

## DEED OF CONSERVATION EASEMENT

### Waggener Community Park

THIS DEED OF CONSERVATION EASEMENT ("Deed") is granted on this 22<sup>nd</sup> day of December 2006, by John Michael Waggener, whose address is 1706 Weld County Road 46, Berthoud, CO 80513 ("Grantor"), to COLORADO OPEN LANDS, a Colorado non-profit corporation ("Grantee"), whose address is Suite 320, 274 Union Boulevard, Lakewood, Colorado 80228, collectively the "Parties."

#### RECITALS:

A. **Description of Property.** Grantor is the owner of the fee simple interest in the subject Property legally described in **Exhibit A** and depicted in **Exhibit B**, both attached hereto and made a part of this Deed, which consists of approximately 35 acres of land, together with water and mineral rights, and grazing or other permits associated with or appurtenant to the Property located in Larimer County, State of Colorado (the "Property").

B. **Qualified Organization.** Grantee is a "qualified organization," as defined in §170(h) of the Internal Revenue Code and a charitable organization as required under C.R.S. §38-30.5-104 (2).

C. **Conservation Purposes.** The Conservation Purposes set forth in this paragraph may hereinafter be collectively referred to as the "Conservation Values." According to Section 170(h)(4)(A) of the Internal Revenue Code and Section 1.170A-14(d) of the Treasury Regulations, the Conservation Values of a qualified conservation contribution may be for one or more of the following: to preserve land for outdoor recreation by or education of the general public; to protect relatively natural habitat of fish, wildlife or plants; to preserve open space; and to preserve historically important land or structures.

The Conservation Values of the Property include Open Space and Recreation or Education as further described below:

**Open Space** [§ 1.170A-14(d)(4)]. The Property qualifies as open space because it will be preserved for the scenic enjoyment of the general public and will yield a significant public benefit.

**Scenic enjoyment.** The Property adds to the scenic character of the local rural landscape in which it lies, and provides a degree of openness, contrast and variety to the overall landscape. The entire Property is visually accessible to the general public from both Colorado State Highway 56 and Larimer County Road 17, which are open to and actively utilized by residents of Larimer County and the State of Colorado. The Property is also visually accessible to the general public from adjacent public lands adjoining the north

side of the Property.

Agriculture. The Property is currently used for agricultural purposes, specifically irrigated crop production. This use is compatible with other land use in the vicinity, as many nearby properties are also used for agricultural production.

Significant public benefit. Many of the properties within a one-mile radius of the Property are being planned for development, and this scale of development is anticipated to continue for some time into the future. Furthermore, the municipal boundary of the Town of Berthoud borders all but a small portion of the Property. There is a strong likelihood that development of the Property would lead to or contribute to degradation of the scenic and natural character of the area. Preservation of the Property will not only provide an opportunity for the general public to appreciate its scenic values, but will offer increasingly significant and meaningful relief from future anticipated dense urban development.

It should also be noted that the terms of the Easement do not permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land.

**Recreation or Education** [§ 1.170A-14(d)(2)]. In addition to the Property's current use for agricultural purposes, the Property is also being preserved for the outdoor recreation and education of the general public. Passive recreational opportunities will be emphasized on the Property by the Grantor, with interpretive activities on walking and cycling trails and in native plant demonstration areas. Public access to the Property will be permitted. Programs and activities will be conducted in a manner to preserve and protect the Conservation Values and natural conditions on the Property.

Further, the Easement is consistent with one of the Primary Goals for 2006-2007 adopted by the Town of Berthoud on August 8, 2006: Goal #1 – Master Plan – Waggener Park. These Primary Goals formalize the Board of Trustee's instructions to the Town Administrator as to what to focus on in the coming year.

It is the intent of the current Grantor, future Grantor, and Grantee that the land be preserved for its scenic and open space values, and for the outdoor recreation of the general public or for the education of the general public. Notwithstanding the foregoing, the property is currently in agricultural use, which constitutes a valid conservation purpose, however it is anticipated that this use may be replaced with public recreational or educational activities in the future.

These Conservation Values are of great importance to Grantor, Grantee, residents of the Town of Berthoud, Larimer County, and the State of Colorado.

D. **State Policy Concerning Conservation Easements.** C.R.S. §§33-1-101, provides in relevant part that "it is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors." C.R.S. §§38-30.5-102, provides for the creation of

conservation easements to maintain land "in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, wetlands, recreational, forest or other use or condition consistent with the protection of open land . . ."

E. **Town of Berthoud Comprehensive Plan.** The Town of Berthoud Comprehensive Plan (1992) states the following supporting Goals and Policies.

8. Parks, Recreation and Open Space

*Goals*

1. Continue to provide quality recreation facilities and programs to meet the needs of Berthoud while minimizing Town subsidies.

