



# Lewis and Clark County

## OPEN LANDS

### PROGRAM GUIDE



**A Guide to the  
Lewis and Clark County Open Lands Program  
(Made possible by the Voter-Approved Land, Water and Wildlife Bond Measure)**

This guide describes the creation of the Lewis and Clark County Open Lands Program (“Program” or “Open Lands Program”), its implementation, and the process it uses to make funding decisions.

For more information on the Program, contact:

Open Lands Program Coordinator  
Lewis and Clark County Department of Community Development and Planning  
316 N. Park Avenue  
Helena, MT 59623  
[planning@lccountymt.gov](mailto:planning@lccountymt.gov)  
406-447-8374

**A. Background**

In November 2008, voters in Lewis and Clark County, Montana, (the County) approved the Land, Water and Wildlife bond measure, a \$10 million general obligation bond measure for “...protecting drinking water sources and ground water quality; protecting water quality in and along rivers and streams; conserving working farm, ranch and forest lands; protecting wildlife areas; preserving open lands and natural areas; providing for recreation; and managing growth and development.”<sup>1</sup>

Funds generated by sales of these bonds will be distributed through the Open Lands Program. The primary purpose of the Program is to conserve resources on private lands in Lewis and Clark County that fulfill the objectives of the bond measure. In accordance with the recommendations of the Heritage Lands Working Group, the language in the campaign materials and the preference of the county commissioners, the Program will use conservation easements to achieve the purposes of the bond measure, rather than buying land outright. However, in exceptional circumstances, the Program may consider purchasing land or providing funding for land purchases by other entities, if this type of transaction best addresses the public’s interests and a landowner’s needs.

The Board of County Commissioners (BOCC) appointed a Citizens Advisory Committee on Open Lands (CAC) to recommend policies and procedures for implementing the Land, Water and Wildlife bond measure. A list of the appointees can be found on the County’s website. CAC members have an excellent range of experience in conservation transactions and work closely with County staff. The CAC’s first job was to develop the Program’s policies and procedures for recommendation to the BOCC. To complete this task, the CAC worked with local nonprofit land conservation organizations, other program both in the state and nationally, and collected public input on the County’s unique needs.

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<sup>1</sup> Appendix A - Official Ballot, Lewis and Clark County, Montana, *Open Space Lands: Working Lands and Land for Water and Wildlife Bond Election*, November 4, 2008

Among the policies developed by the CAC and adopted by the BOCC was the Program's project selection process. Project selection is the process through which the CAC and County staff will assess specific projects to determine if they meet the voter-approved goals and determine which ones the CAC will recommend to the BOCC for approval and expenditure of County bond funds. The process was designed to be streamlined and respectful of landowners' interests while securing the maximum amount of public benefit and providing public accountability. In order to achieve good conservation outcomes consistent with the goals of the bond funds, the CAC recommended that all potential projects involve a qualified sponsoring organization ("Sponsors"). Through these partnerships with effective and experienced non-profit organizations and government agencies, the County will be able to minimize its expenditures on staff and project costs, while gaining high quality assistance and tapping into outside sources of funding to underwrite conservation activities. For more information about Sponsors, see Appendix B, Certification Process for Project Sponsors and Approved Sponsors List.

A summary of the project selection steps can be found in Section C.

## **B. Project Evaluation**

Criteria for evaluating projects are the core of the selection process. The Program uses objective, quantifiable and qualitative criteria based on the Open Lands program goals as well as factors derived from other sources.

This section describes how the criteria and other important considerations are utilized in project selection to prioritize the County's potential conservation investments. The Program will invest the County's bond funds in projects that are consistent with the purposes of the Land, Water and Wildlife Bond Measure which can be summarized as follows:

- Conserve working farms and ranches;
- Conserve working forests;
- Protect habitat for fish and wildlife;
- Provide opportunities for outdoor recreation
- Protect water resources and water quality;
- Preserve open lands and natural areas; and
- Manage growth and development.

All of the goals from the bond measure that can be quantified with available data, scientific information or objective observation are analyzed through the application process. The criteria contained in the application forms were developed by the CAC and local partners, using stakeholder input, opinions provided in two public meetings, information from past County-wide planning efforts, results from the Heritage Lands Working Group's extensive community outreach and data from federal, state and local governments and conservation organizations. Landowners and Sponsors complete the application package and provide background documentation as needed to verify their project's qualities. In this way, County staff, the CAC, BOCC, Landowners and Sponsors use the same initial project evaluation methodology.

In addition basic goal statements listed above, County staff, CAC and BOCC will consider other factors to help them evaluate projects. This information may be observed during a site visit, provided in the application narrative, learned in the course of the presentation by the Sponsor or known from prior conservation experience. Consistency with one or more of the bond issue's conservation goals is one essential element of the County's project selection process, but is not the only deciding factor. To accomplish the purposes of the bond measure, the following factors will also be considered:

- Conserve large blocks of land: Input from all sources indicated that many of the resources valued by citizens of Lewis and Clark County depend on large-scale conserved areas and corridors to connect them. Accordingly, preference will be given to bigger tracts or parcels that can link protected areas. However, scale is an important consideration only if appropriate for the purpose of the project. Some types of projects will not require extensive acreage to achieve their conservation and public benefit objectives.
- Expand and connect existing open land holdings: Similarly, opportunities to add to existing protected or publicly-owned lands to create large conserved areas will be prioritized. The project selection process elevates and supports opportunities to piece together expansive conserved landscapes, whether the property proposed for conservation is currently contiguous with other protected land or not.
- Maximize the public benefit return on the County's funds: Projects that offer multiple benefits to increase the return on each dollar invested in conservation will be prioritized. Leveraging each dollar through matching funds, in the form of money from other sources or reduced purchase prices offered by landowners is important. The higher the level of match, the higher the level of priority for funding,
- Conserve working farms and ranches: Recognizing that farms and ranches are essential to the County's heritage, history, economy, culture, appearance, desirability and natural features, the Program supports landowners who want to conserve their agricultural properties. Accordingly, when working lands projects are evaluated, factors such as how long a property has been owned by members of one family, how the project could help make the current agricultural operation more sustainable, the current condition of the land (as a way of judging the stewardship practices of the operation) and whether the business provides products and jobs for local communities will be considered.
- Conserve working forests: Working forests and the timber/wood products industries have also been an important part of Lewis and Clark County's heritage. Despite the current downturn in the wood products market, county leaders realize that forests contribute in a meaningful way to local culture, scenery, water quality and the health of the environment. Therefore, supporting landowners' efforts to retain and steward their forest lands is significant. As part of helping secure the heritage of the County, the Program's project selection process incorporates factors such as how long a property has been in family ownership, how the project could help address fire risks, the current stewardship practices and contributions to the local economy.

- *Protect habitat for fish and wildlife:* Hunting and fishing are beloved activities for many Lewis and Clark County residents and visitors. Others are equally enthusiastic about watching birds or other wildlife. For another subset of stakeholders, it is very valuable to maintain the full complement of Montana’s creatures and their habitats. These interests will be supported through the County’s conservation investments. Based on the input of experts, priority fish and wildlife projects will contain high-quality (i.e. generally undisturbed) habitat, a diversity of habitat types and sites that contribute to healthy populations of fish and wildlife.
- *Provide opportunities for outdoor recreation:* There is a broad spectrum of recreational interests in Lewis and Clark County and those recreational opportunities contribute to the economy. The CAC, the staff and BOCC feel that public access is a very important goal for any publicly funded project. Although it is not a requirement, all applicants are encouraged to consider the possibility of some form of public access, even if limited. Accordingly, projects that expand the public’s ability to engage in outdoor activities of all types will be given additional consideration. Where access is provided, the County will work with the applicants to ensure that it is well-managed and maintained by an appropriate and capable partner.
- *Protect water resources and water quality:* Lewis and Clark County is a dry place with limited supplies of clean fresh water. Polling prior to the bond measure showed strong local interest in ensuring that those supplies are kept healthy. Bond funding provides the County with limited financial resources to compensate landowners for caring for this irreplaceable resource. To make the best possible use of the limited funds, lands that protect ground or surface water that feeds private or public water sources will be prioritized. Locations where development – and its corresponding changes to the land – would most impact drinking water will have preference.
- *Protect and restore riparian corridors along waterways:* During project selection, factors that support healthy waterways will be considered. These factors include native riparian vegetation, natural watercourses and dedicated buffers to keep pollutants out of the water. Experts have counseled that water quantity and quality are inextricably linked. Therefore, to the degree legally possible, keeping water in rivers and streams will have priority. Other desirable characteristics include protection of both banks of a waterway, longer stretches of frontage, current restoration efforts and other evidence of good or improving water quality.
- *Preserve open lands and natural areas:* Area residents have repeatedly expressed their desire to retain the landscapes, expansive vistas, unique resources, local culture, open space and natural environment that make Lewis and Clark County a desirable place to live, work, recreate and visit. Accordingly, when considering projects, conservation of properties that contribute to the character of the County such as iconic landscapes, especially good examples of natural features, or helping communities achieve their established open space objectives will be prioritized. Where appropriate, and as defined

by the Growth Policy, consideration will be given to how a project might contribute to creating a buffer or green space around a community's important conservation values.

