

SAMPLE CONSERVATION EASEMENT PREPARED BY:
WILLIAM F. (FRITZ) PAULUS, ATTORNEY AT LAW
2015 LAND CAMP, MENUCHA RETREAT CENTER, CORBETT, OR
APRIL 14, 2015
fritz@wfpauluslaw.com
www.wfpauluslaw.com
503-224-1773

AFTER RECORDING, RETURN TO:

William F. Paulus
Attorney at Law
1207 SW 6th Avenue
Portland, OR 97204

GRANTOR:

John and Jane Wapiti
1234 NW Harmony Road
Nirvana, Oregon 97XXX

GRANTEE:

Nirvana Valley Land Trust
1221 SW Elysium Road
Nirvana, Oregon 97XXX

CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT (this “Easement”) is entered into this 14th day of April, 2015, by and between John and Jane Wapiti, whose primary residence is 12345 NW Harmony Road, Nirvana, Oregon 97XXX (collectively “Grantor”) and the Nirvana Valley Land Trust, an Oregon domestic non-profit corporation, (“Grantee”).

RECITALS AND CONSERVATION VALUES

A. Grantor is the fee simple owner of that certain real property approximately 42 acres in size located in the County of New Wonder, State of Oregon, commonly known as 12345 NW Harmony Road, Nirvana, Oregon 97XXX with Tax Lot Identification Number XXXXX - 0100 and more particularly described on the attached Exhibit A (the “Property”).

B. The Property contains approximately 26 acres of non-irrigated farmland, ten (10) acres of mature forest composed predominately of Douglas-fir and native understory, two (2) acres of reproduction forest planted with western redcedar and the headwaters of Deer Creek. Deer Creek is a tributary to Ursus Creek, which flows to the Nirvana River. The Property contains a single-family residence on an approximate two acre home site, several agricultural outbuildings, and a historic loft barn (the “Historic Barn”) constructed in 1860 by James Harmony, the apparent namesake of NW Harmony Road. NW Harmony Road is a gravel county public road that separates the Property into western and eastern portions. The residence area is on the western portion near the intersection of NW Harmony and NW Nirvana Roads and the Historic Barn is across the road in the eastern portion of the Property. The specific sizes and locations of the structures on and features of the Property are further inventoried in the Baseline Documentation as defined below in Section 7. The approximate two acre home site, where the existing residence is located, that is described as Parcel II on Exhibit A, is not subject to the terms of this agreement and is not part of this Easement. Additionally, the portions of the Property that contain NW Nirvana Road, Harmony Road, and NW Badger Road are also excluded from the Easement.

C. Located approximately 30 miles southeast of downtown New Boston, the Property is within the Nirvana River Valley of rural New Wonder County, which is characterized by its pastoral setting with fertile soils on the rolling hills adjacent to the Elkhead Mountains. Farmers immigrated to the area over 120 years ago and named the area “Nirvana” because of the peaceful and serene experience they felt upon first seeing the valley.

D. The Property is currently zoned in an Exclusive Farm Use District (EFU) by New Wonder County, in accordance with Oregon Revised Statutes (ORS) Chapter 215 and Oregon Administrative Rules (OAR) Chapter 660, Division 33, because the Property is “agricultural land” as defined by statewide planning Goal 3. Goal 3 requires agricultural land to be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. Applicable provisions of ORS Chapter 215 and OAR 660, Division 33, enacted and adopted pursuant to Goal 3, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an EFU zone.

E. The Property is also benefits from an Oregon Department of Land Conservation and Development Final Order and Home Site Authorization under ORS 195.300 to ORS 195.336 (Measure 49) that the previous owner of the Property was granted in 2009, with State Election Number EXXXXXX (the “DLCD Order”). The DLCD Order authorized the previous owner to establish up to two additional lots or parcels and two additional dwellings on the Property (the “Measure 49 Rights”) that the current zoning would not otherwise allow. Because the Property is located in an exclusive farm use zone, new lots or parcels created through the DLCD Order may not exceed five acres and possibly only two acres if the Property is designated high-value farmland. Since the Property was transferred to Grantor in 2012, the Measure 49 Rights are effective for 10 years after conveyance.

Comment [A1]: Define critical terms but be concerned about using definitions or terms that run the risk of becoming obsolete and difficult to interpret in the future.

F. Grantee is an Oregon public benefit nonprofit corporation organized under ORS Chapter 65, whose general purposes include, among other things, the conservation of agricultural and forestland open spaces and the protection of natural resource lands in the Nirvana River Valley in the County of New Wonder, Oregon. Its registry date with the Oregon Secretary of State Corporate Division is June XX, XXXX with registry number XXXX-XX. Founded in 1979, the mission of Grantee is to protect and enhance farmland, forests, and watershed of the Nirvana River Valley to benefit its human and natural communities. The board of directors for Grantee has specifically authorized the organization to accept and hold conservation easements to further its above stated mission.

