State of Minnesota.

If the SWCD finds an exception for mineral rights in the commitment, be sure a copy of the documents severing the mineral rights is included with the commitment when it is submitted to the BWSR. The realty staff will work with the SWCD to remove this type of exception from the commitment.

Wells and Environmental Problems

State law requires that BWSR make a diligent effort to be sure that no environmental problems exist at the time of the easement is finalized. Environmental problems that could be listed as an exception are:

- ❖ an agreement by one landowner to supply water to another landowner
- ❖ an abandoned well or observation well
- ❖ an old dump or closed landfill on or adjacent to the easement area

Environmental exceptions require that a copy of the documents referred to in the commitment be submitted to BWSR for review along with the commitment.

Environmental problems identified in the Application Stage, and the agreed to action to resolve the problem developed between the landowner and the district in the Agreement Stage require that the SWCD verify that the problem(s) have been satisfactorily resolved. A brief explanation of the problem and the resolution actions taken, along with a statement indicating that the SWCD feels the problem has been resolved, must accompany the title commitment. The easement cannot be recorded until these problems are adequately resolved.

Property Taxes and Assessments

State law requires that all taxes be paid on the property to be acquired for a conservation easement. If the commitment shows an exception for delinquent taxes the exception will have to be removed. In most cases, removal of the exception will require documentation from the county auditor's office showing that the delinquent taxes have

been paid. This also applies to special assessments unless they are assessed over a number of years (e.g. 15 years) and each installment has been paid (i.e., nothing delinquent). If the commitment exception shows the remaining balance of delinquent taxes or special assessments, no additional information needs to be sent to the BWSR with the title commitment. BWSR staff will work with SWCDs to resolve these exceptions.

Other Conservation Easements

There are other types of conservation easements, such as a U.S. Fish and Wildlife waterfowl area management easement, which may duplicate or conflict with, all or part of BWSR's easement. The terms of the other conservation easement will have to be reviewed to assure that they do not substantially duplicate the terms of the state's conservation easement. The SWCD should obtain a copy of the other conservation easement document and send it to BWSR for review with the title commitment.

Right-of-Way Easements (roads, railroads, ditches, protected waters, etc.)

All rights of way for roads, railroads, ditches etc. must be excluded from the conservation easement area by hatching them out on the Exhibit A, or excepting them from the written legal description of the conservation easement. The SWCD should verify that all roads listed as exceptions are identified on the aerial photo or on an Exhibit A copy submitted with the Agreement Package. The BWSR office will contact you if additional information is necessary for these exceptions.

Electric, Telephone or Other Utility Easements

All utility easements are a potential concern since typically they are blanket easements that cover an entire quarter section and do not confine the actual installed utility line to a specific location. Thus, it is necessary to determine where the actual utility line is located in relationship to the conservation easement.

For each utility easement shown as an exception in the commitment, the SWCD should determine the physical location of the utility line and show it on an aerial photo or Exhibit A copy. The BWSR office will contact the SWCD if additional information is needed to determine whether the conservation easement will conflict with a utility easement that passes over or through the easement area. An example of a conflict would be if the conservation plan identified a tree planting that would likely interfere with electric lines. To resolve this problem, BWSR would request the SWCD modify the conservation plan and possibly even the easement to assure that trees would not be planted in that location.

Pipeline Easements

All pipeline easements are potential problems on a conservation easement. Since pipeline easements are typically blanket easements that cover an entire quarter section, the SWCD will have to find out if the pipeline has been installed, and if so, indicate the location of the pipeline on the aerial photo or on an Exhibit A copy (hopefully this was done during the application stage). The SWCD must also send a copy of the pipeline easement to the BWSR office with the title insurance commitment.

A release from the pipeline easement will be sought to minimize the potential conflicts between it and the conservation easement. The process for acquiring a release will differ in each situation, and may require the SWCD to supply additional information. For

wetland restoration easements, more work may be required of the SWCD in order to minimize the potential conflicts between the two easements. Any additional information needed will be requested by the BWSR office, which may decide that an agreement is necessary between the state and the pipeline company to protect both easements.

Drainage Agreements/Easements

Any exception listed on the commitment relating to drainage agreements/easements must have the referenced documents submitted to BWSR for review. The SWCD will have to identify the location of the drainage areas or tile lines referred to in the exception on a copy of an Exhibit A map or preferably on an aerial photo. If the conservation easement includes a wetland restoration or is a PWP, this type of exception will have to be reviewed even more carefully to be sure the wetland does not affect the drainage agreement and vice versa.

The SWCD will need to make the landowner(s) aware of their responsibility for the perpetual maintenance of the easement area. If a tile or drainage system in the easement area needs repair, any resulting damage to the vegetation on the conservation easement is the landowner's responsibility to repair to comply with the terms of the conservation easement. If additional information is necessary the BWSR office will request it from the SWCD.