- *Manage growth and development:* By implementing the other conservation purposes of the bond measure the Program will automatically accomplish this goal. Conserving lands that contain the natural, scenic, cultural and recreational resources targeted for funding will be a step toward directing growth and development to sites that are less sensitive or locally valued. During the project selection process, consideration will be given to the type and level of threat a property (such as imminent subdivision) and associated resource values is facing and the relative urgency of conserving it. The program will also consider the long-term viability of the conservation values.
- *Ensure permanent conservation outcomes:* Although not explicit in the goals described in the bond measure language, everyone involved in the Program views conserving land in perpetuity as an implicit objective. Accordingly, the terms and conditions of the transaction will be carefully and completely scrutinized to ensure that this objective is met. A property may contain fine resources but if the project will not adequately conserve those resources it may not be deemed a priority for funding.

### C. Project Selection Process

This summary is intended to help Landowners, sponsor organizations and any other interested member of the public understand how the applications for bond funds are reviewed and selected.

The CAC and the County used the following assumptions and values as the cornerstones when developing the Program's project selection process:

- Participation is entirely voluntary and must involve the Landowner from the beginning.
- The County wants to minimize the amount of money spent on staff and other expenses associated with implementation, and maximize the amount of money spent on conservation.
- Projects must be initiated by the Landowner in partnership with a Sponsor.
- Project selection will be open and transparent to build public confidence in how the bond funds are spent. This must be balanced with respect for landowners' reasonable privacy interests.
- The County's focus is on protecting private lands using conservation easements, rather than increasing public ownership through acquisition.
- The County is committed to securing as much matching money as possible in order to achieve the most public benefit possible with the bond funds.

The Program uses a two-phase project selection process to determine which individual projects will receive bond funding for conservation. (A graphic depiction of the steps in the process from start to finish and how they interrelate is provided as Appendix C to this guide) The first phase is referred to as the **Level One Pre-Application Phase** and the second is the **Level Two Project**

**Review and Due Diligence Phase.** Each phase is designed to identify and facilitate expeditious approval of projects that meet program requirements and advance conservation interests. All decisions on expenditure of bond funds will be made by the Board of County Commissioners based upon recommendations of the CAC, County staff, legal counsel and public input.

**Level One Pre-Application Phase:**

The Landowner and a Sponsor complete and submit the Open Lands Funding Level One Application form in Appendix D and request a meeting with County staff and representative CAC members to introduce the project.

Sponsor participation is required for a variety of reasons. As described above, partnerships are the key to efficient use of the bond funds. To minimize expense to the County, these entities will generally be the holders of the conservation easements or other property interests acquired with bond funds. Therefore, Sponsors will assist both the County and the Landowner throughout the application and due diligence process. They will have primary responsibility for working with the Landowner to design the terms of the easement.

The County will require that Sponsors be certified by the Open Lands Program. Please see the instructions for Certification of Project Sponsors contained in Appendix B.

The Level One Pre-Application Phase of project review is intended to give the landowner and sponsor opportunity to determine that a project is eligible for Open Lands funding. It is not intended to provide any indication that the CAC or County Commissioners will automatically approve the application for Open Lands funding. A determination to fund will only be made upon submission and CAC and Commission review of a Level Two application and a decision by those reviewers that County funding for the project is in the best interests of the County.

In addition to confirming eligibility of a project for funding, the Level One Pre-Application Phase also provides opportunity for the Landowner, Sponsor, Staff, and CAC representative(s) to discuss any special aspects of the project that are likely to affect the application review process and to explore options for addressing them. This is where the expertise of Sponsors and staff reviewers can be most effectively applied to ensure that applications submitted for funding are fully prepared in order to allow quick decisions by the CAC and County Commissioners to fund or not to fund a project.

CAC member participation in Level One Pre-Application meetings is intended to include a Committee member's perspective into those staff level discussions. In order to maintain objectivity of a CAC member in subsequent Committee reviews of a project and to avoid premature indications of support for a project, CAC members must follow the participatory guidelines contained in Appendix E.

## **Level Two Project Review:**

1. The Landowner and Sponsor shall submit a Level Two Application contained in Appendix F to start the formal project review process.
2. County staff reviews the application and associated materials for completeness. If necessary, a member of the staff will contact the Landowner and/or the Sponsor to request additional information or might return the application for additional work. Complete applications, as well as all required documentation, are reviewed by County staff and then forwarded to the CAC with a staff analysis of the proposed project. A determination that an application is complete and/or contains sufficient information for review does not ensure the proposed project will be approved or conditionally approved by the County Commissioners and does not limit the ability of the CAC or the County Commissioners to request additional information.
3. Due Diligence is as essential to project selection as the determination that a project is eligible for Open Lands Program funding and has support of the CAC and County Commissioners. During this review, all of the assumptions and information from the application are confirmed in order to ascertain that the project will be implemented as presented and the conservation protections are sufficient and enforceable. In order to assure expeditious processing of Level Two Applications, all information required for due diligence must be submitted with the application. County staff will not process incomplete applications or schedule reviews by the CAC.
4. The Landowner and Sponsor are responsible for confirming the details provided in the application by conducting the investigations required by the County and providing the documents listed below.
5. Although the actual list of **Due Diligence requirements** may vary from project to project, in general the County will require the following items:
  - a. Title commitment for the subject property and resolution of any title issues revealed, such as a mortgage subordination agreement.
  - b. A Mineral Rights Statement and a finding that the probability of any surface mining is so remote as to be negligible, if minerals have been severed from surface ownership.
  - c. Evaluation of water rights and their ownership and status.
  - d. A boundary description of the property proposed for conservation and any building envelopes reserved on the property proposed for conservation.
  - e. Environmental Report -- and resolution of any significant problems revealed.
  - f. Final appraisal values.

- g. Purchase and Sale agreement between the County and the Landowner or sponsoring organization.
  - h. The actual conservation easement with all of the terms as proposed, including any clauses required by the County, if the project proposes creation of a conservation easement. [see Conservation Easement Provisions Required by County Open Lands Program in Appendix G]
  - i. Supplementary maps of the property proposed for conservation, if different from the maps submitted during the Level One phase.
  - j. A baseline documentation report.
  - k. An agreement about responsibilities between the County and the organization that will hold the easement or other property interests.
6. County staff will ascertain if the Due Diligence documentation is complete and sufficiently validates the information and terms provided in the approved application. The County may need other documents depending on the circumstances related to an individual project and property conditions and will make every effort to request such project-specific information at the beginning of the application review. However, in some instances additional requirements may be made in response to Due Diligence materials provided.
  7. In the event that the Due Diligence documentation is incomplete or reveals substantial differences from the proposed project as presented in the application or issues arise about the condition of the property, the CAC could recommend to the BOCC that the Landowner and Sponsor work through these issues prior to a funding decision or recommend that the BOCC not approve the project for funding.
  8. After reviewing the applications and determining that they are complete and meet all Due Diligence Requirements, members of the CAC and County staff visit the project sites at a time that is acceptable to the Landowner and Sponsor. The Board of County Commissioners will be invited to join the site visits.
  9. Landowners and/or the Sponsors are invited to do a short presentation for the CAC at the public meeting. The presentations will give CAC members an opportunity to ask questions. (At the request of the Landowner and/or Sponsor, the CAC may close a portion of the public meeting to protect the reasonable privacy interests of the Landowner and/or Sponsor.)