*Policies*

9. Expand recreational opportunities for all people.

F. **Town of Berthoud Parks, Open Lands, Recreation and Trails Master Plan.** The Town of Berthoud Parks, Open Lands, Recreation and Trails Master Plan approved by the Planning and Zoning Commission states the following supporting Goals, Objectives and text:

*Goal 1* – Provide a wide range of recreational and leisure time opportunities for all citizens and visitors in Berthoud.

*Objective 1.1* – Design parks for both active and passive use and promote a balance between different sized parks, special facilities and recreation programming.

*Goal 2* – Equitably distribute parks, recreational facilities and trails through the growth management area.

*Objective 2.2* – Co-locate schools and parks as opportunities present to create more recreational amenities for school kids and families.

*Goal 5* – Protect open lands that preserve unique or sensitive environmental resources, buffers between Berthoud and adjacent communities, prime agricultural lands and key view corridors that contribute to the Town's rural identity.

*Objective 5.1* – Identify key open lands, prime agricultural lands and other resource areas based on community values and update periodically.

*Objective 5.3* – Preserve views to agricultural lands, natural areas and mountains along major roadway corridors (e.g. SH 56 and HWY 287).

*Park Classification Standards* – A community park is a minimum of 25 acres and not more than 100 acres...A community park contains many different types of recreational amenities from heavily programmed and intensely used areas – fields, courts, amphitheaters, festival spaces – to low intensity areas and features – trails, gardens, picnic areas, playgrounds and nature observation areas. As such, they should have a relatively flat grade to accommodate fields and facility development. Indoor recreational centers can be co-located with a community park, building synergy between the two facilities...Community parks are appropriate for programmed sports activities as well as festivals and special events. They require off-street parking lots to accommodate heavy traffic, during programmed

events...Map 4.1 shows the general locations of two community parks to meet overall community needs [of which this Property is one].

G. **Documentation of Present Conditions.** The Conservation Values and the characteristics, current use, and status of improvements on and development of the Property as of the date of this Deed are further documented in a "Present Conditions Report," dated December 2006 and prepared by ERO Resources, which report is acknowledged as accurate by Grantor and Grantee. The Present Conditions Report has been provided to both parties and will be used by Grantee to assure that any future changes in the use of the Property will be consistent with the terms of this Deed. However, the Present Conditions Report is not intended to preclude the use of other evidence to establish the condition of the Property as of the date of this Deed.

H. **Charitable Donation.** Grantor intends to create a conservation easement under C.R.S. §§38-30.5-101, and hereby makes a charitable gift of the property interest conveyed by this Deed to Grantee.

#### ACKNOWLEDGEMENT OF INTENT:

As a guide to the interpretation of this Deed and administration of the Conservation Easement ("Easement") created by this Deed by future generations, Grantor and Grantee, for themselves, and for their successors and assigns, herein expressly declare their agreement and dedication to the following purpose and intent:

1. **Purpose.** The purpose (the "Purpose") of this Easement is to preserve and protect in perpetuity the Conservation Values of the Property. This Purpose is in accordance with §170(h) of the Internal Revenue Code. In order to achieve this Purpose, Grantor intends to convey this Deed to Grantee to ensure that the Conservation Values of the Property will be preserved and protected forever.

2. **Intent.** Subject only to the Purpose set forth above, the intent of the parties is to permit all other uses of the Property that are not inconsistent with the preservation and protection of the Conservation Values as determined by Grantee in its reasonable discretion and that are not expressly prohibited herein. As used in this paragraph, "reasonable" shall mean as reasonably determined by a "qualified organization" under Section 170(h) of the Internal Revenue Code as such organization would interpret and apply the terms and conditions of this Deed. Nothing in this Deed is intended to compel a specific use of the Property, such as agriculture, other than the preservation and protection of the Conservation Values.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, Grantor and Grantee mutually agree as follows:

1. **Conveyance of Easement.** Grantor voluntarily grants and conveys to Grantee and Grantee voluntarily accepts, a perpetual Conservation Easement in gross, an immediately vested interest in real property defined by C.R.S. §§38-30.5-101, *et seq.*, and of the nature and character

described in this Deed, for the purpose of preserving and protecting the Conservation Values of the Property in perpetuity.

2. **Rights of Grantee.** To accomplish the Purpose of this Easement the following rights are hereby conveyed to Grantee, its employees and its representatives:

A. To preserve and protect the Conservation Values of the Property;

B. To enter upon the Property at reasonable times in order to monitor Grantor's compliance with and otherwise enforce the terms of this Easement; provided that, except in cases where Grantee determines that immediate entry is required pursuant to those provisions in Section 8, such entry shall be upon prior reasonable notice to Grantor, and Grantee shall not unreasonably interfere with Grantor's use and quiet enjoyment of the Property;

C. To prevent any activity on or use of the Property that is inconsistent with the Purpose of this Easement and, except as limited by Section 7 below, Grantee may require the restoration of such areas or features of the Property that are damaged by an inconsistent activity or use; and

Nothing in this Section shall preclude the right of Grantee to enforce the preservation and protection of the Conservation Values of the Property or any other provisions of this Deed to ensure compliance with the Purpose of this Easement.