G. Grantee is organized and maintained as a tax exempt public charity under the Internal Revenue Code §501(c)(3) with EIN #XX-XXXXX. Accordingly, Grantee is a qualified recipient of deductible charitable contributions under Internal Revenue Code § 170(b)(1)(A)(v) and § 170(c)(1). Grantee is also a qualified organization within the meaning of Internal Revenue Code §170(h)(3).

H. ORS 271.715 to 271.795 permit the creation of conservation easements for the purpose of retaining or protecting natural, scenic, and open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property. Grantee is authorized to enter into, hold, and enforce conservation easement agreements pursuant to these statutes.

I. Under ORS 390.010 (3)(a), the State of Oregon has determined that it is in the public interest to protect existing open spaces for the use and enjoyment of Oregon’s scenic landscapes.

J. The State of Oregon has also determined that real property held for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic, and economic asset to the people of Oregon, whether living in rural, urban, or metropolitan areas (ORS 215.243(1)). The State of Oregon has further determined that the preservation of a maximum amount of the limited supply of agricultural land is

necessary to the conservation of the state's economic resources, and that the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthy, and nutritious food for the people of Oregon and the nation (ORS 215.243(3)).

K. The Property is currently used for a "qualifying farm use" and receives a farm use special assessment on New Wonder County property taxes pursuant to ORS 308A.068.

L. Grantee approved this Easement through Grantee's board, the governing body for the organization, on March 31, 2015.

M. At the time this Easement was executed, the Property was not subject to a mortgage or trust deed that required subordination.

N. The Property possesses significant farmland, forest lands, wildlife habitat, and scenic open space (collectively, "Conservation Values") of importance to Grantor, Grantee, and to the people of New Wonder County and the State of Oregon. The Conservation Values of the Property include, but are not limited to, the following:

- a. The Property includes approximately 26 acres of open farmland currently used for pasture and grass seed production that has been classified as prime farmland and farmland of statewide importance by the Soil Conservation Service, now known as the Natural Resource Conservation Service, of the U.S. Department of Agriculture and as High-Value Farmland within the meaning of ORS 215.710(3) and OAR 660-033-0020(8). In particular, according to the Soil Survey of New Wonder County dated 1980 the Property is predominately composed of the following soil types: Fertile Silt Loam 38B, C, D, and E, Elkhead Silt Loam C, D, and E, Burney Silt Loams 11C, and Dexter Silt Loam 16C. Approximately 79 percent of the Property's soils are classified as high value soils, thereby giving it a classification as High-Value Farmland. The farmland on the Property is currently being used to produce grass seed and the pasturing and rearing of bison.
- b. The Property contains the headwaters to Deer Creek a tributary in the Nirvana River Basin. The protection of headwaters streams is important to water quality benefits downstream.
- c. The farm and forestland of the Property is a crucial part of the range of a herd of Roosevelt elk.
- d. East of the Historic Barn, the Property contains approximately 12 acres of native mature and reproductive forest that is predominately composed of Douglas-fir, grand fir, and western red-cedar trees, with an understory of Oregon grape, snow berry, hazel, sword ferns, and trailing blackberries.
- e. The Property borders the paved NW Nirvana Road and significant portion of the Property can be readily seen and enjoyed by the general public traveling on this county road, which is a main public thoroughfare in the Nirvana area and connects the community with State Highway ∞ and the greater New Boston metropolitan area. This farmland is also clearly visible to the public from the gravel county road, NW Harmony Road, which bisects the Property as it heads north from its junction with Nirvana Road. Lastly, NW Badger Road is another county road that touches portions of the Property east of NW Harmony Road and is also visible to the public in those locations.

Comment [A2]: Any mortgage or deed of trust must be subordinated to the rights of the easement holder to enforce the conservation purposes of the gift in perpetuity, if a charitable deduction is to be obtained by the donor. Treas Reg § 1.170A-14(g)(2).

Comment [A3]: Identify conservation values and clearly articulate why these are important and make certain these recitals match up with stated purpose in the body of the agreement.

- f. The Property is currently surrounded by other agricultural and forest lands that are producing a variety of agricultural goods such as grass seed, wheat and other grains, vineyards, Christmas trees, forest products, u-pick vegetable farms, small scale cattle ranchers, and wild game farmers,
- g. In the absence of a perpetual conservation easement, the Property could be developed with two additional home sites pursuant to the Measure 49 Rights. This development would destroy farm soils, create fragmentation of farm parcels, fragmentation of wildlife habitat, impact water resources with well drilling, and consequently greatly diminish the Conservation Values of the Property.
- h. In addition to protecting the farm soils, farming activity, and wildlife habitat, there are other clear community benefits to preservation of the agricultural and forest lands on the Property. With its close proximity to the New Boston metropolitan area, the Helvetia area attracts more than 100,000 people every year who come to enjoy the scenery of the pastoral countryside, historic barns, covered bridges, and to purchase agricultural products from its area farmers. Throughout the year, Grantee presents educational talks about Nirvana River Valley’s history, heritage, farming, natural resources, and other topics of interest to various groups. Grantee also hosts the annual Nirvana Celebrate to celebrate the unique history of the area. Consequently, the Conservation Values on the Property are an important resource to the overall community and the larger New Boston metropolitan community.