Following the presentation, the CAC or County staff could request additional information or documentation, if needed, before completing their evaluation of a project.

10. After questions have been answered and any requested additional information is received, the CAC evaluates the potential project(s) based on the application, results from the site visit, and the presentation. The public benefits offered by a project are assessed relative to the goals of the Program, as described in the Project Evaluation section above.

Following discussion in a regularly scheduled and noticed public meeting about the pros and cons of each proposed project, the CAC votes on each one; either recommending to the BOCC that the project be a priority for funding or that the project as proposed not be a priority for funding. A recommendation for project funding by the CAC is necessary to move a project to consideration by the BOCC, but it is not a guarantee of funding approval.

11. County staff, with input from the CAC, prepares a report to the BOCC that summarizes the public benefits, financial considerations, possible issues and the Committee's recommendation for each project.
12. The BOCC reviews the summary reports and application materials and conducts a hearing on the CAC recommendations at a regularly scheduled and noticed public meeting of the BOCC. Landowners and/or Sponsors or project supporters have an opportunity to comment at this meeting. The BOCC decides which projects will receive project funding and which projects will not receive funding. That decision will also take place at a regularly scheduled and noticed public meeting.

**D. Closing and Post-closing Actions**

1. Regardless of the type of property interest conveyed in the transaction, the County, sponsor and landowner will make legal arrangements prior to closing that ensure that the conservation values are maintained.
2. In addition to the Due Diligence items listed in Section C, the following items will be required after the BOCC has approved the project for funding and authorized closing:
  - Closing arrangement information.
  - Closing documents.
3. After the conveyance of property interests in exchange for County bond funds is properly recorded, on-going activities may be necessary to ensure that the values conserved with county funding are maintained. Stewardship, monitoring and enforcement of any conservation easement acquired using bond funds will be the responsibility of the primary Grantee, which in many cases will be the Project Sponsor. The County will require annual reports from the primary Grantee to ensure that the conservation values are being maintained in accordance with the project's goals.

## **LIST OF APPENDICES**

APPENDIX A - Official Ballot, Lewis and Clark County, Montana, Open Space Lands: Working Lands and Land for Water and Wildlife Bond Election, November 4, 2008

APPENDIX B – Certification of Project Sponsors and Approved Sponsors List

APPENDIX C – Applications Flow Chart

APPENDIX D – Level One Application for Project Funding

APPENDIX E – Guidelines for Citizen Advisory Committee Member Participation in Level One Meetings

APPENDIX F – Level Two Application for Project Funding

APPENDIX G – Conservation Easements Provisions for County Funded Projects

# APPENDIX A

OFFICIAL BALLOT  
LEWIS AND CLARK COUNTY, MONTANA  
OPEN-SPACE LANDS: WORKING LANDS AND LAND FOR WATER AND WILDLIFE  
BOND ELECTION  
NOVEMBER 4, 2008

INSTRUCTIONS TO VOTERS: Make an X or similar mark in the vacant square before the words "BONDS--YES" if you wish to vote for the bond issue; if you are opposed to the bond issue, make an X or similar mark in the square before the words "BONDS—NO."

Shall the Board of County Commissioners (the "Board") of Lewis and Clark County, Montana (the "County") be authorized to issue and sell general obligation bonds of the County, in one or more series in the aggregate amount of up to Ten Million and No/100 Dollars (\$10,000,000.00), bearing interest at rates to be determined by the Board at a competitive sale, payable semiannually during a term not to exceed twenty (20) years and redeemable on any date after one-half of their term, for the purpose of preserving open-space lands in the County, including working lands and land for protecting water and wildlife, by providing funds to acquire conservation easements or other property interests from willing sellers and to pay costs associated with the sale and issuance of bonds, for any one or more of the following reasons: protecting drinking water sources and ground water quality; protecting water quality in and along rivers and streams; conserving working farm, ranch and forest lands; protecting wildlife areas; preserving open lands and natural areas; providing for recreation; and managing growth and development?

If the election on the bonds should pass, the County shall create a citizens advisory committee charged with making recommendations on the expenditure of bond funds to the Board.

The estimated annual tax upon the issuance of the full \$10,000,000 in bonds, assuming a 5.50% interest rate per annum on the bonds for 20 years and based on the current assessed value of property in the County that would be subject to taxation to pay the debt service on the bonds, is estimated to be \$16.77 for a home with an assessed value of \$100,000 and \$33.54 for a home with an assessed value of \$200,000.

BONDS — YES

BONDS — NO



Lewis & Clark County

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# APPENDIX B

## **Certification Process for Project Sponsors Lewis and Clark County Open Lands Program**

### **Introduction**

This document explains the process for approving the qualifications of Qualified Sponsoring Organizations (Sponsors) participating in Lewis and Clark County's Open Lands Program (Program). Sponsors are defined in the Program's Application for Conservation Funding.

The Citizens Advisory Committee (CAC) wants to ensure that Sponsors are bona fide organizations and agencies qualified to hold, steward, maintain and defend conservation easements funded with Lewis and Clark County bond funds. The County Attorney's office has recommended that the Program request certain documentation from Sponsors that would demonstrate their qualifications.

Instead of requiring this documentation as part of a specific application, potential Sponsors may choose to be pre-certified in advance of submitting applications for funding. Potential Sponsors would not be required to secure pre-certification and could choose to submit the required documentation with the funding application.

The following is a list of documents that the County Attorney's office will require for Sponsor certification. Sponsors will be certified upon submitting these documents (on disk) to the County. In instances where a Sponsor does not anticipate holding and enforcing conservation easements, items related to easement stewardship could be omitted. However, Sponsors pre-certified only for transactional partnerships with the Open Lands Program would have to partner with another organization or agency certified by the County to hold easements or fee title.

### **CERTIFICATION DOCUMENTS:**

- (1) Mission, Bylaws, Articles of Incorporation, Date of Inception (if applicable)
- (2) IRS determination letter granting 501(c)3 status, if Sponsor is a not-for-profit
- (3) A letter from the Executive Director or other authorized person attesting to the existence of the organization's Defense Fund and Stewardship Fund (applicable to those entities that may hold conservation easements) and explaining how they are maintained
- (4) Number of conservation easements held, and acres under easement that Sponsor has negotiated or is already monitoring
- (5) Policies and Procedures (a-c apply only to entities that may hold conservation easements):
  - a. Baseline documentation - development and maintenance
  - b. Conservation Easement Violation Policy/Procedures

- c. Conservation Easement Amendment Policy/Procedures that include these two principal constraints
      - i. Impact on conservation values
      - ii. Private inurement/benefit back to landowner
    - d. Conflict of Interest Policy
- (6) Accreditation Status (Accreditation by the Land Trust Accreditation Commission is not a requirement for certification; however the County would like to know if Sponsors have applied and have been accredited.)
- (7) Proof of Membership in the Montana Association of Land Trusts, if a land trust.

## Sponsoring Organization/Agency Information

Lewis and Clark County Open Lands Program requires that a landowner apply in partnership with a sponsoring organization or agency. The sponsoring organization or agency would work with landowners to evaluate eligibility, complete and submit applications, and provide technical assistance. A sponsoring organization or agency is also required to hold and monitor the conservation easement.