3. **Rights Retained by Grantor.** Grantor retains the right to perform any act not specifically prohibited or restricted by this Easement. These ownership rights include, but are not limited to, the retention of the economic viability of the Property, provided that such acts and uses are not inconsistent with the preservation and protection of the Conservation Values.

4. **Property Improvements.** The parties agree that the current use of and improvements to the Property are not inconsistent with the preservation and protection of the Conservation Values and are permitted. Without limiting the generality of any of the foregoing, Grantor and Grantee hereby acknowledge and agree:

A. **Existing Improvements.** At the time of granting of this Deed, there are no improvements on the Property.

B. **Construction of Improvements.** The construction of any improvement is prohibited except as described below and in Sections 5A and 5D. Any other improvements are prohibited unless Grantee determines in its sole discretion that the proposed construction is not inconsistent with the preservation and protection of the Conservation Values.

(1) **Other Improvements.**

a. **Road Construction and Paving.** Except as herein provided, construction, paving or otherwise surfacing of roads, driveways or parking areas is prohibited. Notwithstanding the foregoing, it is anticipated that Highway ~~287~~<sup>56</sup> and County Road 17, which border the Property along the south and west sides respectively, as well as curbs, gutters and sidewalks will need to be widened or added by Grantor or another governmental entity in the future to ensure the public's safety and interest in roads adequate for safe vehicular travel. Because these roads are directly adjacent to the Property, such widening is expected to impact the Property.

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Prior to such widening and/or additions, Grantor shall notify Grantee, and provide Grantee with a map and legal description accurately describing and depicting the portion of the Property that will need to be utilized for the expanded roadway, including shoulders, ditches and any necessary slope and maintenance easements ("Proposed Roadway"). Grantee agrees to approve the Proposed Roadway if Grantor demonstrates to Grantee that the Proposed Roadway has been planned in a manner that minimizes impact to the Property and widens the roadway no more than necessary to achieve public safety standards. Upon Grantee's approval of the Proposed Roadway, Grantor and Grantee shall execute and record an Amendment to this Deed to remove the Proposed Roadway from the definition of Property.

Furthermore, Grantor retains the right to construct a paved parking lot within the four (4) acre area at the north end of the Property, as depicted on **Exhibit B**. Grantor also retains the right to construct such paved or unpaved sidewalks, walking paths and trails as are reasonably necessary to provide adequate access to and through the Property for uses permitted in paragraph 5D below.

b. **Fences.** Existing fences may be repaired and replaced, and new fences may be built anywhere on the Property for purposes of reasonable and customary management of recreational access and wildlife management not inconsistent with the preservation and protection of the Conservation Values without any further permission of Grantee.

c. **Utilities.** Existing utilities may be repaired and replaced in the same location with a similar structure without any further permission of Grantee. Grantor shall install new utility lines or relocate existing above-ground utility lines underground. Additional utility lines or the relocation or significant upgrading of existing utility lines may be approved by Grantee if Grantee determines said utility lines are not inconsistent with the preservation and protection of the Conservation Values. Notwithstanding the foregoing, if existing or new utility lines are

located only along the perimeter of the Property, said utility lines may be located above ground.

d. **Billboards and Signs.** Signs existing on the Property at the time of execution of this Deed are permitted and may be replaced with signs similar in character. Grantor shall not construct, maintain, or erect any signs or billboards on the Property that are inconsistent with the preservation and protection of the Conservation Values.

5. **Resource Management.** Grantor recognizes the importance of good resource management and stewardship to preserve and protect the Conservation Values. To this end, the following uses of the Property shall be conducted in accordance with the provisions below. In the event Grantee believes any resource management practice(s) are not consistent with the preservation and protection of the Conservation Values, Grantee may request that Grantor and Grantee shall, at Grantor's expense, consult with a mutually agreed upon resource management professional at a mutually agreed upon cost. This professional will provide written recommendations for said resource management practice(s) not inconsistent with the preservation and protection of the Conservation Values.

A. **Agriculture.** All agricultural uses shall be conducted using stewardship and management methods that preserve the natural resources upon which agriculture is based. Long term stewardship and management goals include preserving soil productivity, preventing soil erosion, minimizing invasive species, and avoiding unsustainable livestock grazing practices. The construction and maintenance of agricultural ditches, stock ponds or other agricultural water features are permitted.

B. **Timber.** Timber harvesting is prohibited except as set forth below. On a limited and localized basis, trees may be cut to control insects and disease, to control invasive non-native species, to prevent personal injury and property damage, and for domestic uses on the Property such as firewood and construction of permitted buildings and fences. Tree thinning activities may take place to maintain the character and nature of the habitat. Other timber harvesting activities shall be conducted in accordance with a forest management plan prepared by a professional forester at Grantor's expense, and approved by Grantee.

C. **Minerals and Other Deposits.** Grantor owns all of the mineral rights on or under the Property. Grantor's current and future ownership of mineral rights on or under the Property shall be subject to the following provisions:

(1) **Mining.** The exploration, development, mining or other extraction of minerals, coal, peat, sand, gravel, rock or soil by any surface mining method is prohibited.

