



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

EVALUATION REPORT

Conservation Easements

FEBRUARY 2013

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OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • James Nobles, Legislative Auditor

February 2013

Members of the Legislative Audit Commission:

In the last ten years, the State of Minnesota spent almost \$190 million to acquire and manage conservation easements. From 2001 to 2011, the number of state-funded conservation easements more than doubled, as did the number of acres protected by these easements. With money available from the “Legacy Amendment,” the increased use of conservation easements will probably continue.

Given the size and importance of the public investment, you asked the Office of the Legislative Auditor to evaluate conservation easements and how the state has used them to achieve public purposes. Our report addresses both the benefits and challenges in obtaining and managing conservation easements. It also highlights the need for more oversight and accountability to ensure that state-funded conservation easements achieve their intended results.

Our evaluation was conducted by Judy Randall (project manager), Julie Trupke-Bastidas, and Heather LaChapelle. The Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, Minnesota Land Trust, and others cooperated with our evaluation, and we thank them for their assistance.

Sincerely,

A handwritten signature in black ink that reads "Jim Nobles".

James Nobles
Legislative Auditor

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Summary

More oversight and stronger accountability are needed to help ensure that the public investment in conservation easements will have maximum and sustained impact.

Key Facts and Findings:

- Both public and private organizations have used state funds to purchase and maintain various types of conservation easements in Minnesota. State-funded conservation easements currently protect about 600,000 acres in Minnesota. (pp. 6-16)
- From 2001 to 2011, the state spent almost \$190 million to purchase conservation easements and restore and monitor land protected with easements. (pp. 11-13)
- Private nonprofit organizations are given wide latitude to select property to protect, negotiate the terms of state-funded conservation easements, and purchase the easements without approval by the state. (pp. 27-28 and 48-49)
- Some key provisions are not routinely included in agreements for state-funded conservation easements. Additionally, terms in some state agency easement agreements we reviewed were not clear, which contributed to enforcement problems. (pp. 45-52)
- State requirements to monitor easements for compliance are not adequate. (pp. 63-64)
- As the result of longstanding inattention, the Department of Natural Resources faces challenges to providing proper oversight of many of its easements. (pp. 69-72)
- Some state officials and legislative staff have expressed concerns about

nonprofit organizations holding state funds for stewardship outside of state control. (p. 86)

- Easement holders do not regularly measure the outcomes of state-funded easements. (pp. 34-36)

Key Recommendations:

- The Legislature should require the Board of Water and Soil Resources or the Department of Natural Resources to review and approve easement agreements with a state investment of \$500,000 or more that are entered into by nonprofit organizations. (pp. 56-57)
- The Legislature should require all nonprofit organizations that hold state-funded conservation easements to be accredited by the Land Trust Accreditation Commission. (pp. 94-95)
- The Legislature should require all state-funded easement agreements to contain certain standard provisions. (p. 56)
- The Legislature should require easement holders to monitor state-funded conservation easements on a regular basis. (p. 88)
- The Legislature should consider different options for ongoing funding of conservation easement stewardship. (pp. 90-94)
- The Legislature should require easement holders to biennially report on outcomes of state-funded conservation easements. (p. 54)

Conservation easements are one method to protect and preserve land.

There are several different types of conservation easements.

Report Summary

A conservation easement is a set of restrictions a landowner voluntarily agrees to that limits how the land can be used. The landowner is typically compensated for relinquishing these rights and continues to own the land. Conservation easements are one method to protect and preserve land; other methods include zoning and local regulations, state or federal laws and regulations, and public ownership. Currently, organizations in Minnesota hold more than 6,600 state-funded conservation easements, more than half of which were acquired from 2001 to 2011. During that time, the state spent almost \$190 million to acquire, manage, and monitor conservation easements in Minnesota. Currently, state-funded conservation easements protect about 600,000 acres in Minnesota.

There are more than 15 different types of state-funded conservation easements, each with a different purpose. For example, Wild and Scenic River easements protect the scenic qualities of the property and allow no or very minimal building construction; other conservation easements, such as Wildlife easements, focus on maintaining wildlife habitat and may permit buildings in specific areas on the property. State-funded conservation easements are administered primarily by four easement holders: Board of Water and Soil Resources (BWSR), Department of Natural Resources (DNR), Ducks Unlimited (DU), and Minnesota Land Trust (MLT). Among these four easement holders, BWSR received more than 58 percent of the state conservation easement funds from 2001 to 2011; DNR received 40 percent.

Each easement holder has different standards for acquiring and monitoring conservation easements. Based on these standards, the national literature, and federal and state law, we developed standards for all phases of acquiring and managing conservation easements. We then used these standards to evaluate the performance of the four primary easement holders in the state.

Nonprofit organizations have significant discretion to select the property to protect and negotiate the terms of state-funded conservation easements.

In a number of instances, the Legislature has appropriated state funding for conservation easements to DU and MLT based on broad programmatic areas of emphasis, such as “interests in land in fee or permanent conservation easements and to restore and enhance natural systems associated with the Mississippi, Minnesota, and St. Croix Rivers...”¹ Given the broad language in the law, the funding recipient has significant discretion to determine what land to protect. Organizations receiving funding from the Outdoor Heritage and the Environment and Natural Resources Trust funds must provide a list of the proposed properties they plan to protect with conservation easements. However, recipient organizations often revise the list of properties after receiving funding.

Once the property to protect is selected, the organization seeking an easement negotiates the terms of the easement agreement. Due diligence by the nonprofit organizations is especially important because the Legislature, legislative councils and

¹ *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subd. 5(b).