The following is a list of organizations that have experience in Lewis and Clark County:

Prickly Pear Land Trust  
46 N. Last Chance Gulch, Suite 2A  
P.O. Box 892  
Helena, MT 59624  
(406) 442-0490  
[www.pricklypearlt.org](http://www.pricklypearlt.org)

Montana Fish, Wildlife and Parks  
1420 E. 6<sup>th</sup> Avenue  
P.O. Box 200701  
Helena, MT 59620-0701  
(406) 444-2535  
[www.fwp.mt.gov](http://www.fwp.mt.gov)

Trust for Public Land  
Emerson Cultural Center  
111 South Grand Avenue, Suite 203  
Bozeman, MT 59715  
(406) 522-7450  
[www.tpl.org](http://www.tpl.org)

Montana Land Reliance  
324 Fuller Avenue  
P.O. Box 355  
Helena, MT 59624-0355  
(406) 443-7027  
[www.mtlandreliance.org](http://www.mtlandreliance.org)

Rocky Mountain Elk Foundation  
5705 Grant Creek  
Missoula, MT 59808  
(406) 523-4500  
[www.rmef.org](http://www.rmef.org)

Blackfoot Challenge  
405 Main Street  
P.O. Box 103  
Ovando, MT 59854  
(406) 793-3900  
[www.blackfootchallenge.org](http://www.blackfootchallenge.org)

The Nature Conservancy  
32 South Ewing, Suite 215  
Helena, MT 59601  
(406) 443-0303  
[www.nature.org](http://www.nature.org)

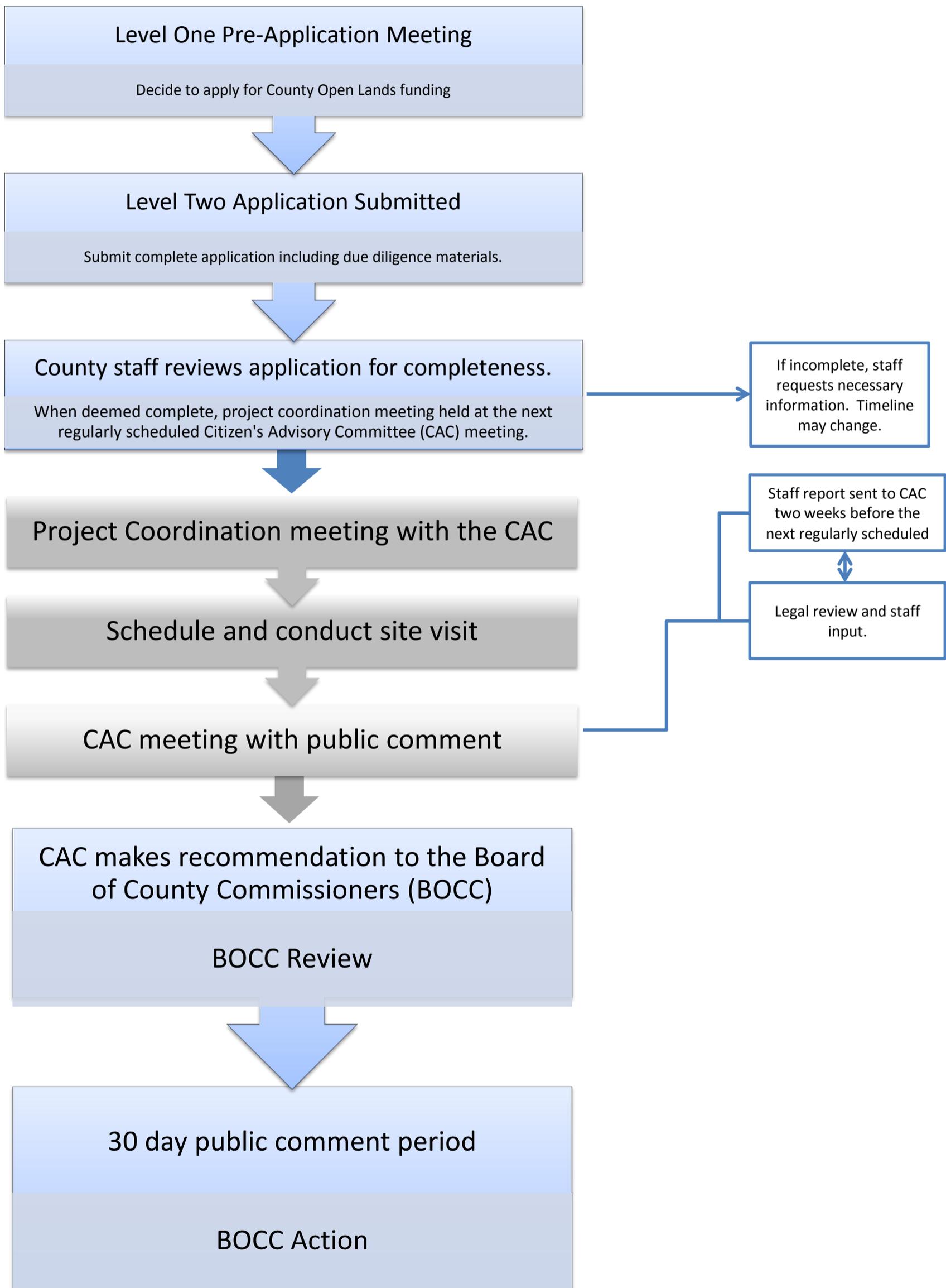
U.S. Fish & Wildlife Service  
Montana Partners for Fish and Wildlife  
Program  
P.O. Box 66  
Ovando, MT 59854  
(406) 727-7400  
<http://www.fws.gov/mountain-prairie/pfw/MONTANA/mt2.htm>

The Conservation Fund  
125 Bank Street, Suite 612  
Missoula, MT 59802  
(406) 541-8555  
[www.conservationfund.org](http://www.conservationfund.org)

Five Valleys Land Trust  
120 Hickory Street, Suite B  
Missoula, MT 59801  
(406) 549-0755  
[www.fvlt.org](http://www.fvlt.org)

# APPENDIX C

# Project Application Process



# APPENDIX D

**LEWIS & CLARK COUNTY**  
**OPEN LANDS FUNDING LEVEL ONE APPLICATION**

Please respond in writing to the questions below. Responses should be forwarded to Community & Planning Department, City-County Building, Room 220, Helena, Montana 59623. For additional information, please contact Community Development & Planning at 406-447-8374.

Landowner and Sponsor Agency Identification: \_\_\_\_\_

Project Name: \_\_\_\_\_

Planning Area (Circle one): Augusta, Canyon Ferry/York, Craig/Wolf Creek, Helena, Lincoln, Marysville

Project Address: \_\_\_\_\_

Project Legal Location: T \_\_\_\_\_ R \_\_\_\_\_ Section \_\_\_\_\_

Project Type: (easement, acquisition, etc.):

Owner Signature: \_\_\_\_\_ Sponsor Agent Signature: \_\_\_\_\_

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

**Please elaborate but do not use more than two attached pages (total) for your responses.**

1. Briefly describe the conservation values on the property and explain how the completion of this project will protect the conservation values of the property and meet the goals of the Open Lands Program to:
  - a. Conserve working farms & ranches;
  - b. Conserve working forests;
  - c. Protect habitat for fish and wildlife;
  - d. Provide opportunities for outdoor recreation;
  - e. Protect water resources and water quality;
  - f. Preserve open lands and natural areas; and,
  - g. Manage growth and development.
2. Describe how the history of the sponsor agency allows it to be capable of the long-term stewardship and management of the conservation values of the property.
3. State why the applicants consider the property to be of sufficient size to be commensurate with the type of open space values being protected.
4. State if the land is or is not contaminated by hazardous or toxic substances from previous on or off site uses. If the land is contaminated, please identify the contamination and describe how the materials can be removed from the property and the site reclaimed.
5. Please declare if the property is associated with a subdivision or any other land use development. If so, explain how the subdivision/development is compatible with the goals and policies of Lewis & Clark County, the surrounding local community, and the open space values contained in the Open Lands Program listed above.
6. If the project will be funded by sources other than the Lewis & Clark County Open Lands Bond, please identify the sources and extent of the funding.

Thank you. Projects passing the Level One review will be forwarded to the Lewis & Clark County Open Lands Citizen Advisory Committee only when accompanied by a Level 2 application.