(2) **Oil, Gas, and Geothermal Resources.** The exploration, development, mining or other extraction of geothermal resources and

hydrocarbons is prohibited except that oil, gas and geothermal resources located under the surface of the Property may be accessed from an adjacent real property by slant drilling or other similar methods provided that the subjacent and lateral support of the Property is not in any way affected by such drilling.

D. **Recreation.** Active recreational uses of the Property, including playgrounds, athletic fields, golf courses, and camping, are prohibited on the Property. Non-motorized, passive recreational uses such as bird watching, hiking, environmental education, cross country skiing, fishing, and other low-impact recreational uses are permitted, provided they are not inconsistent with the preservation and protection of the Conservation Values. Public access to the Property will be primarily through trailheads and designated trail systems. The construction of paved trails and the installation of minor amenities, including but not limited to small kiosks, benches and interpretive signs, to support public access and environmental education on the Property are permitted so long as they are not inconsistent with the preservation and protection of the Conservation Values. These uses are specifically excluded from the Restricted Practices in Section 6D.

E. **Water Rights.** The Property subject to this Easement includes two (2) shares of Loveland Lake and Ditch Company appurtenant to or customarily or historically used or associated with or upon the Property, together with any and all of the rights associated with the historical and beneficial use of any of the embankments, flumes, headgates, measuring devices or any other structures that are appurtenant to those water rights, along with all easements and rights of way therefore. Grantor and Grantee agree that the water rights represented by these shares (collectively, the "Dedicated Water Rights") must be maintained on the Property to contribute to the preservation and protection of the Open Space and Recreation and Education Conservation Values. The Dedicated Water Rights are described in **Exhibit C** attached hereto and made a part of this deed. The Dedicated Water Rights are beneficially used on the Property as set forth in C.R.S. §38-30.5-102. Grantor shall not transfer, encumber, sell, lease or otherwise separate from the Property without the prior written consent of, and determination by, Grantee that such transfer, encumbrance, sale, lease or other change is not inconsistent with the preservation and protection of the Conservation Values. Water rights appurtenant to the Property that are not Dedicated Water Rights are not subject to this Easement.

If Grantor shall fail to maintain the historic use of the Dedicated Water Rights upon the Property that contribute to the preservation and protection of the Conservation Values of the Property, Grantee shall have the right, but not the obligation, to enter upon the Property and undertake any and all actions reasonably necessary to continue the historic use of the Dedicated Water Rights in order to preserve and protect the Conservation Values of the Property.

Grantor shall not abandon or allow the abandonment of, by action or inaction, any of the Dedicated Water Rights. If the Dedicated Water Rights are under threat of abandonment, Grantor shall convey ownership of said Dedicated Water Rights to



Grantee. Grantee shall have the right to use the Dedicated Water Rights for purposes consistent with the Purpose of this Deed.

Notwithstanding the foregoing, the provisions of this subsection shall be subject to and subordinate to the Articles of Incorporation, By-laws, Rules, Regulations, and Policies of the Loveland Lake and Ditch Company as the same now exist or as they may be amended in the future by proper corporate action. Furthermore, the provisions of this section are subject to all agreements, rights, adjudications and decrees of the Loveland Lake and Ditch Company as the same now exist or as they may be amended by action of the company or court order and decree.

F. **Habitat Improvements.** Habitat improvement and maintenance activities may be permitted upon Grantee's approval and determination that said improvements and activities are not inconsistent with the preservation and protection of the Conservation Values.

6. **Restricted Practices.**

A. **Subdivision.** The Property or description of the Property may identify or include one or more legal parcels. Notwithstanding the foregoing, Grantor and Grantee agree that the division or subdivision of the Property into two or more parcels of land is prohibited.

B. **Existing Water Features.** Except as permitted within this Deed, alteration, impairment, modification or adverse change in or to existing ponds, wetlands or stream channels that is inconsistent with the preservation and protection of the Conservation Values, is prohibited.

C. **Commercial or Industrial Activity.** Commercial or industrial uses inconsistent with the preservation and protection of the Conservation Values of this Deed are prohibited.

D. **Feed Lot.** The establishment or maintenance of a feed lot is prohibited. For purposes of this Deed, "feed lot" is defined as a permanently constructed confined area or facility within which the Property is not grazed or cropped annually, and which is used and maintained continuously and exclusively for purposes of feeding livestock.

E. **Public Access.** If public recreation or education uses are implemented on the Property, public access shall be permitted consistent with said uses. Until such public uses are implemented on the Property, nothing contained herein shall be construed as affording the public access to any portion of the Property, although the Grantor may permit public access to the Property on such terms and conditions as it deems appropriate, provided that such access is not inconsistent with the preservation and protection of the Conservation Values of the Property.