O. In order to preserve the Conservation Values of the Property, Grantor desires to grant to Grantee and Grantee desires to accept from Grantor, a conservation easement over an approximate 40 acre portion of the Property (the “Easement Area”). The Easement Area is more particularly described in attached Exhibit B (the “Easement Area”) and depicted on the attached Exhibit C (the “Easement Area Map”).

P. The Conservation Values of the Easement Area are further inventoried in the Baseline Documentation as defined below in Section 7.

Q. Grantee has the commitment to protect the Conservation Values on the Easement Area and the resources to enforce the restrictions of this Easement.

R. Grantor is donating this Easement to Grantee and intends that the market value of the Easement be a charitable contribution to Grantee. Grantee makes no representation as to the tax consequences of the transaction contemplated by this Easement. Grantor will obtain independent tax counsel and be solely responsible for compliance with the gift value substantiation requirements of the Internal Revenue Code.

NOW THEREFORE, for valuable consideration, the receipt of which is hereby acknowledged by Grantor, and the mutual covenants, terms, conditions, and restrictions contained herein, the parties hereby agree as follows:

AGREEMENT

1. Grant of Conservation Easement. Grantor hereby voluntarily grants to Grantee a perpetual conservation easement, in gross, on, over, under, and across the Easement Area. This Easement is being created and acquired in accordance with ORS 271.715 to 271.795, and the provisions herein shall be construed and applied accordingly.

2. Qualified Conservation Contribution. It is intended that a portion of this grant shall constitute a “qualified conservation contribution” within the meaning of 26 U.S.C. §170(h)(1) of and any applicable tax laws

Comment [A4]: A contribution will not be treated as *exclusively for conservation purposes* unless the conservation purposes are protected in perpetuity. IRC § 170(h)(5)(A).

of the State of Oregon. The provisions of this Easement shall be construed and applied accordingly. Grantee acknowledges that no goods or services were received in consideration of the grant of this Easement.

3. Purpose.

(a) **General Purposes.** The general purposes of this Easement are to ensure that the Easement Area will be retained in perpetuity predominantly in its current condition for:

- “The preservation of certain open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant benefit” (as that phrase is used in 26 U.S.C. §170(h)(4)(A)(iii));
- “The preservation of land areas for ... the education of, the general public” (as that phrase is used in 26 U.S.C. §170(h)(4)(A)(i)); and
- “Protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, or cultural aspects of real property” (as that phrase is used in ORS 271.715(1)).

(b) **Specific Purposes:** The more specific purposes of this Easement are to allow certain uses as specified in Section 6 and to ensure that the Easement Area will be retained in perpetuity predominately in its current natural condition to preserve the farmland, forest land, and open space features of the Easement Area, and to prevent any use of the Easement Area that will significantly impair or interfere with its Conservation Values. Grantor and Grantee intend that this Easement will confine the use of the Easement Area to such activities that are consistent with this purpose.

4. Rights of Grantee. To accomplish the purposes of this Easement, Grantor grants to Grantee the following rights:

- (a) To preserve and protect the Conservation Values of the Easement Area pursuant to the terms and conditions of this Easement;
- (b) To enter on the Easement Area as provided in Section 8;
- (c) To prevent any activity on or use of the Easement Area that is inconsistent with the Conservation Values of the Easement Area or the purposes of this Easement; and
- (d) To require restoration of such areas or features of the Easement Area that may be damaged by any inconsistent activity or use, pursuant to Section 9.

5. Prohibited Uses. Grantor shall not engage in any activity on, or use of, the Easement Area that is inconsistent with the terms of this Easement or materially interferes with or impairs the Conservation Values of the Easement Area. Without limiting the generality of the foregoing, the activities described immediately below are expressly prohibited.

(a) Any further partition, subdivision, or other legal or de facto creation of lots or parcels in separate ownership is prohibited, except that the partition or division of the non-Easement portion of the Property is permitted if allowed by law.

Comment [A5]: Draft clear and unambiguous purposes clause. For a donation to be allowed under IRC 170(h), a donation must be exclusively for conservation purposes. Treas Reg § 1.170A-14(e)(1).

Comment [A6]: Did not cite “protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem” which is another IRC 170(h)(4)(A) conservation purpose.