# APPENDIX E

## **Lewis & Clark County Open Lands Citizen Advisory Committee**

### **Guidelines for Attending Level One Application Meetings with Potential Open Space Bond Applicants:**

1. CAC members' primary reason for attendance is to observe the initial process.
2. CAC member(s) will avoid making comments that might convey approval, disapproval, or modifications of a potential application.
3. At the beginning of meeting, the member or Community Development & Planning staff will inform the potential applicant(s) of committee membership and policy of individual members not speaking for the committee.
4. CAC member(s) may make factual statements such as committee purpose, membership composition, projects approved to date.
5. Invitation for committee member attendance will be by rotation among those members who agree to participate in this activity.
6. CAC representatives, if possible, will consist of one representative from the applicant's region and one from elsewhere in the County.

# APPENDIX F

## **Lewis and Clark County Open Lands Program Level Two Application**

### **Landowner and Agency Identification**

Please state the name, address, and telephone number of the landowner and of the sponsoring land conservation organization.

Please submit this application by digital media accompanied by one complete paper version.

**Note:** When submitted to the County, this application will become a public document and all information contained in it may be viewed by any member of the public that may request to do so.

These criteria summarize the objective, quantifiable, desirable characteristics sought by the Open Lands Program as established by the Land, Water and Wildlife bond measure passed by voters in 2008. These criteria will be used by County Staff and the Citizens Advisory Committee on Open Lands (CAC) as an objective means to guide the evaluation of specific projects to determine if they meet the voter-approved goals for conservation funding. The CAC recognizes that not all these features will be present on each property.

Provide a general description of the property that includes:

- a. The size of the property – total acreage and amounts by sub-ownership categories (i.e., deeded, leased, permitted public land, etc.)
- b. Size of the area to be included in the conservation easement or land purchase – total acreage and percentage of deeded land
- c. Permitted home sites – identify any existing home sites and future home sites that will be permitted in the conservation easement.
- d. Water/Mineral Rights - identify any other rights appurtenant to the property and whether they will remain with the property
- e. Hazardous materials – confirm that no hazardous materials, as defined by the federal government, are known or believed to be present on the property both above and below ground. If the land is contaminated, the contamination has been identified and a description is included as to how the material can be removed from the property and the site reclaimed.
- f. Other Conservation Easements and Public Lands – adjacent or nearby existing or proposed conservation easements and/or public land that would enhance the purpose of this application.
- g. Commercial Activities – identify and describe any existing and/or proposed commercial activities occurring on the property.

**Funding:** Describe the general budget of the project and any of the following that apply.

- What funding is requested from the County and how will they be applied?
- Will the County's funds be matched through donation of land value and/or other funding sources? If so, what amounts have been approved or requested, or are pending approval?

- If applicable, describe the total project costs, including transaction costs and stewardship fees.

**Conserve Working Farms and Ranches:** Describe the value of the property in terms of continuing or restoring the historic land use, and identify any of the following characteristics that apply.

- Does the property contain "prime, unique, statewide or locally important" agricultural soils, as defined by NRCS?
- Is the property contiguous with other working lands?
- Is this property currently a working farm or ranch?
- Is there an existing farm or ranch management plan in place?

**Conserve Working Forests:** Describe the value of the property in terms of protecting or improving forest uses, and identify any of the following characteristics that apply.

- Is the property located within the urban/wildland interface?
- Is the location deemed to be an area of high risk for wildfire?
- Is there a current forest management plan?
- Is the property, or a portion of it, classified as forest land/commercial timber for tax purposes?
- Is the forest being actively managed for current or future timber harvest?

**Protect Habitat for Fish and Wildlife:** Describe the value of the property as fish and wildlife habitat, and include any of the following that apply.

- Does the property contain significant wildlife habitat?
- Is there a diversity of habitat for wildlife or fish on the property?
- Has the property been identified as an area critical to the lifecycle of some wildlife species? (Summer or winter range, migration corridors, spawning habitat, etc.)
- Is there habitat for Threatened and Endangered, or Sensitive species of wildlife or fish?
- Are there streams or rivers with high habitat ratings from MFWP?
- Is there intact native riparian habitat?

**Provide Opportunities for Outdoor Recreation:** Describe the value of the property for outdoor recreation, and identify any of the following that apply.

- Will the proposed project maintain or increase legal and physical access for the public to existing public land or waters?
- Does the proposed project include legal access for the public on the private land proposed for conservation?
- Will the project secure access for the public to an existing, long-standing recreation or access site?
- Does the site and type of access offer the possibility of recreation for people with physical limitations?
- Will the project create or maintain a trailhead or trail for use by the public?

- Does the project support an existing, adopted outdoor recreation plan or initiative?

**Protect Water Resources and Water Quality:** Describe the value of the property in terms of Water Resources and Water Quality, and identify any of the following that may apply.

- Does the property contain high-quality wetlands?
- Are there lakes, ponds, or springs located on the property?
- Does the property contain riparian areas with intact vegetation?
- Are there rivers/streams with perennial flows?
- Does the property contain land in the 100 year floodplain?
- Are there water rights appurtenant to the property?
- Is the property within a watershed that is the source of a public water supply system?
- Is the property in an area that has been identified by a local, state or federal government agency as particularly sensitive in terms of its geology, soils or risk to an aquifer?
- Has DEQ classified the waterway on the property as A-1 or better (per ARM 17.30.606-614)?

**Preserve Open Lands, Natural Areas and Historic Value:** Describe the value of the property in terms of Open Lands, Natural Areas and Historic Value, and identify any of the following that may apply.

- Does the property contain scenic features that are strongly associated with the county's identity and sense of place?
- Will the project conserve unique geologic or geographic features?
- Does the proposed project help implement an adopted community plan or neighborhood vision?
- Does the property adjoin a city, town or unincorporated community?
- Are there threatened or endangered species, or species of concern on the property?
- Is there a particularly good example of a native habitat (e.g., native grasslands, healthy stands of aspen or limber pine, riparian plant associations)?
- Are there historic, archeological or prehistoric sites located on the property including historic or prehistoric corridors and trails?

**Are there any other outstanding or unique feature of the property you would like to describe?**

**Required Supporting Documentation:** Please refer to the 'Required Attachments for Level Two Application for Projects Funded by the Open Lands Program, Lewis and Clark County, Montana' document.

I/we have prepared this application to the best of our ability and knowledge and request that Lewis and Clark County evaluate this request for funding based on the information contained herein. I/we understand the project selection process described in the Lewis and Clark Open Lands Program Guide. I/we understand that a recommendation that this project move to the Due Diligence Phase is not a guarantee of funding. If any information or circumstance changes

substantially the project may be subject to reconsideration or reapplication, as described in the Program Guide.

I am authorized to sign this application as the applicant/landowner or a representative of the Sponsor.

---

Landowner signature Date

And/or

---

Sponsor representative signature Date

**Required Attachments for Level Two Application  
For Projects Funded by the Open Lands Program, Lewis and Clark County, Montana**

This checklist is meant to be a guide for Applicants and Sponsors submitting the Level Two application of an Open Lands Program project. This is a general checklist, not tailored to any particular project. Depending on the proposed project, not all attachments may be required. If you believe an attachment is not necessary for your project, please contact the appropriate County staff member (contact information provided below).

Please submit the information requested below to Lewis & Clark County Open Lands Program, Department of Community Development and Planning. Contact by phone at (406) 447-8375 or by email at [planning@lccountymt.gov](mailto:planning@lccountymt.gov) if you have any questions. These documents must be reviewed and approved by county staff *prior* to the project being submitted to the Citizens Advisory Committee for its recommendation and the Board of County Commissioners for approval and authorization to disburse funds.

**A. Successful completion of a Level One application and meeting with County staff and one member of the Citizens Advisory Committee are required before the Level Two application will be accepted.**

**1. Title Commitment and copies of Schedule A and B lists of documents**

Please provide the County with a copy of an American Land Title Association (ALTA) form commitment for title insurance and with copies of all documents referenced in the Schedule A list of requirements and Schedule B list of exceptions to title.