F. **Trash.** The dumping or accumulation of any kind of trash, sludge, or refuse on the Property is prohibited, except for farm-related trash and refuse produced on the Property, provided that such dumping or accumulation is not inconsistent with the preservation and protection of the Conservation Values. The storage or accumulation of agricultural products and by-products on the Property is permitted in accordance with all applicable government laws and regulations.

G. **Hazardous Materials.** Grantor may use agri-chemicals on the Property in accordance with all applicable federal, state or local laws. Otherwise, the treatment, permanent storage, disposal or release of hazardous materials on, from or under the Property is prohibited. For the purpose of this Deed, hazardous materials shall mean any hazardous or toxic material or waste that is subject to any federal, state, or local law or regulation. Notwithstanding anything in this Deed to the contrary, this prohibition does not impose any liability on Grantee for hazardous materials, nor does it make Grantee an owner of the Property, nor does it permit or require Grantee to control any use of the Property that may result in the treatment, storage, disposal or release of hazardous materials within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA").

H. **Weed Control.** The Property shall be managed to control noxious weeds to the extent reasonably possible.

I. **Other Restricted Uses.** Golf courses, sod farms, helicopter pads, and airstrips are prohibited. Towers in excess of 35 feet in height are prohibited unless Grantee determines the proposed tower is not inconsistent with the preservation and protection of the Conservation Values.

7. **Responsibilities of Grantor and Grantee Not Affected.** Other than as specified herein, this Deed is not intended to impose any legal or other responsibility on Grantee, or in any way to affect any existing obligations of Grantor as owner of the Property. Additionally, unless otherwise specified below, nothing in this Deed shall require Grantor to take any action to restore the condition of the Property after any Act of God or other event over which Grantor had no control. Grantor shall continue to be solely responsible and Grantee shall have no obligation for the upkeep and maintenance of the Property and Grantor understands that nothing in this Deed relieves Grantor of any obligation or restriction on the use of the Property imposed by law. Among other things, this shall apply to:

A. **Taxes.** Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the Property. If Grantee is ever required to pay any taxes or assessments on its interest in the Property, Grantor will reimburse Grantee for the same. If for any reason Grantor fails to pay any taxes, assessments or similar requisite charges, Grantee may pay such taxes, assessments or similar requisite charges, and may bring an action against Grantor to recover all such taxes, assessments and similar charges plus interest thereon at the rate charged delinquent property taxes by the county assessor's office in which the Property is located.

B. **Liability.** Grantor and Grantee agree that Grantee shall not be liable for any and all liabilities, penalties, loss, damage, costs, causes of action, claims, demands, judgments or expense, arising from or in any way related to: (i) injury to or the death of any person, or damage to property, resulting from any act, omission, condition, or other matter related to or occurring on or about or related to the Property, regardless of cause; (ii) the past, present or future use of or the presence of any hazardous materials on, under or about the Property; and (iii) the violation or alleged violation of, or other failure to comply with any state, federal or local law, regulation, or requirement, including, without limitation, CERCLA and state hazardous waste statutes, by any person in any way affecting, involving, or relating to the Property.

To the extent permitted by law, Grantor shall indemnify, defend, and hold Grantee and its members, officers, directors, employees, agents, and contractors (collectively, the "Indemnified Parties") harmless from and against any and all loss, damage, cost, or expense, including reasonable attorneys' fees, arising from or in any way related to: (i) injury to or the death of any person, or damage to property, occurring on or about or related to the Property, unless due to the willful and wanton act or omission (as defined by C.R.S. 13-21-102(1)(b)) of the Indemnified Parties; (ii) the obligations under this Section 7 or (iii) the presence or release of hazardous materials on, under, or about the Property under Section 6(F) and (iv) the violation or alleged violation of, or other failure to comply with any state, federal, or local law, regulation, or requirement, including, without limitation, CERCLA and state hazardous waste statutes, by any person other than any of the Indemnified Parties, in any way affecting, involving, or relating to the Property. Grantee shall indemnify, defend and hold Grantor and its assigns, successors and heirs harmless from and against any and all loss, cost or expense, including reasonable attorney's fees, arising from or in any way related to injury to or death of any person occurring on or about or related to the Property arising out of the Indemnified Parties' actions on the Property.

Grantor agrees to fully cooperate with Grantee in efforts to dismiss Grantee from any action alleging that Grantee is liable for anything covered under this subsection 7B.