Comment [A7]: Terms of donation must provide a right of donee to enter the property at reasonable times for inspection and compliance purposes. Treas Reg § 1.170A-14(g)(5)(ii). Must also include right to enforce easement and right to require the restoration of the protected property. Id.

(b) Any residential use, or the maintenance, construction or placement of any permanent residential structures of any kind, including manufactured dwellings or mobile homes on the Easement Area.

(c) All rights to further develop the Property and Easement Area under the Measure 49 Rights and DLCD Order are extinguished, and cannot be used to transfer development rights to other lands.

(d) Construction or placement of any nonresidential structures or improvements, except for permitted agricultural and forestry uses under Section 6 of this Easement.

(e) The filling, dumping, excavating, draining, dredging, mining, drilling, removing or exploring for or extracting of minerals, oil, gas, coal, and other hydrocarbons, soils, sands, gravel, rocks or any other materials on or below the surface of the Easement Area, except for the right to construct agricultural structures and ponds under Section 6 of this Easement.

(f) Any activity that causes significant soil degradation, loss of productivity, or erosion, or which contributes to the significant pollution of any surface or subsurface waters, provided that this prohibition shall not be construed as extending to any agricultural use or right to construct agricultural structures or ponds under Section 6 of this Easement.

(g) It is forbidden to dispose of or store rubbish, garbage, building debris, unserviceable vehicles and equipment or parts thereof, hazardous or other waste, hazardous or toxic substances, or other unsightly or offensive waste material on the Easement Area, except that organic matter, compost, and logging debris may be used, stored, or disposed of in a manner not detrimental to the Conservation Values of the Easement Area, and other waste generated by permitted uses on the Easement Area may be stored temporarily in appropriate containment for removal at reasonable intervals, all in accordance with applicable state, local, and federal laws and regulations. This restriction is not inclusive of any occurrence prior to the effective date of this Easement.

(h) Any industrial or commercial use or activity, except (i) permitted farm and forestry use activities, described in Section 6, and (ii) de minimus commercial or recreational activities that are otherwise permitted in this Easement or are not inconsistent with the purposes of this Easement or the Conservation Values of the Easement Area.

(i) Placing, constructing, or maintaining any signs, billboards, or outdoor advertising structures on the Easement Area other than a reasonable number and size of signs needed to advertise the sale or lease of the Easement Area, to state the conditions of access and address to the Easement Area, to promote political views, to advertise the sale of farm products produced on the Easement Area, or for farm activities and events on the Easement Area.

(j) Unless otherwise expressly permitted by Grantee in accordance with Section 14(b) of the Easement, the granting of any utility corridor right-of-way easements or cell tower leases, utility systems or structures, cell towers, septic systems, septic drain fields, communication devices, or aerial lines. This restriction is not inclusive of the siting or installation of the above mentioned utilities occurring prior to the effective date of this Easement.

6. Permitted Uses. Grantor reserves to themselves, and to their personal representatives, heirs, successors, and assigns any and all rights accruing from its ownership of the Easement Area, including the right to engage in or permit or invite others to engage in all uses of the Easement Area that are not inconsistent with the terms of this Easement or expressly prohibited herein. Without limiting the generality of the foregoing, the activities and uses described below are expressly permitted.

(a) To manage, lease or rent the Easement Area and its buildings, structures, or other improvements.

Comment [A8]: Reserved rights for surface mining generally invalidate the perpetual nature of an easement for federal tax purposes. IRC 170(h)(5)(B). However, to address a frequent problem in Western states where the ownership of surface mineral rights was separated from the estate, Congress allowed an exception to the no-surface-mining rule “if the probability of surface mining occurring on such property is so remote as to be negligible.” IRC § 170(h)(5)(B)(ii); Treas Reg § 1.170A-14(g)(4)(ii). Nonetheless, the extraction of minerals from the subsurface is permitted on an easement as long as such removal is not inconsistent with the conservation purposes of the donation. See IRC § 170(h)(5)(B)(ii)-(6); Treas Reg § 1.170A-14(g)(4)(i)

Comment [A9]: Make certain that permitted uses (aka “reserved rights”) do not impair or are inconsistent with the conservation values of the protected property. For a donation to be considered *exclusively for conservation purposes*, the donor must not reserve rights that are inconsistent with the conservation purpose of the easement. See Treas Reg § 1.170A-14(e)(2). When a donor reserves rights that the exercise of which may impair the conservation values, then the IRS requires a Baseline Documentation as set forth in below in Section 7.