State agency staff do not approve state-funded easement agreements entered into by nonprofit organizations.

commissions, and legislative and state agency staff do not approve state-funded easement agreements entered into by these organizations. Although staff at BWSR and DNR have the expertise to review the easement agreements entered into by nonprofit organizations, they do not have the authority to do so.

The two nonprofit organizations that currently hold state-funded conservation easements (DU and MLT) have both been accredited by the Land Trust Accreditation Commission, which requires organizations to follow nationally recognized “gold standards” for conservation easements. Such accreditation is especially important given the level of responsibility the state has entrusted in these organizations. We recommend the Legislature require all nonprofit organizations that hold state-funded conservation easements to have this accreditation. We also recommend additional state oversight for conservation easements with a state investment of \$500,000 or more.

Easement agreements entered into by state agencies often did not contain key provisions and some included ambiguous terms, which can jeopardize the conservation benefits of the easement.

We reviewed 127 state-funded conservation easement agreements and found that about 75 percent of them, all held by state agencies, did not address amendments to or termination of the easement. We recommend the Legislature, with the assistance of a taskforce, identify key provisions such as these to include in all state-funded easement agreements.

In some easement agreements we reviewed, certain provisions were not clear, which could affect the state’s

ability to enforce the agreement. For example, one conservation easement agreement, which was drafted by another organization but held by DNR, prohibited building new roads except for “roads relating to the uses for agriculture, forestry, personal residence, and recreational use...” that are described elsewhere in the document. The landowner built a road on the property, which DNR and Attorney General’s Office staff initially thought was a violation of the easement terms. However, after reviewing the easement agreement, the Attorney General’s Office determined that the lack of clarity in the agreement made it difficult to enforce the prohibition on building roads. In the end, the landowner was not required to remove the road or restore the property.

The Department of Natural Resources has not met monitoring standards for the majority of its conservation easements.

Baseline reports are essential for monitoring conservation easements because they set a benchmark of the initial condition of the land protected by an easement. DNR had prepared baseline reports for only 37 percent of its easements we reviewed.

Minnesota statutes require DNR to establish a long-term program for monitoring Forestry easements. Aside from these Forestry easements and easements acquired with funding from specific sources, monitoring is not required for other state-funded easements. Nevertheless, easement holders have recognized the importance of monitoring and have established standards for the frequency of monitoring easements.

DNR was the only easement holder we evaluated that did not meet OLA’s standards for regular monitoring (at

Most easement agreements we reviewed did not include some key provisions, such as how to handle amendments or termination of the easement.

Most of DNR's conservation easements we reviewed were monitored infrequently or not at all.

least once every three years) for the majority of its easements. Most of the department's easements were either monitored infrequently (less often than once every three years) or not at all. We recommend the Legislature require easement holders to monitor all state-funded easements on a regular basis.

One of the conservation easement types DNR had managed poorly until recent years is the Wild and Scenic River easements. Most of the 133 Wild and Scenic River easements were acquired in the 1970s and 1980s (when easement standards were different); no baseline reports were prepared for the easements when they were acquired. For many years, DNR did not monitor most of these easements, and DNR even lost track of the location of many of them.

In 2008, DNR began a systematic effort to improve management and monitoring of these easements. Staff have identified easement locations, contacted landowners, prepared baseline reports, and tracked possible enforcement issues. DNR has found several potential violations of agreement terms and is addressing many as it finalizes the baseline reports. For more serious cases, staff will develop an enforcement strategy.

Some state appropriations for easement stewardship are held outside of the state's control.

In recent years, the Legislature has appropriated state funding for stewardship of new conservation easements and, in some cases, directed nonprofit organizations to hold and manage these funds on an ongoing basis. The law requires the organizations to keep this money in a monitoring and enforcement fund and

provide an annual financial report on the use of this fund.²

Despite these reporting requirements, the Commissioner of the Department of Minnesota Management and Budget and some legislative staff have expressed concern about dedicated stewardship funds being managed by nonprofit organizations. In particular, concerns about this arrangement include that the stewardship money: (1) is outside of the state's control and subject to less oversight; and (2) has been pooled with the organization's other stewardship funds, leading to less transparency of the use of state money. We set forth several funding alternatives for the Legislature to consider, including establishing a stewardship advisory fund and requiring nonprofit organizations to provide stewardship money as a match for state appropriations.

Easement holders do not report on the outcomes of state-funded conservation easements.

All four easement holders we reviewed focused on the number of acres protected by easements; but there was little attention to the ultimate goal of those individual acres, such as an increase in wildlife populations or a cleaner river.

The state has invested more than \$190 million in conservation easements over the past ten years and should have some reassurance of the benefits of this investment. We recommend the Legislature require easement holders to biennially report the public benefits and outcomes of state-funded conservation easements.

There has been little attention paid to measuring the intended outcomes of conservation easements, such as an increase in wildlife or cleaner water.

² See, for example, *Laws of Minnesota* 2011, First Special Session, chapter 6, art. 1, sec. 2, subd. 15.

Introduction

The number of state-funded conservation easements in Minnesota has doubled over the last ten years.