8. **Enforcement.** Grantee shall have the right to prevent and correct or require correction of violations of the terms of this Deed and Purposes of this Easement. In those cases where Grantee determines that immediate entry is required to inspect for, prevent, terminate, or mitigate a violation of this Easement, Grantee may enter the Property without advance notice. Grantee may notify Grantor in writing of the nature of the alleged violation. Upon receipt of this written notice, Grantor shall immediately cease the alleged violation and either (a) if necessary, restore or remediate the Property to its condition prior to the violation; (b) provide a written plan for restoration and remediation of the Property acceptable to Grantee; (c) provide written documentation, acceptable to Grantee, that the activity is permitted and is not a violation. If Grantor is unable or unwilling to cease the immediate alleged violation, and comply with (a), (b) or (c) of the previous sentence, both parties agree to resolve the dispute through mediation, or court procedures. At any point in time, the parties may take appropriate legal action including an

injunction to stop the alleged violation. Any costs incurred by Grantee in enforcing the terms of this Easement against Grantor, including, without limitation, costs and expenses of suit, and attorneys' fees, and any reasonable costs of restoration shall be borne by Grantor. In the event the deciding body determines that Grantor is the prevailing party, each Party shall be responsible for their own costs. The parties will share equally in the mediation fees. Grantee's remedies described in this section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity, including the right to recover any damages for loss of Conservation Values. Enforcement of the terms of this Easement shall be at the discretion of Grantee and the failure of Grantee to discover a violation or to take action shall not waive any of Grantee's rights, claims or interests in pursuing any such action at a later date.

9. **Transfer of Easement.** Grantee shall have the right to transfer this Easement and Grantor may require Grantee to transfer this Easement to any public agency or private non-profit organization that, at the time of transfer, is a "qualified organization" under § 170(h) of the U.S. Internal Revenue Code, and under C.R.S. §§38-30.5-101, *et seq.*, and only if the Grantee, as a condition of the transfer, requires that the conservation purposes set forth in the Recitals to this Easement continue to be carried out and the qualified organization expressly agrees to assume the responsibility imposed on Grantee by this Easement. Grantee shall notify Grantor in advance of any proposed transfers. Notwithstanding the foregoing, Grantor may not require transfer of this Easement if Grantee has notified Grantor pursuant to Paragraph 8 above regarding any potential violation of this Easement or if the proposed transferee of the Easement does not agree to carry out the conservation purposes of the Easement or to assume all responsibilities imposed on the Grantee by this Easement. If Grantee ever ceases to exist or no longer qualifies under federal or state law, a court with jurisdiction shall transfer this Easement to another qualified organization having similar purposes and that agrees to assume the responsibility.

10. **Transfer of Property.** Any time the Property or a portion thereof is transferred by Grantor to any third party, Grantor shall notify Grantee in writing within five (5) business days after closing using the form in Exhibit D attached hereto. The document of conveyance shall expressly refer to this Deed of Conservation Easement.

11. **Real Property Interest.** The granting of this Deed immediately vests Grantee with a property interest. Grantor and Grantee also agree, as to the value of the Property, an appraisal has been completed that indicates the fair market value of this property interest is 80% percent of the full fair market value of the Property. Pursuant to Treasury Regulation § 1.170A-14(g)(6)(ii), Grantor and Grantee further agree that this percentage shall remain constant.

12. **Termination of Easement.** This Easement may only be terminated or extinguished by judicial proceedings by a court of competent jurisdiction in accordance with current law or law in effect at the time. The total loss of all the Conservation Values on the Property is the only grounds under which this Deed can be terminated. Should this Easement be extinguished, sold for public use, taken for public use, or terminated, whether in whole or in part, Grantee shall be paid proceeds equal to the aforementioned percentage of the fair market value of the Property. Grantee's use of the proceeds shall comply with Treasury Regulation § 1.170A-14(g)(6)(i).

13. **Perpetual Duration.** This Easement shall be a servitude running with the land in perpetuity. The provisions of this Deed that apply to Grantor or Grantee shall also apply to their respective agents, heirs, executors, administrators, assigns, and all other successors as their interests in the Property may appear; provided, however, that each party's rights and obligations under this Easement shall terminate as to such party, but not as to such party's successor, who shall be bound as provided herein upon a transfer of the party's entire interest in this Easement or the Property, except that liability of such transferring party for acts or omissions occurring prior to such transfer shall survive the transfer.

14. **Change of Circumstance.**

A. **Economic Value.** The fact that any use of the Property that is prohibited by this Easement, or any other use as determined to be inconsistent with the Purpose of this Easement, may become economically more valuable than permitted uses has been considered by the Grantor in granting this Easement. It is the intent of both Grantor and Grantee that such circumstances shall not justify the termination or extinguishment of this Easement pursuant to Section 12. In addition, the inability to carry on any or all of the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Easement or be considered grounds for its termination or extinguishment pursuant to Section 12.

B. **Public Value.** In the event Grantor desires to replace agriculture on the Property with public recreation or education uses as identified in Recital C and Section 5D, Grantor shall notify Grantee and provide Grantee with written plans for such public recreation or education.

15. **Notices.** As specified herein, any notices required by this Deed shall be sent as appropriate to the following parties or their successors in writing. All parties shall be notified of any change of address.

Grantor: John Michael Waggener  
1706 Weld County Road 46  
Berthoud, CO 80513  
Phone: (970) 532-4575

Grantee: Colorado Open Lands  
274 Union Blvd., Suite 320  
Lakewood, CO 80228  
(303) 988-2373

16. **Liens on the Property.**

A. **Current Liens.** None.

B. ***Subsequent Liens.*** No provisions of this Deed should be construed as impairing the ability of Grantor to use this Property as collateral for subsequent borrowing. Any mortgage or lien arising from such a borrowing is subordinate to this Easement.