- (b) Grantor reserves the right to build new structures reasonably necessary for agricultural, forestry, and wildlife education uses on the Easement Area.
- (c) Grantor reserves the right to remove, renovate, or replace in substantially the same location the existing agricultural buildings on the Easement area, with the exception of the Historic Barn, which will be maintained unless destroyed by fire or weather.
- (d) To engage in any farm use, as defined by ORS 308A.056, in accordance with sound, generally accepted agricultural practices.
- (e) To engage in any forestry use in accordance with sound, generally accepted forestry management practices.
- (f) Grantor may, upon Grantee's written approval, sell mitigation credits, wetland credits, carbon credits, habitat credits, species credits, and other similar types of mitigation or conservation credits ("*Ecosystems Services Credits*") generated from the enhancement of Conservation Values beyond the values indicated in the Baseline Documentation.
- (g) Grantor reserves the right to develop new water resources on the Easement Area according to applicable state and local agencies by the drilling of wells for groundwater or construction of ponds for agricultural or other permitted uses.
- (h) To construct and use small scale solar or wind electric production equipment for personal or commercial use or sale. Such improvements must be consistent with the Conservation Values and the terms of this Easement. Grantor must notify Grantee in writing before exercising its rights under this subsection.
- (i) Grantor reserves the right, subject to written approval by Grantee, to permit limited excavation of the surface of the Easement Area for ecological, education, scientific research, and archaeological investigation conducted under then current generally accepted professional standards and without impact to the Conservation Values.
- (j) The construction and maintenance of fences are permitted as necessary for agricultural and forestry use.
- (k) Construct or develop wildlife habitats in accordance with applicable federal or state law.
- (l) Create, restore, conserve, and manage wetland, riparian, and other wildlife habitats.
- (m) Grantor reserves the right to establish and maintain additional unpaved footpaths and recreational trails, and agricultural and forestry access roads provided that they are located and designed in a manner to prevent soil erosion and prevent damage to fragile plant communities and wildlife habitat.
- (n) Conduct a property line adjustment with New Wonder County, and if needed to adjust boundary lines with adjacent properties owned by Grantor, to create a separate lot or parcel for the residence and existing approximate two (2) acre home site on the Property that is excluded from the Easement Area and more particularly described as Parcel II on Exhibit A.
- (o) Generally to undertake any and all other activities that are necessary to protect public health or safety, or which are required by any governmental law, regulation, or agency, provided that any such activities shall be conducted to avoid or minimize inference with the Conservation Values.

7. Baseline Documentation. The current condition of the Easement Area is documented in an inventory of relevant features of the Easement Area, dated April 13, 2015, on file at the offices of Grantee, and signed by Grantor for identification purposes (the “Baseline Documentation”). The Baseline Documentation consists of reports, maps, photographs, and other documentation derived from various methods (including field visits) that the parties agree provide an accurate representation and description of the Easement Area at the time of this grant and that are in compliance with 26 C.F.R. § 1.170A-14(g)(5)(i). The Baseline Documentation is intended to serve as an objective, although not exclusive, information baseline for monitoring compliance with the terms of this Easement. The Baseline Documentation may be updated by Grantee periodically to reflect the current condition of the Easement Area.

Comment [A10]: Under Treas Reg 1.170-14(g)(5)(i) donor of easement must make the baseline documentation “available to the donee, prior to the time the donation is made.”

8. Access to the Easement Area.

- (a) Periodic Monitoring. Grantor grants Grantee access to the Easement Area periodically (e.g. at least once a year), at a mutually agreeable time and upon written notice to Grantor, for the purpose of making a general inspection to monitor compliance with this Easement.
- (b) Violation Inspections. Grantor grants Grantee access to the Easement Area at such other times as are necessary if Grantee has a reason to believe that a violation of the Easement is occurring or has occurred, for the purpose of mitigating or terminating the violation and otherwise enforcing the provisions of this Easement. Such entry shall be upon prior reasonable notice to Grantor and Grantee shall not in any case unreasonably interfere with Grantor’s use and quiet enjoyment of the Protected Easement Area.
- (c) No General Public Access. Nothing contained herein shall be construed as affording the general public physical access to any portion of the Easement Area, except at the discretion of the Grantor.

Comment [A11]: Elaborate on the conservation values and purposes in the Baseline Documentation.

9. Enforcement and Remedies.

(a) Notice of Violation. Grantee shall have the right to prevent any use of, or activity on, the Easement Area that is inconsistent with the purpose and terms of this Easement. If Grantee determines that Grantor, or third parties under Grantor’s authority or permission, are in violation of the terms of this Easement, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation. In the event that such violation involves injury to the Easement Area resulting from any use or activity inconsistent with the purposes and terms of this Easement, such notice shall demand that Grantor, at Grantor’s sole cost and expense, restore the portion of the Easement Area so injured to its prior condition in accordance with a plan approved by Grantee.