A conservation easement is a set of restrictions a landowner voluntarily agrees to that limits how the land can be used in order to protect the natural characteristics of the property. Currently in Minnesota, there are more than 6,600 state-funded conservation easements, most of which are intended to last indefinitely. State agencies, local government units, and nonprofit organizations hold conservation easements. The first conservation easements in Minnesota were acquired by the Department of Natural Resources in the late 1960s. Over the last ten years, the number of state-funded conservation easements and the amount of land protected with these types of easements has more than doubled. This increase is due, in part, to the increased funding available for conservation easements from the 2008 approval of the “Legacy Amendment” to the Minnesota Constitution.¹

The recent increase in the number of conservation easements has prompted questions about their use and long-term effectiveness. In response to these concerns, the Legislative Audit Commission directed the Office of the Legislative Auditor to evaluate conservation easements. Our evaluation addressed the following questions:

- **How is land selected for conservation easements, and how is the price paid for easements determined?**
- **What are the public benefits of conservation easements, and what benefits accrue to the landowners whose properties have conservation easements?**
- **How well do state agencies and nonprofit organizations that use state money to purchase easements monitor and enforce conservation easement requirements?**

To address these questions, we reviewed the national literature, federal and state laws related to conservation easements, and standards and practices of the organizations that hold conservation easements. We conducted numerous interviews with easement holders and other conservation stakeholders in the state.

Based on our research, we developed a set of minimum standards for the selection, acquisition, and stewardship of conservation easements. To evaluate how well holders of state-funded easements in Minnesota met these standards, we conducted a file review of 127 state-funded conservation easements held by

¹ *Minnesota Constitution*, art. XI, sec. 15. The constitutional amendment increased the state sales and use tax rate by three-eighths of 1 percent beginning July 1, 2009, until June 30, 2034, and dedicated the proceeds of this tax to outdoor heritage, clean water, parks and trails, and arts and cultural heritage.

Our evaluation focused on four easement holders: BWSR, DNR, Ducks Unlimited (DU), and Minnesota Land Trust (MLT).

four easement holders: Board of Water and Soil Resources (BWSR), Department of Natural Resources (DNR), Ducks Unlimited (DU), and Minnesota Land Trust (MLT). We focused on these four organizations because they hold nearly all state-funded conservation easements in Minnesota. We reviewed a given number of easement files from each holder. For DU and MLT, we reviewed more than 15 percent of the state-funded easements they acquired since 1999. For BWSR, we examined about 10 percent of the easements acquired since 2001 by four soil and water conservation districts (located in Blue Earth, Morrison, Renville, and Winona counties) that represent different characteristics and locations in the state. For DNR, we reviewed a roughly proportionate number of easements by easement type. We also accompanied the four easement holders on monitoring site visits of a sample of the properties on which they hold conservation easements.

To obtain a broader understanding of the growth and nature of conservation easements in Minnesota, we obtained and analyzed easement data from BWSR, DNR, DU, and MLT. These data permitted us to evaluate the number and types of conservation easements; the extent to which easements were purchased or donated; and, for one of the easement holders, the extent and nature of violations of and amendments to the easement agreements.

This evaluation focused on state-funded conservation easements. The federal government also funds and manages a large number of conservation easements in Minnesota. We included easements with both state and federal funding in our evaluation but excluded easements that relied solely on federal funding. Local units of government also hold a small number of conservation easements, some of which were partially funded by the state. Although we spoke with representatives from Cass, Dakota, and Washington counties about their conservation easement programs, we also excluded their conservation easements from any in-depth analysis.

Background

A conservation easement is a set of restrictions a landowner voluntarily agrees to that limits how the land can be used.

A conservation easement is a land conservation tool that protects the natural characteristics of a particular property while leaving the property in private ownership. More specifically, a conservation easement is a set of restrictions a landowner voluntarily agrees to that limits how the land can be used. The landowner is typically compensated for relinquishing some rights but continues to own the land. Conservation easements are one method to protect and preserve land; other methods include landowner education, zoning and local regulations, state or federal laws and regulations, and public ownership.

Exhibit 1.1 illustrates the concept of conservation easements by representing the typical rights of a landowner as a “bundle of sticks.” Each stick represents a unique landowner right, such as the right to subdivide, build on, farm, or sell the property. A conservation easement often compensates the landowner for relinquishing some of these rights, effectively removing some sticks from the landowner’s bundle of rights.

Currently in Minnesota there are more than 6,600 state-funded conservation easements;¹ more than half were acquired from 2001 to 2011. State-funded conservation easements protect around 600,000 acres in the state.² In this chapter we provide an overview of conservation easements in Minnesota and present standards for evaluating how easement holders have performed.³

OVERVIEW

Minnesota Statutes 2012, chapter 84C, governs conservation easements in Minnesota. The law, which was first enacted in 1985, defines the term “conservation easement;” authorizes the creation, modification, and termination of easements; and sets forth broad parameters that govern conservation easements in Minnesota.⁴ Other statutes govern specific types of conservation easements, which are further discussed below.⁵

¹ We use the term “state-funded conservation easements” to identify easements for which state money was used to acquire the easement and/or pay for associated ongoing stewardship costs.

² State-funded conservation easements protect more than 1 percent of the 51 million acres of land in Minnesota.

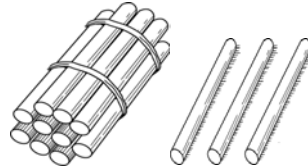
³ For an earlier evaluation of conservation easements in Minnesota, see Minnesota Office of the Legislative Auditor, *Natural Resource Land* (St. Paul, March 2010), 21-34.

⁴ Prior to 1985, the Department of Natural Resources acquired “conservation restrictions,” as authorized by *Minnesota Statutes*, 84.64 and 84.65. Conservation restrictions are now considered and treated as conservation easements. See *Minnesota Statutes* 2012, 84C.05.