- The commitment must propose to insure the interest of the Grantee (holder of the easement), which in most cases will be the Project Sponsor, and Backup grantee (Lewis and Clark County), except where a federal or state agency's regulations prevent the County from being named Backup Grantee, in the event that Backup Grantee becomes the primary holder.
- The commitment must propose to insure an amount not less than the total project cost, including the full amount from all funding sources.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**2. Boundary descriptions of the property proposed for conservation and any proposed building envelopes**

The County needs to ensure it has adequately specific information detailing exactly what property the bond funds are supporting for conservation. For that reason, a legally adequate boundary description of the property proposed for conservation, and any areas within the conserved property boundaries designated as building envelopes, is required by the County. The County understands that conducting a survey of an entire property or a survey of building envelopes provides a high level of accuracy for a property description; however, in many cases this methodology may be prohibitively expensive. Therefore, the County provides the

following alternatives for boundary descriptions of properties proposed for conservation and for any building envelopes:

**a. Boundary description of the property**

If the boundaries of the property proposed for conservation are already surveyed and recorded with Lewis and Clark County, the previously recorded survey may be sufficient to meet this requirement. Similarly, if the boundaries of the property proposed for conservation are already defined by a legal description (metes and bounds, aliquot part, et al) recorded with Lewis and Clark County, the previously recorded legal description may be sufficient to meet this requirement. Since title insurance for the property proposed for conservation is also required, the legal description within the title commitment may also be sufficient to meet this requirement, depending on the Schedule B exceptions to coverage.

Please include with the legal description any information related to the adjacent properties, such as ownership, misplaced fencing, boundary discrepancies, or other known or potential problems.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**b. Boundary description of any building envelopes**

If any building envelopes are proposed, the locations of those envelopes must be clearly described in the easement and supporting materials and must be identifiable in the field (unless the conservation easement allows for floating building envelopes that will be located at a future date). Such description may be provided by a survey, an aliquot part description, or a metes and bounds description, or a combination of those three. Alternatively, the locations of the building envelopes may be designated on other maps or aerial photographs that clearly identify the building envelope and allow it to be identifiable in the field. The acceptable methodology will be dependent upon the size and location of the building envelopes, the size, location and surroundings of the entire property, the proposed use of the building envelope, and the accuracy of the proposed method for identifying the envelope in the field.

Note that these descriptions of property are for purposes of implementing the Open Lands Program and do not create a "division of land" as defined in Section 76-3-103, MCA.

If no legally adequate boundary description is provided and boundary discrepancies are a concern, the County may ask for a survey of the property or part of the property proposed for conservation.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**3. Environmental Report**

All Applicants proposing a conservation easement must submit an Environmental Report (ER or Report). This Report should contain information about the property, its known prior uses and potential contamination.

To complete the ER, the Applicant or Sponsor must:

- Interview the current landowner and any available and known prior owners to determine known prior uses of the property;
- Perform an investigation of the property. This investigation should be performed by someone with experience in looking for obvious signs of environmental contaminants (please include a CV or resume with ER); and
- Check the Title for environmental cleanup liens against the property.

County staff will solicit comments from and review records of appropriate federal, state, county, and municipal health/environmental officials and local, state and federal courts about known contamination at the site.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

If the Environmental Report indicates the potential of contamination and recommends further investigation, the Applicant shall conduct additional review to determine the nature and extent of any contamination, and whether remediation is needed to protect the property's conservation values.

If remediation is recommended, the Applicant shall develop and provide the County the following information for the purpose of ensuring that environmental contamination will not interfere with the conservation purposes of the Project.

- A remediation plan that has been certified by a qualified environmental engineer or environmental agency to reasonably protect the public health and environment,
- The estimated cost of funding the plan and a schedule for implementation of the plan, and
- A description of how implementation will be funded.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

All Applicants proposing a fee title acquisition for conservation with County Open Lands bond funds will be asked to provide a Phase I environmental site assessment in accordance with ASTM E 1527 -05.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

#### **4. Qualified Appraisal**

Applicants must provide a qualified appraisal to the County. The appraisal must meet the Uniform Standards of Professional Appraisal Practice (USPAP).

In order to comply with MCA § 7-8-2202, the County Attorney, County Commissioners and Landowner all must participate in the selection of the appraiser. For this reason and to expedite the appraisal process, the County Attorney and County Commissioners have prepared a “Pre-selected list of qualified appraisers” from which the Sponsor/Applicant can select their appraiser. The appraisers on this list will all be experienced, independent, and certified as general real estate appraisers.

*Note that if the land contains structures or improvements, the appraisal should separately present the value of the land from the value of the structures/improvements. Generally, the County will not help purchase structures or other improvements on the land.*

*Also note that the County is willing to accept the appraiser’s statement of the appraised value of the property without a completed report if for some reason the report cannot be ready in time for closing.*

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

#### **5. Signed Purchase and Sale Agreement**

This will be an agreement between the Applicant/landowner, the Sponsor (if the easement holder), and the County. County will provide a template agreement. Once agreement is acceptable to all parties, the County will provide the Project’s contact person four copies of the agreement. Once the applicant and sponsor sign and return all four copies of the agreement, the authorized county staff will sign all four copies, file one in the County Commissioners Office, return one to the Project’s contact person and one to the Applicant/landowner, and keep one for the County’s Open Lands Program file.

The representative of the Sponsor organization, and the representative of the landowner/applicant, if landowner/applicant is an organization, must provide a resolution from their board or certificate of authority to sign and accept the Agreement.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

#### **6. Mineral Remoteness Letter**

If the mineral rights are severed from the surface estate, the County will ask the Sponsor to provide a mineral remoteness letter.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

#### **7. Water Rights Information**

Attach a General Abstract from the State of Montana’s Department of Natural Resources and Conservation (DNRC). The applicant or sponsor may order a General Abstract by calling

DNRC or visiting: [www.dnrc.mt.gov/wrd/water\\_rts/records\\_unit/default.asp](http://www.dnrc.mt.gov/wrd/water_rts/records_unit/default.asp). Click on the NRIS Water Right Query System under “Research for Water Rights,” plug in the landowner’s name, and order the General Abstract. The DNRC will compile a list of all domestic wells, stock water, irrigation water, surface or subsurface water in a particular area, if given a legal description.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

## 8. Supplementary Maps

- **Site Location Map:** On a Lewis and Clark County base map, clearly identify the location of the proposed acquisition. In the digital version of the application, provide a jpeg or pdf of the same map and location information. For a County base map, click here: <http://www.co.lewis-clark.mt.us/departments/information-technology/gis-maps/wwwhelenamontanamapsorg.html> scroll down, read and accept the Terms of Use. On the next page, click on “Launch Lewis and Clark Viewer. Use the layers on the right hand side of the page or the tools at the top of the page for zooming and finding your property.
- **Project Boundary Map:** On a map of sufficiently large scale to see the property; identify the boundaries of the proposed project. Provide a digital version of this map. If reserved building sites are contemplated in your proposal, please identify their proposed locations and approximate size. Similarly, if your proposal contemplates excluding or subdividing land please indicate. For mapping assistance, use the County base map described in (a) above.
- **Aerial Photo Map:** Include the property boundaries over the most recent aerial photo available.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

## 9. Color Photos

Provide at least six (6) digital color photos (in .jpeg format) of the property proposed for conservation. The photos should show important terrain, waterfront, man-made features, access roads, wetlands, unique characteristics, or other elements that make the property a good candidate for funding.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

## 10. Baseline Documentation Report

This report should contain all the information necessary to enforce the terms of the conservation easement.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**11. Draft deed of type stipulated in application**

**a. Draft of Conservation Easement**

If a conservation easement is the legal tool proposed for the Project, the Sponsor/easement holder must submit to the County a proposed draft of conservation easement for the County's legal review and to work out mutually satisfactory terms. This will be a grant from landowner (grantor) to land trust or public agency (grantee) with the County indicated as the backup grantee. The draft conservation easement submitted to the County should incorporate the Conservation Easement Provisions prepared by County legal staff.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**b. Draft deed of other property interests conveyed.**