(b) Failure to Cure. If Grantor fails to cure a violation within 30 days after Grantor’s receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a 30-day period, fails to begin curing the violation within the 30-day period, Grantee shall bring an action at law or in equity to (i) enforce the terms of this Easement, (ii) enjoin the violation by a temporary, preliminary, and/or permanent injunction, (iii) recover any damages to which Grantee may be entitled for such violation of the terms of this Easement, and (iv) require the restoration of the Easement Area to the condition and appearance that existed prior to such violation.

(c) Right to Proceed Against Third Parties. Grantee has the right to proceed against any third party or parties whose actions threaten or damage the Conservation Values. Grantor shall cooperate with Grantee in any such proceeding. If requested by Grantee, Grantor shall assign to Grantee any cause of action for trespass resulting in damage to the Conservation Values that may be available to Grantor.

(d) Emergency Enforcement. If Grantee, in its sole discretion, reasonably determines that the circumstances require immediate action to prevent or mitigate significant damage to the Easement Area, Grantee may enter the Easement Area to prevent or mitigate further damage to or alteration of the Easement Area necessary to protect the Conservation Values or otherwise pursue its remedies under this Section 9 without prior notice to Grantor and without waiting for the expiration of the cure period set forth above in subsection (b).

(e) Nature of Remedies. Grantee shall have available all legal and equitable remedies to enforce Grantor's obligations hereunder. Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate, and that Grantee shall be entitled to injunctive relief, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including without limitation specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's rights under this Section 9 shall be cumulative, in addition to all remedies now or hereafter existing at law or in equity, and apply equally in the event of either actual or threatened violations of the terms of this Easement.

(f) Costs of Enforcement. Grantor shall reimburse Grantee for all costs and expenses incurred by Grantee in enforcing the terms of this Easement necessitated by Grantor's violation of the terms of this Easement including, without limitation, all reasonable court costs, attorney fees, expert witness fees, and costs of restoration mitigation.

(g) No Waiver. Any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any terms of this Easement by Grantor, its agents, employees, contractors, family members, invitees, or licensees shall not be deemed or construed to be a waiver by Grantee of such term under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.

(h) Waiver of Certain Defenses. Grantor acknowledges that it has carefully reviewed this Easement and has had the opportunity to consult with and been advised by legal counsel of its terms and requirements. In full knowledge of the provisions of this Easement, Grantor hereby waives any claim or defense it may have against Grantee or its successors or assigns under or pertaining to this Easement based upon waiver, laches, estoppel, adverse possession, or prescription.

(i) Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor to abate, correct, or restore any condition on the Easement Area or to recover damages for any injury to, or change in, the Easement Area resulting from (1) causes beyond Grantor's control including, without limitation, natural changes, fire, flood, storm or earth movement, acts of trespassers, or (2) any reasonable and prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Easement Area resulting from such causes.

10. Costs; Taxes. Grantor shall bear all costs related to the ownership of the Easement Area and the Property. Grantor shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Easement Area and the Easement Area by competent authority (collectively "taxes"), and shall furnish Grantee with satisfactory evidence of payment upon request. Grantor shall also be responsible for and shall bear all costs associated with ensuring compliance with all federal, state, and local laws, regulations, rules, and ordinances.

11. Liability and Indemnification.

(a) Liability. The parties acknowledge and agree that because Grantor is the fee owner of the Easement Area, except as specifically provided for under subsection (b) below, the general liability for risks, damages, injuries, claims, or costs arising by virtue of Grantor's ownership and use of the Easement Area shall

remain with Grantor as a normal and customary incident of the right of Property ownership. Grantor shall maintain adequate liability insurance coverage on the Easement Area. Nothing in this Easement shall be construed as giving rise to any right or ability of Grantee to become an “owner” or “operator” of the Easement Area within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended.

(b) **Indemnification.** Grantor shall indemnify, defend, and hold harmless Grantee (and Grantee’s officers, employees and agents) from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Grantor and Grantor’s invitees on the Easement Area, except to the extent such damages are due to Grantee’s (or Grantees officers, employees and agents) negligence or willful misconduct, or to any breach of this Easement by Grantee or Grantee’s officers, employees and agents. Grantee shall indemnify, defend, and hold harmless Grantor from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature resulting from, arising out of, or relating to the activities of Grantee (or Grantee’s officers, employees and agents) on the Easement Area, except to the extent such damages are due to Grantor’s or Grantor’s invitees’ negligence or willful misconduct, or to any breach of this Easement by Grantor or Grantor’s invitees.

12. Covenants Running With the Land. The parties acknowledge and agree that the covenants and agreements set forth in this Easement are intended to bind Grantor, Grantee, and their respective successors and assigns. The Property and the Easement Area shall be held, conveyed, mortgaged, pledged as security for a debt, leased, used, and occupied subject to the covenants, conditions, restrictions, and other limitations set forth in this Easement (the “Restrictions”). All and each of the Restrictions are imposed as equitable servitudes upon the Property and every part thereof shall run with the land. Furthermore, all and each of the Restrictions shall be binding upon and burden, and shall inure to the benefit of, all persons having or acquiring any right, title, or interest to either the Property or the Easement Area.