⁵ For example, *Minnesota Statutes* 2012, 12A.05, 84.95, and 103F.501-103F.535, outline the Reinvest in Minnesota (RIM) Reserve conservation easement program, and *Minnesota Statutes* 2012, 84.66-84.68, outline requirements for state-funded Forestry easements.

Exhibit 1.1: Explanation of Conservation Easements

Landowner Rights before a Conservation Easement

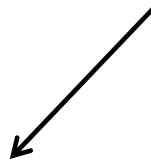


Each landowner has a “bundle” of rights (represented by the 13 sticks), including the right to subdivide, build on, farm, mine, and sell the property, subject to local zoning and ordinance laws. Each stick represents a different landowner right.

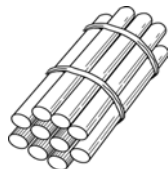


Conservation Easement Acquired

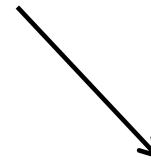
A conservation easement compensates a landowner for extinguishing some of these rights, typically the right to subdivide and build on the property, among others.



Landowner Rights after a Conservation Easement



The landowner’s “bundle” of rights is now smaller, representing only the rights the landowner retains after a conservation easement is in place.



Rights Extinguished by the Conservation Easement



The conservation easement extinguishes some of the landowner’s rights and removes them from the “bundle” of rights that would otherwise remain with the property.

SOURCE: Office of the Legislative Auditor.

Exhibit 1.2 defines key terms used throughout this evaluation. As discussed, a **conservation easement** (at times simply referred to as an “easement”) is a set of restrictions a landowner voluntarily agrees to that limits how the land can be used. The restrictions and other terms of the easement are codified in a legally binding document called the **easement agreement**, which must be “recorded”

State-funded conservation easements do not always require public access.

(filed) in the county recorder’s office and permanently restricts the use of the property regardless of ownership. Conservation easement agreements protect land’s natural, scenic, historical, cultural, or other values typically by limiting development or other activities. Some easement agreements may require the landowner to undertake certain management or restoration activities on the property. A conservation easement agreement may require the landowner to allow the public to access the protected property, but public access is not always required even when public money was used to acquire the easement.

Exhibit 1.2: Conservation Easement Definitions

	Definition
Conservation Easement	A set of restrictions a landowner voluntarily agrees to that limits how the land can be used. A conservation easement can be a <i>limited-term easement</i> , which restricts how the land can be used for a defined length of time, typically for at least 20 years, or a <i>perpetual easement</i> , which permanently restricts how the land can be used.
Easement Agreement	The legal document in which the terms of the conservation easement are codified.
Easement Holder	The organization that holds an interest in the land—but does not own the land outright—and is responsible for ensuring the terms of the conservation easement agreement are upheld.
Landowner	The individual or organization that owns the title to the land on which a conservation easement may be placed. The landowner is responsible for adhering to the terms of the easement agreement.

SOURCE: Office of the Legislative Auditor.

Conservation easements can be either perpetual or have a limited term.

Conservation easements can be either perpetual or have a limited term. A *perpetual* conservation easement permanently removes specific rights from the property, regardless of future changes in ownership. A *limited-term* conservation easement removes certain rights from the property for the length of the term, typically at least 20 years.⁶ Limited-term conservation easements also remain in place with a change in ownership but expire at the end of the established duration (unless they are renewed).

Landowners, who own title to the land on which the conservation easement is placed, are often compensated for giving up their development rights through the easement. Landowners may be paid directly or may receive a tax deduction based on the value of the conservation easement they have donated.⁷ An **easement holder** is the organization that holds an interest in the land (but does

⁶ Statutes set the minimum term length at 20 years, although most limited-term conservation easements the state has funded since 2001 have terms of at least 35 years.

⁷ A “donated” conservation easement is one for which the landowner voluntarily gives up some rights without being compensated for the full value of the easement. Landowners can also receive a mix of direct payment and tax deductions. To be eligible for a tax deduction, a donated conservation easement must meet criteria established in federal regulations. See 26 *CFR* sec. 1.170A-14 (2012).

not own the land outright) and is responsible for ensuring the terms of the conservation easement agreement are met. The easement holder is often the organization that identified and selected the property for the easement, as well as the organization that entered into the easement agreement.⁸

TYPES OF CONSERVATION EASEMENTS

While conservation easements are generally intended to protect the natural characteristics of properties, the goals and detailed provisions of conservation easements can vary significantly. In fact, we found:

- **There are more than a dozen different types of conservation easements in Minnesota, and they have different purposes.**

Exhibit 1.3 lists the different types and numbers of state-funded conservation easements in Minnesota and provides a brief explanation of each. As shown in the exhibit, the easement types with the largest numbers of state-funded conservation easements are the Conservation Reserve Enhancement Program (CREP) easements, which are funded jointly by federal and state easement programs, and the Reinvest in Minnesota (RIM) Reserve easements. Exhibit 1.3 also highlights the differences among easement types. Some conservation easement types, such as the Wild and Scenic River easements, focus on the scenic qualities of the property; other conservation easement types, such as Wildlife easements, focus on maintaining wildlife habitat.

Different conservation easement types may restrict different activities.

Different conservation easement types may restrict different activities. For example, the RIM Reserve easements require the land to stop being used for agricultural purposes and be restored with perennial vegetation; other conservation easements, such as some of the Army Compatible Use Buffer (ACUB) easements, permit farming on the property. These different restrictions typically do not interfere with each other because the easements are placed on different properties in different locations of the state; however, the multitude of types and purposes of conservation easements makes it difficult to draw conclusions about conservation easements in general.