B.8 Final Title Insurance Policy

When all changes and/or endorsements necessary to provide the state with a good title have been made to the title insurance commitment, the conservation easement will be sent to the SWCD for signature and recording. Prior to recording the easement and associated documents, the title agent must check the public records for any taxes, judgments or other encumbrances that have attached to the property since the date of the commitment. If none have occurred the title agent should record the easement and associated documents and prepare the final title insurance policy. ***If the SWCD is recording the easement, they are responsible for checking for new encumbrances prior to recording. If any are found, the easement should not be recorded.*** The amount of the policy should be the sum of the easement payment plus the conservation plan dollars. When the recorded easement and final policy are received at the BWSR they are reviewed to be sure that the new exceptions, if any, are not a problem. If there are no new problems, and all of the endorsements and changes agreed to have been made, the Final Title Insurance Policy is approved and the landowner is paid.

B.9 Frequent Problems with Title Insurance Policies

The four most frequently occurring final title insurance policy problems that have required policy endorsement before final approval and landowner payment can be made by the State are listed below. Each of these problems includes a reference to the page and item of the Specimen Policy that addresses that specific problem.

Final Title Insurance Policy is for an Incorrect Amount

The policy should be issued for the amount of the easement payment plus the conservation plan dollars. Issuing the final policy based on the values given in the

recorded easement will almost always result in an incorrect policy amount. (See page 1, Schedule A of the [Specimen Policy](#).)

Ownership Interests - Fee Title and Easement

Problem - The final title insurance policy either does not specify the State of Minnesota as the owner of the Conservation Easement and/or does not specify the fee owner(s) of the property where the easement is located.

To avoid this problem use the wording on page 1 item 3 of the [Specimen Policy](#). If the ownership is subject to a contract for deed it should be listed here and not in Schedule B as an exception.

General Legal Descriptions

Problem - The final title insurance policy includes an exception for a general legal description that is written to apply to all easement areas including those that in whole or part are described by a specific legal description.

The State will not approve an exception for a general legal description except when an easement area has a complete general description (i.e., beginning with "Part of"). To avoid this problem completely, please use the specific language in the [Specimen Policy](#) that covers both general and specific legal description situations.

Subordination Agreements

Problem - The final title insurance policy lists a mortgage as an exception but does not acknowledge the mortgage subordination consent to the conservation easement prepared by the mortgage lender and/or does not utilize the language of the Specimen Policy insuring that the mortgage is subordinated to the easement. To avoid the mortgage and subordination consent problem use the language provided in the [Specimen Policy](#).

All efforts to minimize these problems in final title insurance policies will be appreciated and will help speed the conservation easement process for everyone.

C. STATE REIMBURSEMENT FOR TITLE INSURANCE EXPENSES

The state will reimburse the SWCD for expenses incurred relating to the purchase of the title insurance policy. The state will not reimburse landowners for the expense of updating their abstract or torrens certificate except when associated with a flowage easement. An [Easement Reimbursable Expenses Invoice](#) may be periodically submitted to the BWSR for reimbursement payment.

The state cannot reimburse the SWCD for title insurance expenses unless the final title insurance policy has been received at the BWSR.

When completing the invoice please keep in mind the following:

- ❖ Attach copies of all receipts indicating the expenses that have been paid.
- ❖ Indicate the easement ID # and the landowner name for that easement.
- ❖ Sign and date the request (invoice) in the lower left corner.

Once a year SWCDs will be notified to submit all expenses incurred in the previous fiscal year that have not already been submitted for reimbursement. Expenses paid, but not submitted to BWSR by that deadline, will not be reimbursed.

(For more information on SWCD reimbursable expenses refer to the [Processing Framework](#) section of the handbook.)

D. EASEMENT RECORDING AND PAYMENT

The final conservation easement document will be produced by the BWSR upon satisfactory resolution of problems identified on the title insurance commitment.

D.1 Signing and Recording

The SWCD should review the conservation easement document upon receipt from the BWSR. Check to make sure names are spelled correctly, the correct marital status is listed, the easement payment is correct and the legal description and Exhibit A are consistent with what the landowner has agreed to.

It is very important to review the terms and conditions of the easement with the grantors. Make sure they understand these terms.

In addition, review the conservation plan, practice plan, plan map and other pertinent documents relating to the installation/establishment and maintenance of conservation practices with the landowners. Have the principal landowner sign the conservation plan. Make sure the landowners are aware of the dollar amounts available to cost-share the establishment of the practices, particularly if the amount has changed from what was identified on the conservation easement agreement.

The SWCD must not record an easement if the landowner has not adequately resolved environmental problems, abandoned wells or structures on the easement area.

D.2 IRS Reporting Information

The conveyance of a perpetual conservation easement is considered to be a real estate transaction by the IRS and may be subject to capital gains tax. Make sure that all grantors are aware that the full amount of the easement payment will be reported to the IRS corresponding to the year the payment is made. Where an easement has multiple grantors, an IRS Payment Distribution form will be included with the easement documents and must be filled out indicating how much (including zero) of the total easement payment will be paid to each individual (married couple are considered the same as individuals). Failure to fill out and submit the payment distribution form will result in the easement payment being withheld. Therefore, the distribution forms must be submitted to the BWSR with the recorded easement.

D.3 Submitting for Payment

In order for the state to make the easement payment all of the following documents must be submitted to the BWSR:

- ❖ Recorded easement showing the recording information.
- ❖ Final title insurance policy.
- ❖ Final signed conservation plan (only page one, unless the practice plan and plan map have been amended since the one submitted at the agreement stage).
- ❖ IRS 1099S Payment Information form (for multiple grantors only).