13. Termination of Easement. This Easement can only be terminated or extinguished by judicial proceedings in a court having jurisdiction upon a finding that a subsequent unexpected change in the conditions surrounding the Easement Area make impossible or impractical the continued use of the Easement Area for conservation purposes. In accordance with 26 C.F.R. § 1.170A-14(g)(6), this Easement gives a property right immediately vested in Grantee, with a fair market value that is equal to the proportionate value that the Easement at the time of donation bears to the value of the Property as a whole at that time. The values at the time of this donation shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this Easement, pursuant to 26 U.S.C § 170(h). The ratio of the value of this Easement to the value of the Property unencumbered by this Easement shall remain constant, and the proportionate value of Grantee’s property rights shall also remain constant. If this Easement is terminated in accordance with this Section 13, Grantee shall be entitled to receive, upon a subsequent sale, exchange, or involuntary conversion, a portion of the proceeds equal to its proportionate value of this Easement, unless Oregon law provides that the Grantor is entitled to the full proceeds from the conversion without regard to the terms of this Easement. All such proceeds received by Grantee must be used by Grantee in a manner consistent with the conservation purposes of this Easement as of the effective date of this grant.

14. Subsequent Property Transfers and Encumbrances.

(a) **Transfers.** Any subsequent transfer, including without limitation, conveyance, lease, or mortgage of the Easement Area, shall be subject to this Easement. Grantor shall incorporate the terms of this Easement in any deed or other legal instrument by which it divests itself of any interest in the Easement Area. Grantor shall also give written notice to Grantee of the prospective transfer of any interest in all or a portion of the Easement Area no later than 30 days prior to the date of such prospective transfer. Such notice to Grantee shall include the name, address, and telephone number of the prospective transferee or the prospective transferee’s

Comment [A12]: As another component of the perpetuity requirement for IRS purposes, a donated easement can be extinguished only by judicial proceedings upon a finding that a subsequent unexpected change in the conditions surrounding the property makes the continued use of the property for conservation purposes impossible or impractical. Treas Reg § 1.170A-14(g)(6)(i).

Comment [A13]: Donation of CE gives rise to a property right immediately vested in the grantee. FMV formula stated. Treas Reg § 1.170A-14(g)(6)(ii).

Comment [A14]: Proportionate value of donee’s property rights shall remain constant. Treas Reg § 1.170A-14(g)(6)(ii).

Comment [A15]: A donee is entitled to its proportionate share of sale proceeds if the easement is extinguished under Treas Reg section 1.170A-14(g)(6)(i). All of the donee’s proceeds must be used in a manner consistent with the conservation purposes at the time the easement was donated. Treas Reg § 1.170A-14(g)(6)(ii).

representative. Failure of Grantor to perform any act required by this subsection shall not impair the validity of this Easement or limit its enforceability in any way.

(b) **Encumbrances.** The grant of any additional easements, use restrictions or any other encumbrances by Grantor against the Easement Area is hereby prohibited without the prior written consent of Grantee, which consent may be given only if Grantee determines in its sole and absolute discretion that the encumbrance will in no way frustrate the conservation purposes of this Easement. Within 45 days after receiving written notice from Grantor requesting such permission, Grantee shall provide Grantor with a written response either granting or denying Grantor's request. Notwithstanding the foregoing, nothing in this Easement should be construed as impairing the ability of Grantor to use the Easement Area or the Property as collateral for subsequent borrowing.

(c) **Estoppel Certificate.** Upon written request by Grantor, Grantee shall within 60 days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies that to the best of Grantee's knowledge Grantor is in compliance with any obligation of Grantor contained in this Easement or which otherwise evidences the status of this Easement. Such certification shall be limited to the condition of the Easement Area as of Grantee's most recent inspection.

15. Amendment. Grantor and Grantee may mutually agree to amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including 26 U.S.C. § 170(h), as amended (or any successor provision(s) then applicable), and ORS 271.715-795. Any such amendment shall (a) be consistent with the purpose of this Easement, (b) either enhance or have no effect on the Conservation Values, (c) not affect this Easement's perpetual duration, (d) be in writing and be signed by both parties hereto (or their respective successors or assigns), and (e) be recorded in the official real property records of the county in which the Property is located. In no event shall the "economic hardship" of Grantor constitute a changed circumstance that would allow Grantor to unilaterally amend this Easement.