State law establishes duration requirements for some types of easements. For example, state law requires ACUB, Forestry, and Wild and Scenic River easements to be permanent easements.⁹ In contrast, state law permits Native Prairie Bank and RIM Reserve easements to have limited terms, although they must be in place for at least 20 years.¹⁰

⁸ In some cases, the easement holder is not the organization that selected the property. For example, nonprofit organizations sometimes acquire conservation easements and then transfer them to the Department of Natural Resources to hold.

⁹ *Minnesota Statutes* 2012, 84.0277, subd. 1 (ACUB); 84.66, subd. 5 (Forestry); and 103F.311, subd. 6 (Wild and Scenic River).

¹⁰ *Minnesota Statutes* 2012, 84.96, subd. 3(b) (Native Prairie Bank); and 103F.515, subd. 3 (RIM Reserve). *Minnesota Statutes* 2012, 103F.515, subd. 2(e), requires that permanent easements be given the highest priority under the RIM Reserve program.

Exhibit 1.3: Types, Holders, and Numbers of State-Funded Conservation Easements in Minnesota, 2011

Type	Easement Holder(s)	Number	Purpose
Aquatic Management Area	DNR	13	To protect land critical for fish and other aquatic life.
Army Compatible Use Buffer (ACUB)	BWSR, DNR	75	To limit development or use of the property or preserve habitat on the property in a three-mile zone around Camp Ripley.
Conservation Reserve Enhancement Program (CREP)	BWSR	2,735	To restore marginal agricultural land using a combination of payments from the federal Conservation Reserve Program and the state Reinvest in Minnesota (RIM) Reserve program.
Forestry	DNR	37	To protect private forest lands for a variety of purposes, including timber, scenic, recreational, and habitat.
Metro Greenways	DNR	16	To protect natural areas in the Twin Cities metropolitan area.
Native Prairie Bank	DNR	103	To protect native prairie lands that have never been plowed.
Northern Pike Spawning	DNR	10	To protect northern pike spawning habitats.
Reinvest in Minnesota (RIM) Reserve ^a	BWSR	2,474	To restore certain marginal agricultural land and protect environmentally sensitive areas.
Scientific and Natural Area	DNR	17	To protect in an undisturbed state natural features with exceptional scientific or educational value.
Shallow Lake	DU	9	To protect wetlands and waterfowl habitat around shallow lakes.
Trout Stream	DNR	583	To provide angler access, improve trout habitat, and restrict nearby land use.
Water Bank	DNR	21	To preserve wetlands.
Wild and Scenic River	DNR	133	To protect the scenic, recreational, or natural characteristics along the state rivers designated as Wild and Scenic rivers.
Wildlife	DNR	18	To protect wildlife habitat.
Other ^b	DNR, MLT, BWSR	443	To preserve and protect unique natural features, such as caves, bat hibernaculum, wetlands, or land adjacent to or near other protected areas and shorelines.

NOTES: Easement holders and numbers are as of December 31, 2011, for the four primary easement holders of state-funded conservation easements in Minnesota: Board of Water and Soil Resources (BWSR), Department of Natural Resources (DNR), Ducks Unlimited (DU), and Minnesota Land Trust (MLT). Because MLT does not classify its conservation easements by type, we have classified all of its 120 state-funded conservation easements as "Other."

^a "RIM Reserve" includes a number of easement types, such as Marginal Cropland and Riparian Buffer Strip easements.

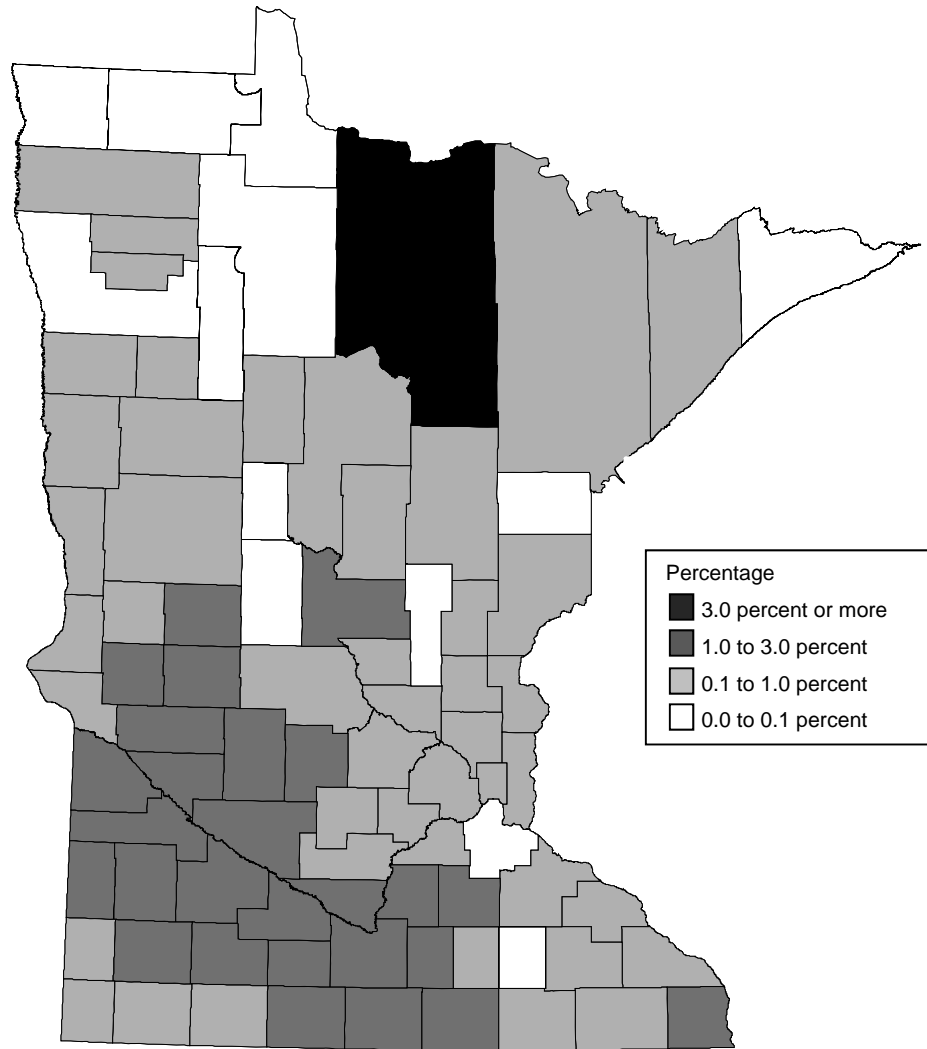
^b "Other" includes several different types of conservation easements, such as Cave, Park, and Perpetual Wetland Preserve easements.