If a conservation easement is **not** the legal tool proposed for the Project, the Sponsor must submit to the County a proposed draft of the deed conveying the agreed to property interests for the County's legal review and to work out mutually satisfactory terms.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**12. Notification of the Closing date.**

Notify the County as soon as you are aware of your project's anticipated closing date. Please coordinate with the appropriate County staff member before selecting a closing date if you are planning to use county funding at the closing.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted with Level Two Application? Yes \_\_\_ or No \_\_\_

**B. After the Board of County Commissioners approves the project and authorizes staff to close, but at least seven (7) days prior to closing, please submit the following:**

**1. Draft settlement statements, other closing documents, and wire transfer instructions**

This advance notice is essential to the County's ability to ensure funds are available at closing. Please coordinate this with the closing agent at the title company as early as possible; otherwise, s/he may find it difficult to provide this information as far in advance as the County needs.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted prior to closing? Yes \_\_\_ or No \_\_\_

**2. A signed agreement about responsibilities between the County and the organization that will hold the easement or other property interests**

County will ask that holder of the easement agree to send the County annual status reports on the property; and County will ask that the holder of the easement agree to send the County additional information not included in the annual status reports but that may relate to enforcement actions or other activities on the property affecting conservation values.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted prior to closing? Yes \_\_\_ or No \_\_\_

**C. Submit at or before Closing:**

**1. Signed Deed of Conservation Easement**

All parties signing the Conservation Easement must provide proof of authorization to sign the easement, either a resolution or certificate of authority.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted at or before closing? Yes \_\_\_ or No \_\_\_

**2. Mortgage or Lien Subordination, if necessary**

All parties signing the Mortgage Subordination must provide proof of authorization to sign the subordination document, either a resolution or certificate of authority.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted at or before closing? Yes \_\_\_ or No \_\_\_

**D. Submit within 30 days after Closing:**

**1. Copies of all recorded documents and title insurance policy**

The Title Company will likely provide these.

Required Document for this project? Yes \_\_\_ or No \_\_\_

Submitted within 30 days after closing? Yes \_\_\_ or No \_\_\_

**E. Submit once every year**

**1. Update on the status of the property.**

Status report on property sent to County on \_\_\_\_\_.

Status report on property sent to County on \_\_\_\_\_.

Status report on property sent to County on \_\_\_\_\_.

# APPENDIX G

**Provisions for Conservation Easements  
Funded with Lewis and Clark County's Open Lands Program bond funds**

**Introduction**

Lewis and Clark County Attorney's Office will require that the following provisions, or provisions that are substantially similar, be included in the Conservation Easements that are purchased with funding from the County's Open Lands Program. In certain rare instances the County Attorney's Office may make exception to these general rules, as every project and conservation easement will be evaluated on a case-by-case basis.

While some of these provisions may also apply or be required where a type of property interest other than an easement is acquired with financial support from the County, this list of required provisions is created specifically for use in conservation easements.

**(1) Backup Grantee or Third Party with Right of Enforcement:**

Lewis and Clark County will likely require that it be named "Back-Up Grantee" [see the Land Trust Alliance fact sheet online] in the easement document. This requirement stems from the wording of the 2008 bond measure that requires that bond proceeds must fund the County's acquisition of property interests, such as a conservation easement. If the County only provides funding and enters into a purchase and sale agreement with the seller/landowner, it is not actually "acquiring" a property interest. In order to comply with the measure language, the County must be a named interest-holder under the instrument recording the conveyance. Additionally, title companies will be unable to insure the County against defects in title if the County is not a named party under the legal instrument.

Naming the County as a "Backup Grantee" creates some protections for the primary Grantee as well. Including a provision for a Backup Grantee (a.k.a. third-party with rights of enforcement) in the easement deed can help permanently prevent termination of the easement by abandonment. If the original easement holder fails to enforce the terms of the easement, a third-party interest holder (the County, in this instance) can undertake responsibility for enforcement, thus ensuring that the easement does not go untended and fall victim to termination by abandonment. Use of third-party enforcement is suggested in the Uniform Conservation Easement Act, and this method of ensuring enforcement of conservation easement terms is commonly used throughout the United States.

Sample clause for incorporation into conservation easements:

Back-Up Grantee with Third-party right of enforcement.

If Grantee is unable or unwilling to enforce the terms of this Easement in the event of a violation or threatened violation of the terms hereof, Grantor and Grantee expressly agree that Lewis and Clark County's role as Backup Grantee constitutes holding the Conservation Easement for purposes of enforcement pursuant to MCA § 76-11-211(2). As a public body holder of an easement, Backup Grantee, shall have the right

to enforce the terms of this Easement to protect the Conservation Values for the benefit of the public as described below.

The Grantee will retain primary authority to monitor the Property and enforce the terms of the Easement. The Backup Grantee recognizes and agrees that the Grantee shall have discretion to assure that the Conservation Values are protected for the benefit of the public. The Backup Grantee's third-party right of enforcement may only be exercised pursuant to this Section.

If a violation or threatened violation of the purposes or terms of this Easement come to the attention of Lewis and Clark County, Lewis and Clark County shall notify Grantee in writing of the violation or threatened violation. Upon receiving Lewis and Clark County's written notice, the Grantee shall have thirty (30) days to investigate the violation or threatened violation, determine whether a violation has occurred or is threatened or imminent, and communicate its findings to Lewis and Clark County in writing. If the Grantee determines a violation has occurred or is threatened or imminent, Grantee shall immediately commence its enforcement processes set forth in Section \_\_\_\_.

If Lewis and Clark County concludes that the enforcement actions (or lack of enforcement) taken by Grantee are not sufficient to protect the Conservation Values for the benefit of the public and that the Grantee's actions are outside of its discretion in protecting those Conservation Values, Lewis and Clark County may notify Grantee and the Grantor of its intention to intervene and assert its right of enforcement to compel Grantor to comply with the Easement in thirty days unless: (i) Grantee and Grantor resolve the basis of Lewis and Clark County's planned intervention to the County's satisfaction, or (ii) Grantee agrees to undertake Lewis and Clark County's planned intervention.

If, after thirty (30) days, neither (i) nor (ii) in the preceding sentence occurs, Lewis and Clark County may enforce the terms of this Easement to protect the Conservation Values for the benefit of the public pursuant to MCA § 76-11-211(2).

One predictable instance in which the County may waive the requirement that it be named "Backup Grantee" is where the primary Grantee or holder under the easement is a state or federal agency whose rules prevent them from acquiring easements with third parties. The County believes a waiver of the "Backup Grantee" requirement in this instance is defensible as long as the primary Grantee or holder is an agency of state or federal governmental (which would have the power of eminent domain over counties in any case), its goals for conservation mirror those of the County, and the public benefit provided by the easement receives the same protections as it would under the County's jurisdiction.

#### **Significant Public Benefit to County residents:**

The County requires the following language, or substantially similar language, be incorporated into the Conservation Values section of conservation easements to recognize the public benefits provided by the easement. Additional language may be added to support the conservation

purposes recognized by the Internal Revenue Service, if applicable, and further delineate the particular conservation values of the Property.

The Property provides significant public benefit to the people of Lewis and Clark County, Montana, the State of Montana, and the United States by conserving the Property for the following resources (hereafter collectively referred to as the "Conservation Values"):

- a. Open-space lands that provide scenic enjoyment to the public or some other specifically delineated significant public benefit;
- b. Scenic views of historic working landscapes in the historic and fertile [Helena/Blackfoot/Missouri River valley] valley with panoramas of the [Big Belts, Continental Divide, Rocky Mountain Front, Elkhorns] mountain ranges for members of the traveling public;
- c. Working landscapes, for farming, ranching, forestry or other land-based activities, and the heritage of the activity (perhaps touching upon the type of ranching or farming, etc.);
- d. Relatively natural habitat for [native plants, fish, and wildlife];
- e. Water resources;
- f. Cultural resources;
- g. Recreation
- h. Other.

**(3) State Law's recognition of the importance of private land conservation:**

The County also requires the following language, or substantially similar language, to show that this instrument of conveyance is authorized by and created according to the laws of the State of Montana and the local government.