17. ***No Merger.*** Unless the parties expressly state that they intend a merger of estates or interests to occur, then no merger shall be deemed to have occurred hereunder or under any document executed in the future affecting this Easement.

18. ***Grantor's Representations and Warranties.***

A. Except as provided in Section 16, Grantor warrants that Grantor has good and sufficient title to the Property, free from all liens and encumbrances securing monetary obligations except ad valorem property taxes for the current year, and hereby promises to defend title to the Property against all claims that may be made against it by any person claiming by, through, or under Grantor.

B. Grantor represents and warrants that, after reasonable investigation and to the best of its knowledge:

(1) No hazardous substance or toxic waste exists nor has been generated, treated, stored, used, disposed of, deposited, or transported, in, on, or across the Property, and that there are no underground storage tanks located on the Property;

(2) Grantor and the Property are in compliance with all federal state, and local laws, regulations, and requirements applicable to the Property and its use;

(3) There is no pending or threatened litigation in any way affecting, involving, or relating to the Property; and

(4) No civil or criminal proceedings or investigations have been instigated at any time or are now pending, and no notices, claims, demands, or orders have been received, arising out of any violation or alleged violation of, or failure to comply with, any federal, state, or local law, regulation, or requirement applicable to the Property or its use.

19. ***Acceptance.*** Grantee hereby accepts without reservation the rights and responsibilities conveyed by this Deed.

20. ***General Provisions:***

A. ***Severability.*** If any provision of this Deed, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this

Deed, or the application of such 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 thereby.

B. **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.

C. **Waiver of Defenses.** Grantor hereby waives any defense of laches, estoppel or prescription and acknowledges and agrees that the one-year statute of limitation provided under C.R.S. § 38-41-119 does not apply to this Easement, and Grantor waives any rights of Grantor pursuant to such statute.

D. **Controlling Law and Interpretation.** This Easement shall be performed and broadly interpreted under the laws of State of Colorado, resolving any ambiguities and questions of the validity of specific provisions in favor of maintaining the Purpose of this Deed. Any decisions resolving such ambiguities shall be documented in writing.

E. **Counterparts.** The parties may execute this instrument in two or more counterparts which shall, in the aggregate, be signed by all parties; each counterpart shall be deemed an original instrument as against any party who has signed it; all counterparts, when taken together, shall constitute this instrument.

F. **Amendment.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will confer a private benefit to the Grantor or any other individual greater than the benefit to the general public (see IRS Reg. 1.170A-14(h)(3)(i)) or result in private inurement for a Board member, staff or contract employee of Grantee (see IRS Reg. 1.501(c)(3)-1(c)(2)), or affect the qualifications of this Easement under any applicable laws. Any amendment must not be inconsistent with the preservation and protection of the Conservation Values of the Property and shall not affect the perpetual duration of the Easement. Grantee shall have the right to charge a fee to Grantor for time and costs associated with any amendment. Any amendment must be in writing, signed by both parties, and recorded in the official records of Larimer County, Colorado.

G. **Entire Agreement.** This instrument sets forth the entire agreement of the parties with respect to the terms of this Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the terms of this Easement, all of which are merged herein.

H. **Successors and Assigns.** The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the Parties hereto and Grantor's respective personal representatives, heirs, successors, transferees, and assigns, and the Grantee's successors, transferees, and assigns, and shall continue as a servitude running in perpetuity with the Property.

A Party's rights and obligations under this Easement terminate upon transfer of the Party's interest in the Easement or the Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

21. **Development Rights.** Grantor hereby grants to Grantee all development rights except as specifically reserved herein, and the parties agree that such rights are terminated and extinguished.

22. **Recording.** The Grantor shall record this Deed in timely fashion in the official records of Larimer County, Colorado, and Grantee may re-record it at any time as may be required to preserve its rights in this Easement.

23. **No Third Party Beneficiary.** This Deed is entered into by and between Grantor and Grantee, and is solely for the benefit of Grantor and Grantee, and their respective successors in interest and assigns, and does not create rights or responsibilities in any third parties.

24. **Governmental Immunity.** Notwithstanding any other provision of this Deed to the contrary, no term or condition of this Deed shall be construed or interpreted as a waiver, either express or implied, of any immunities, rights, benefits or protection provided to Grantor under the Colorado Governmental Immunity Act ("CGIA") as amended or as may be amended including, without limitation, any amendments to such statute or under any similar statute which is subsequently enacted.

TO HAVE AND TO HOLD, this Deed of Conservation Easement unto Grantee, its successors and assigns, forever.

IN WITNESS WHEREOF, Grantor and Grantee, intending to legally bind themselves, have set their hands on the date first written above.