SOURCES: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust; *Minnesota Statutes* 2012, 84.0277, 84.66, 84.96, 86A.05, 97C.02, 103F.311, 103F.505, and 103F.601; Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011); and Minnesota Land Trust, *An Inventory of Conservation Easement Activity in Minnesota* (St. Paul, January 2010).

Conservation easements are located across the state, as shown in Exhibit 1.4. However, different types of conservation easements tend to be concentrated in different areas, as illustrated in Exhibit 1.5. For example, CREP and RIM Reserve easements tend to be located in the Minnesota River Valley in southwestern and south central Minnesota. In contrast, Forestry easements are more likely to be in the northeast or southeast areas of the state, where there are large tracts of forested land.

Exhibit 1.4: Percentage of Land Protected by State-Funded Conservation Easements by County, 2011

Conservation easements protect land located across Minnesota.

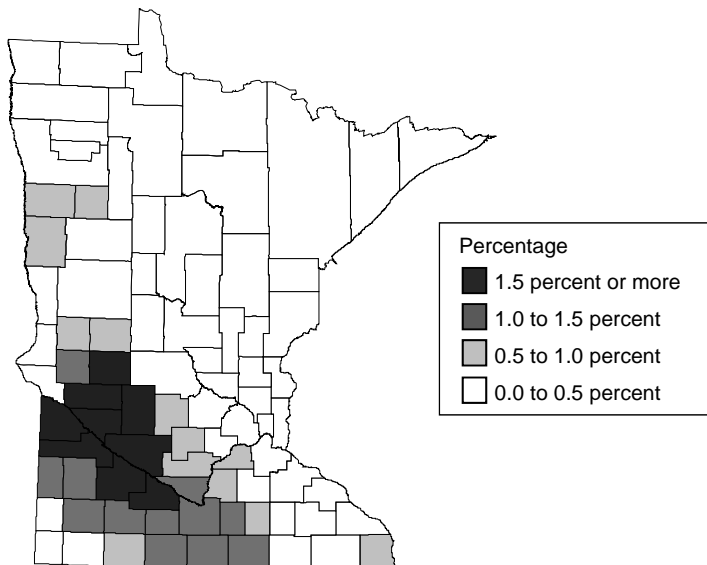


NOTES: We did not have acreage data per county for six of the conservation easements that protect properties located in more than one county. For each of these easements, we assigned the total acreage into one of the counties in which the easement was located.

SOURCE: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust.

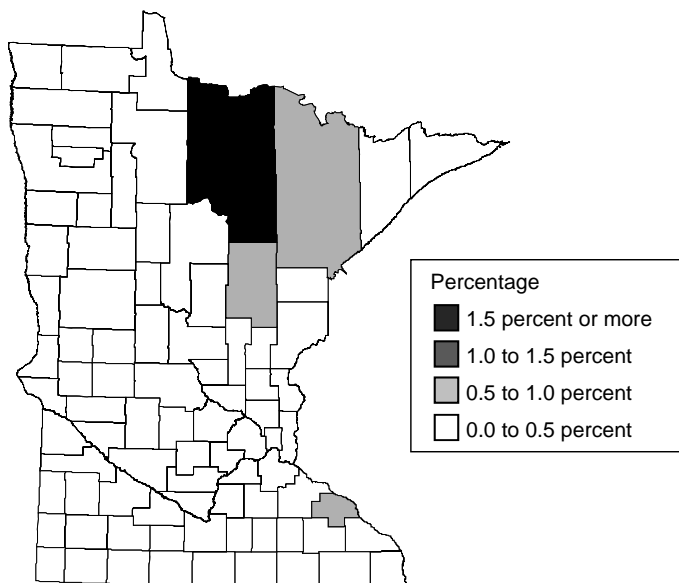
Exhibit 1.5: Percentage of Land Protected by Selected State-Funded Conservation Easements by County, 2011

Reinvest in Minnesota (RIM) Reserve and Conservation Reserve Enhancement Program (CREP) Conservation Easements



Different types of conservation easements are concentrated in certain parts of the state.