16. Assignment. With the written consent of Grantor, which consent shall not be unreasonably withheld, this Easement is transferable by Grantee, but Grantee may only assign its rights and obligations hereunder to an organization that is a "qualified organization" at the time of the transfer under 26 U.S.C. § 170(h)(3) (or any successor provision then applicable) and authorized to acquire and hold conservation easements under ORS 271.715 to 271.795 (or any successor provisions then applicable). In the event that an assignee assumes the obligations of Grantee hereunder, then Grantee shall have no further liability with respect to this Easement. Notwithstanding the foregoing, Grantee is prohibited from assigning this Easement, unless Grantee, as a condition of the subsequent transfer, requires in writing that the conservation purposes and terms of this Easement shall continue to be carried out by the assignee.

17. Condemnation. If all or any part of the Easement Area is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate, or other authority, so as to terminate this Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Easement Area subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. As between Grantor and Grantee, Grantee shall be entitled to receive the value of the property condemned, determined in accordance with the method set forth above in Section 13. All expenses reasonably incurred by Grantor and Grantee in connection with the taking shall be paid out of the amount recovered.

18. Recording. Grantor shall immediately record this instrument in the official records of the county within which the Property is located, and in any other appropriate jurisdictions, and Grantee may re-record it at any time as may be required to preserve Grantee's rights in this Easement.

Comment [A16]: See Termination Clause – i.e. need court order to extinguish CE.

19. Notice and Addresses. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by mail, postage prepaid, to the address set forth below. Any party may change the address to which its notices are to be sent by duly giving notice pursuant to this Section.

To Grantor: John and Jane Wapiti
1234 NW Harmony Road
Nirvana, Oregon 97XXX

To Grantee: Nirvana Valley Land Trust
1221 SW Elysium Road
Nirvana, Oregon 97XXX

20. General Provisions.

(a) Governing Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Oregon.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to affect the purposes of this Easement and the policy and purpose of ORS Chapter 271. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the Purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Conservation Intent. Any ambiguities in this Easement shall be construed in a manner which best effectuates the Conservation Values for the Easement Area.

(d) Changed Circumstances. Grantor and Grantee acknowledge that future conditions may change in the areas neighboring the Property and the Easement Area, including without limitation, increased development, land use, and zoning changes. Grantor and Grantee further acknowledge that such future conditions may result in various hardships to Grantor by virtue of the restrictions contained in this Easement, including without limitation, restrictions on the ability to develop the Property and the Easement Area. However, Grantor and Grantee expressly intend that this Easement continue in perpetuity regardless of such changed conditions and circumstances and regardless of hardship, whether such hardship is economic or otherwise. Under no circumstances may Grantor unilaterally terminate this Easement. Any termination of all or part of this Easement must be made in accordance with Section 13.

(e) Sale Proceeds. Any sale proceeds received by the Grantee pursuant to Sections 13, 16 or 17 of this Easement must be used in a manner consistent with the conservation purposes of this Easement as of the effective date of this grant.

(f) Notice Before Exercising Reserved Rights. To the extent required for compliance with 26 C.F.R. § 1.170A-14(g)(5)(ii), and only to the extent such activity is not otherwise subject to review under this Easement, Grantor agrees to notify Grantee as provided for in Section 19 before exercising any reserved right that may have an adverse impact on the conservation interests associated with the Easement Area.

(g) Severability. If any provision of this Easement, or its application to any person, entity, or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such

Comment [A17]: IRS requirement about required notice before exercising reserved rights.

provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected.

(h) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement Area and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement Area, all of which are merged into this Easement. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Section 15.

(i) No Forfeiture. Nothing contained in this Easement will result in a forfeiture or reversion of Grantor's title in any respect.

(j) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon assignment of that party's interest in the Easement or transfer of the Easement Area, except that liability for acts or omissions occurring prior to transfer shall survive assignment or transfer.

(k) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

IN WITNESS WHEREOF, the parties have executed this Easement as of the date first set forth above.

GRANTOR:

GRANTEE:
NIRVANA VALLEY LAND TRUST

By: _____
John Wapiti

By: _____
Meadowlark Smith,
Secretary, Board of Directors

By: _____
Jane Wapiti

[Notarizations follow on the next page.]

State of OREGON
County of NEW WONDER

This instrument was acknowledged before me on _____, 2015 by John Wapiti.

Notary Public - State of Oregon

State of OREGON
County of NEW WONDER

This instrument was acknowledged before me on _____, 2014 by Jane Wapiti.

Notary Public - State of Oregon

State of OREGON
County of NEW WONDER

This instrument was acknowledged before me on _____, 2015 by Meadowlark Smith, as Secretary of Grantee, Nirvana Valley Land Trust, a nonprofit corporation.

Notary Public - State of Oregon

SAMPLE

Exhibit A
Property Description

SAMPLE

Exhibit B
Easement Area Description

SAMPLE

Exhibit C
Easement Area Map

SAMPLE