**GRANTOR:**

By: John Michael Waggener  
John Michael Waggener

STATE OF COLORADO )  
COUNTY OF LARIMER ) ss.  
)

The foregoing instrument was acknowledged before me this 22<sup>nd</sup> day of December 2006, by John Michael Waggener in his/her individual capacity as owner of the Property.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_

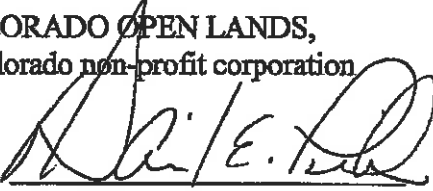
Buzz Sawyer  
Notary Public



Buzz Sawyer  
Commission Expires: 02-04-08  
3665 JFK Pkwy #2-300  
Fort Collins, CO 80525

**GRANTEE:**

COLORADO OPEN LANDS,  
a Colorado non-profit corporation

By   
Daniel E. Pike, President

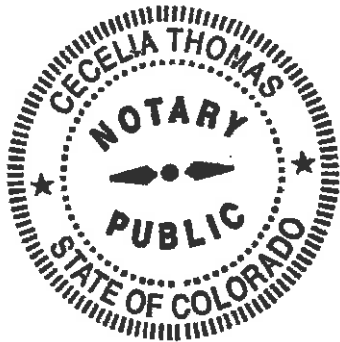
STATE OF COLORADO )  
  ) ss.  
COUNTY OF JEFFERSON )

The foregoing instrument was acknowledged before me this 20<sup>th</sup> day of December 2006, 2006, by Daniel E. Pike as President of Colorado Open Lands, a Colorado non-profit corporation.

Witness my hand and official seal.

My commission expires: 11-21-2008

  
Notary Public



## EXHIBIT A

### Legal Description of the Property

A parcel of land situate in Lot 1 of the "Vielehr Boundary Line Adjustment #05-S2462," recorded December 28, 2005 as Reception No. 2005-0110573 of the Records of Larimer County, said Lot 1 being located in the Southwest Quarter (SW¼) of Section 14, Township 4N, Range 69W of the 6<sup>th</sup> P.M., Larimer County, being more particularly described as follows:

BEGINNING at the Northwest corner of Lot 2 of said "Vielehr Boundary Line Adjustment #05-S2462" and assuming the West line of said Lot 2 as bearing South 00°00'43" West, being a Grid Bearing of the Colorado State Plane Coordinate System, North Zone, North American Datum 1983/92, a distance of 646.85 feet with all bearings contained herein relative thereto;

THENCE South 00°00'43" West along the West line of said Lot 2 of the "Vielehr Boundary Line Adjustment #05-S2462" a distance of 646.85 feet to the South Line of Lot 1 of the "Vielehr Boundary Line Adjustment #05-S2462";

THENCE North 89°17'44" West along the South line of said Lot 1 a distance of 1100.99 feet to the West line of said Lot 1;

THENCE North 00°18'10" West along the West line of said Lot 1 a distance of 2004.10 feet;

THENCE North 89°44'18" East along a line parallel with the North line of said Lot 1 a distance of 593.66 feet;

THENCE South 00°35'11" East along a line parallel with the East line of said Lot 1 a distance of 1375.30 feet;

THENCE North 89°48'02" East a distance of 503.91 feet to the Northwest corner of Lot 2 of the "Vielehr Boundary Line Adjustment #05-S2462" and to the POINT OF BEGINNING.

Said parcel of land contains 35.000 acres, more or less.

Legal description provided by Steven A. Lund on behalf of King Surveyors, Inc., 650 Garden Drive, Windsor, CO 80550

Exhibit B  
Waggener Community Park  
Larimer County, CO  
Map Compiled From Beulah, CO, USGS  
7.5 Minute Topographical Quad (1983) 20 foot contour interval  
Prepared by Mark Hannon

For Parking (4 +/- Acres)

Larimer Cty. Rd. 17

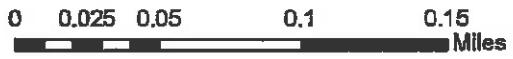
Athletic  
Field

Turner Middle School



052

State Hwy 56



Legend

-  Waggener Boundary
-  Waggener Parking Lot

**EXHIBIT C**

**Dedicated Water Rights**

Two (2) shares of Loveland Lake and Ditch Company.

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EXHIBIT D

Sample Notice of Transfer of Property

To: Colorado Open Lands ("Grantee")  
From: [Insert name of fee owner] ("Grantor")

Pursuant to Section 10 of the Deed of Conservation Easement recorded     (date)     under reception number \_\_\_\_\_, Grantee is hereby notified by Grantor of the transfer of the fee simple interest in the subject Property legally described in Exhibit A attached hereto effective [insert date of closing] to [insert name of new Grantor], who can be reached at [insert name, legal address, phone and fax number]. Also pursuant to Section 10 of the aforementioned Deed of Conservation Easement is attached a copy of the new ownership deed.

GRANTOR:

By: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF COLORADO            )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by \_\_\_\_\_ as \_\_\_\_\_ of \_\_\_\_\_.

Witness my hand and official seal.  
My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

Date: \_\_\_\_\_