Forestry Conservation Easements



NOTES: We did not have acreage data per county for six of the conservation easements that protect properties located in more than one county. For each of these easements, we assigned the total acreage into one of the counties in which the easement was located.

SOURCE: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust.

EASEMENT HOLDERS

As discussed above, there are more than 15 types of state-funded conservation easements in Minnesota. We found that:

- **Several public and private organizations hold state-funded conservation easements in Minnesota.**

State law authorizes units of government and certain nonprofit organizations to hold easements. Specifically, *Minnesota Statutes* 2012, 84C.01, states that a charitable organization may hold a conservation easement if its purposes or powers include the purposes of a conservation easement, such as:

Retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.¹¹

In Minnesota, two state agencies, the Board of Water and Soil Resources (BWSR) and the Department of Natural Resources (DNR), and three nonprofit organizations (Ducks Unlimited, Minnesota Land Trust, and The Nature Conservancy) hold conservation easements funded by the state.¹² These nonprofit organizations meet the requirements outlined in law and have successfully requested and received state money for acquiring or managing conservation easements. Because The Nature Conservancy holds only one state-funded conservation easement in Minnesota, we excluded it from our evaluation.

BWSR holds the majority of state-funded conservation easements.

BWSR holds three primary types of conservation easements: ACUB, CREP, and RIM Reserve easements, as shown earlier in Exhibit 1.3. BWSR has the majority of state-funded conservation easements, holding more than 5,500 at the end of 2011. BWSR works with the 90 soil and water conservation districts in the state to identify properties for conservation easements and to conduct regular monitoring of easement sites.¹³

DNR holds the greatest variety of types of conservation easements, including ACUB, Forestry, Native Prairie Bank, and Wild and Scenic River easements. DNR alone holds more than 12 different types of conservation easements, which are managed by several divisions within the department. Because many DNR

¹¹ *Minnesota Statutes* 2012, 84C.01(2)(ii).

¹² The federal government also funds and holds conservation easements in Minnesota. Three counties in Minnesota (Cass, Dakota, and Washington) hold state-funded conservation easements as well. We met with officials from these counties and The Nature Conservancy to discuss their conservation easement practices but largely excluded them from our evaluation. Finally, we met with representatives from several other nonprofit organizations that facilitate the acquisition of conservation easements but do not hold the easements themselves, including the Conservation Fund, Leech Lake Area Watershed Foundation, Pheasants Forever, and the Trust for Public Land.

¹³ Soil and water conservation districts oversee natural resource management programs at the county level. They are administered by elected boards of supervisors.

divisions use conservation easements as a tool for land protection, no single division or section within the agency is responsible for managing all of the agency's easements. Instead, responsibility is shared among most of the department's divisions, including Ecological and Water Resources, Fish and Wildlife, Forestry, and Parks and Trails. Across all divisions, DNR held more than 980 conservation easements as of the end of 2011.

Minnesota Land Trust (MLT), first formed in 1991 as the Washington County Land Trust, is a private nonprofit land conservation organization. In 1993, the organization expanded its area of interest and became the Minnesota Land Trust, focused on acquiring conservation easements throughout the state. As of the end of 2011, MLT held 428 conservation easements in Minnesota. MLT received state funds to acquire, manage, or monitor 120, or 28 percent, of its conservation easements. The majority of MLT conservation easements were either donated or acquired using other sources of funds. Unlike BWSR and DNR, MLT does not classify its conservation easements by type; however, most of MLT's easements are focused on protecting wildlife habitat, shorelines, or scenic resources.

Ducks Unlimited (DU) is a national nonprofit organization focused on conserving, restoring, and managing wetlands and associated waterfowl habitats. DU started working in Minnesota in the mid-1980s and now has almost 40,000 members in the state. As of the end of 2011, DU held nine state-funded easements in Minnesota, all focused on protecting shallow lakes and waterfowl habitat. For these nine easements, state money was used only to fund the purchase and related acquisition costs; the organization relies on other donations to pay for the ongoing management and stewardship costs associated with these conservation easements. State-funded easements account for one-half of DU's 18 conservation easements in Minnesota.

FUNDING

From 2001 to 2011, the state spent almost \$190 million on conservation easements.

Funding for conservation easements comes from a variety of sources, including federal, state, and county funds; private donations; and landowner contributions. From 2001 to 2011, almost \$190 million of state funding was used to acquire, manage, and monitor conservation easements in Minnesota.¹⁴ The state has provided funding for conservation easements from a variety of sources, including:

- Capital investment appropriations (bonding bills),
- Clean Water Fund,
- Environment and Natural Resources Trust Fund,

¹⁴ This \$190 million figure includes money used by BWSR, DNR, DU, and MLT to purchase conservation easements and pay for related acquisition costs. It also includes money appropriated to MLT for monitoring conservation easements. Aside from funding allocated to DU, the \$190 million does not include funding used to pay for staff costs to acquire the easements or money used by DNR or BWSR for ongoing monitoring and oversight of conservation easements. This figure also does not include an additional \$27 million used by BWSR to restore and manage land protected by conservation easements.

- General Fund, and
- Outdoor Heritage Fund.