Sample clause for incorporation into conservation easements:

The State of Montana has recognized the importance of private voluntary conservation of private lands in the state by enacting the Montana Open-Space Land and Voluntary Conservation Easement Act, MCA Sections 76-6-101, *et seq.*; and

The Lewis and Clark County Commissioners have expressly recognized in Lewis and Clark County Resolution No. 2008-97, recording # 3153419, passed and adopted August 12, 2008, and in the Lewis and Clark County Growth Policy, adopted \_\_\_\_\_ and amended \_\_\_\_\_, the importance of preserving open-space lands, including working lands and land for protecting water and wildlife, in Lewis and Clark County, Montana; and in furtherance of such Resolution and Growth Policy have specifically committed funds as noted in Section \_\_\_\_\_ for the purchase of all or a portion of this Easement.

**(4) Amendment:**

After the easement has been recorded, the County requires that the parties to the easement obtain its approval before amending the conservation easement.

Example:

Easement Amendments. In the rare circumstance where an amendment to or modification of this Easement is sought, all parties (Grantor, Grantee and Backup Grantee) must agree in writing to the amendment or modification.

To obtain the approval of the Backup Grantee, a request to amend must be submitted in writing to the County's Community Development and Planning Office together with proof that the conservation values will not be adversely affected. The request must be placed on the Commissioners' agenda for the next available regularly scheduled public meeting of the County Commission, and a public hearing must be held on the request.

The Backup Grantee's approval of amendments sought jointly by Grantor and Grantee shall not be unreasonably withheld, as long as there is (1) no adverse impact on conservation values and (2) no private inurement or financial benefit back to the landowner.

Any amendment must be in writing, signed by all parties, or their successors and assigns, and recorded in the official records of Lewis and Clark County, Montana.

**(5) Assignment:**

The County will require that its approval be obtained before the holder of the easement assigns its rights under the easement to another holder, even if the assignee is qualified under the terms of § 76-6-101, et. seq., as required under § 76-6-205, MCA. Approval from the County will not be unreasonably withheld. The following is an example of this type of assignment provision:

Example:

Assignment of Rights under Easement. Both Grantee and Backup Grantee may assign their interests under the easement to another entity,

(1) provided the assignee is a "qualified private organization" under § 76-6-104(5) or "public body" under §76-6-104(4), and further described by § 76-6-204 and I.R.C., Section 170(h)(3) and

(2) provided the Grantee has notified and obtained the written approval from Backup Grantee or Backup Grantee has notified and obtained written approval from Grantee.

Approval shall not be unreasonably withheld.

In the event of any assignment, both Grantee and Backup Grantee agree that each will seek an assignee that has conservation of open space or other resource pertinent to the conservation purposes of this Easement as a substantial organizational purpose. Any such qualified organization or public body shall agree in writing to enforce in perpetuity the terms and purposes of this Easement as a condition of such assignment. Any assignment must be recorded with the Clerk and Recorder.

Grantee represents to the Grantor and Backup Grantee that its present intention is to assign its interest in this Easement only in connection with a dissolution of the Grantee. Should Grantee dissolve without properly assigning its interest to a willing and qualified assignee, Grantee's interest will automatically transfer to the Backup Grantee until Backup Grantee makes an assignment of those interests to a willing and qualified assignee and records such interest.

**(6) Termination or Extinguishment:**

Termination and Extinguishment provisions typically identify when an easement may be terminated and how the parties to the Conservation Easement must be compensated if the easement is extinguished.

The County will require that it be compensated according to the proportion of the easement's value that the County contributed. Any compensation received by the County as a result of an termination or extinguishment will be made available only for acquisition of another conservation easement or to fund other conservation projects that are priorities for the current Open Lands Program and approved through whatever process exists at that time. Additional language may be added to be consistent with the termination or extinguishment requirements of the Internal Revenue Service, if applicable.

Example:

Termination and Extinguishment Language. This Easement constitutes a real property interest immediately vested in the Grantee and Backup Grantee with a fair market value that is equal to the proportionate value that this Easement, as of the date of conveyance, bears to the value of the Property as a whole at that time. This proportionate value shall remain constant. The values applicable for purposes of the calculations required by this paragraph shall be the final values used to determine the value of this Easement at the time of its conveyance.

If a subsequent unexpected change in conditions renders the conservation purposes of this Easement impossible to accomplish, this Easement may be extinguished, in whole or in part, by judicial proceedings in a court of competent jurisdiction. The amount of the compensation to which Grantee and Backup Grantee shall be entitled from any sale, exchange, or involuntary conversion of all or any portion of the Property, subsequent to such extinguishment, shall be determined in accordance with this section, unless otherwise provided by Montana law at the time. Grantee

and Backup Grantee shall use any such proceeds received from easement termination in a manner consistent with the conservation purposes of this Easement.

If for any reason this Easement is terminated as to all, or a portion, of the Property, the Grantee and Backup Grantee, on a subsequent sale, exchange, or involuntary conversion of the Property, or any portion thereof, shall be entitled to a percentage of the proceeds of such sale, exchange or involuntary conversion, equal to the proportionate value determined above. In the event that such proportionate value was determined without regard to structural improvements existing on the Property at the time of the conveyance, then such improvements shall be disregarded in determining the amount of such proceeds, etc. to which the Grantee is entitled hereunder. In any event, the value of structural improvements made to the Property after the date of conveyance shall be disregarded in determining such amount.

**(7) Indemnification:**

The easement should provide the County indemnity protection against any potential liability. The County will require that it be included in **any** indemnification language, such as the following:

Example:

Grantor's Obligation to Indemnify. Grantor agrees to hold harmless and indemnify Grantee, and/or Backup Grantee from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, Grantee's reasonable attorneys' fees and costs of defense, arising from or in any way connected with:

Grantee and Backup Grantee do not intend to possess and use the property to the exclusion of others within the meaning of Mont. Code Ann. § 70-1-101, or manage, direct or conduct operations on a day-to-day basis.

Nothing in this Easement shall be construed as giving rise to any right or ability in Grantee or Backup Grantee to exercise physical or managerial control over activities on the Property or to become an "owner" or "operator" of the Property within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 *et seq.*, ("CERCLA"), or the Montana Hazardous Waste Act, Sections 75-10-401, *et seq.*, and 75-10-601 *et seq.*, M.C.A., and similar state and federal statutes.

The Grantor shall indemnify and hold the Grantee and Backup Grantee harmless from any court awarded damages, together with reasonable attorney's fees and expenses incurred by the Grantee and Backup Grantee, and all attorney's fees and expenses assessed against the Grantee and/or the Backup Grantee, resulting from any and all of the following:

- Personal injury or property damage that occurs on the Property not due to the negligence of the Grantee or the Backup Grantee;
- Liability, including, but not limited to, liability under CERCLA, and/or similar local, state or federal laws, relating to cleanup of hazardous substances that were released or in any way deposited on the Property, other than by the Grantee or Backup Grantee;
- Or other costs associated with the upkeep of the Property or taxes.

**(8) Building Envelopes or Conveyances of Property:**

Where the conservation easement proposes to reserve for Grantor certain rights to build or develop on the property proposed for conservation (in a building envelope, development area, or similarly identified property earmarked for a specific use) or where the conservation easement proposes to reserve for Grantor the right to divide his property for purposes of conveying land (sale, rent, lease, gift or other conveyance) to another, the County requires that certain language be included in the easement clarifying that such reservations do not guarantee the approval of such development or conveyance by federal, state or local government.

Example:

Compliance with all applicable federal, state, and local laws, ordinances, and regulations:

If Grantor elects to build in a designated building envelope provided for under the easement and described in the exhibits to the easement, or decides to divide for purposes of conveying a piece of the property as permitted under the easement, Grantor must comply with all federal, state and local laws, ordinances and regulations.

**(9) Baseline Documentation:**

Both Grantee and Backup Grantee must maintain baseline documentation prepared by the Grantee in preparation of this conveyance. This documentation provides the information on the condition of the property at the time the easement was negotiated and recorded.