In reviewing the legislative appropriations related to conservation easements, we found that:

- **The Legislature has appropriated funds to purchase conservation easements; restore or enhance land protected with easements; and administer, monitor, and enforce easements.**

Funding has typically been appropriated to acquire, enhance, or restore “land in fee or permanent conservation easements;” as such, it is difficult to determine the precise amount appropriated explicitly for conservation easements in a given year.¹⁵ For example, during the 2012 legislative session, the Legislature appropriated from the Outdoor Heritage Fund:

- \$4.8 million specifically to acquire conservation easements,
- \$5.2 million to acquire land *or* permanent conservation easements, and
- \$14.09 million to acquire conservation easements and enhance and restore land protected by conservation easements.

State agencies received 98 percent of the state funds used to acquire conservation easements from 2001 to 2011.

Based on data provided by BWSR, DNR, DU, and MLT, these easement holders spent more than \$186 million of state money from 2001 to 2011 to acquire conservation easements. Of this amount, BWSR spent 58 percent and DNR spent 40 percent. In addition to state funds, other public money has also been used to acquire conservation easements in Minnesota. For example, federal funds have been used to help acquire certain types of conservation easements, such as ACUB, Forestry, and RIM Reserve easements. Additionally, Dakota and Washington counties have passed voter-approved levies to raise money for conservation easements and other land conservation initiatives.¹⁶ Landowner donations and private contributions have also been used to acquire conservation easements. For example, more than \$15 million in private funding has been used to acquire Forest Legacy conservation easements.

In recent years, the Legislature has appropriated money specifically for easement monitoring and enforcement. For example, the 2012 Legislature allocated up to \$51,000 of a \$3.68 million appropriation to establish a monitoring and enforcement fund.¹⁷ In 2011 and 2012 alone, the Legislature appropriated \$1.7 million explicitly for conservation easement stewardship purposes, which

¹⁵ “Land in fee” refers to outright public ownership of the land.

¹⁶ In 2002, Dakota County voters passed a \$20-million bond referendum to provide funding for the county’s Farmland and Natural Area Protection Plan. In 2006, Washington County voters approved a referendum that authorized the county board to issue up to \$20 million in general-obligation bonds to acquire and improve land and interests in land.

¹⁷ *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subd. 5(b).

Landowners who donate conservation easements on their property may be eligible for a tax deduction.

include monitoring property protected by easements and enforcing the terms of conservation easement agreements.¹⁸

State funding has also been appropriated for the administration and management of *donated* conservation easements. When a conservation easement is donated, the landowner agrees to extinguish some of his or her rights associated with the land without receiving direct compensation for doing so. In recent years, MLT and the Leech Lake Watershed Foundation (a nonprofit organization focused on protecting land in the Leech Lake watershed) have requested and received state funding for the administration and stewardship of some easements that were donated. For example, the 2011 Legislature appropriated \$339,000 to the Leech Lake Area Watershed Foundation and \$741,000 to MLT to “pay for acquisition-related expenses and monitoring costs of donated permanent conservation easements on sensitive shore lands in north central Minnesota.”¹⁹

In cases where landowners donate conservation easements or do not receive compensation equivalent to the full value of the conservation easement, public funds may be used indirectly to compensate for landowner tax deductions. To be eligible for an income or estate tax deduction, a landowner must donate some or all of the value of a conservation easement that meets specific requirements established by the Internal Revenue Code. In particular, to be tax deductible the easement donation must protect certain types of property, such as:

- property for outdoor recreation and education for the general public;
- land containing a relatively natural habitat of fish, wildlife, or plants;
- qualifying open spaces for scenic enjoyment by the general public; or
- historically important land areas or certified housing structures.²⁰

Federal Treasury regulations require that easement holders accepting donated easements meet conditions, such as having “a commitment to protect the conservation purposes of the donation” and “the resources to enforce the restrictions.”²¹

TRENDS

DNR acquired its first Trout Stream easement in 1969, and state agencies and nonprofit organizations have been acquiring conservation easements ever since.²² Both nationally and in Minnesota, the use of conservation easements began

¹⁸ We discuss conservation easement stewardship in detail in Chapter 3.

¹⁹ *Laws of Minnesota* 2011, First Special Session, chapter 6, art. 1, sec. 2, subd. 5(e).

²⁰ 26 *U.S. Code*, sec. 170(h)(4)(A)(i)-(iv) (2012).

²¹ 26 *CFR* sec. 1.170A-14(b)(2)(c)(1) (2012).

²² Although state law did not recognize conservation easements until 1985, *Minnesota Statutes*, chapter 84C, retroactively applies to any interest that otherwise meets the requirements of a conservation easement outlined in that section. See *Minnesota Statutes* 2012, 84C.05.

substantially expanding in the early 2000s.²³ State and federal laws related to conservation easements have evolved since 2000, and as a result, we focused our analysis of conservation easement trends on those easements acquired from 2001 to 2011. We analyzed data from BWSR, DNR, DU, and MLT and found that:

- **From 2001 to 2011, the number of state-funded conservation easements acquired more than doubled, increasing the total amount of land protected by easements in Minnesota.**

From 2001 to 2011, state funding enabled state agencies and nonprofit organizations to acquire more than 3,500 conservation easements. Exhibit 1.6 shows the number of state-funded conservation easements each organization held at the end of 2000 and 2011. Since 2000, all four conservation easement holders we evaluated—BWSR, DNR, DU, and MLT—increased the number of state-funded conservation easements they held. For example, BWSR acquired more than 3,000 conservation easements from 2001 to 2011, and MLT acquired 110 state-funded conservation easements during the same time period. All together, easement holders acquired a total of 3,569 new easements from 2001 to 2011.

More than 3,500 state-funded easements were acquired from 2001 to 2011.

Exhibit 1.6: State-Funded Conservation Easements Held in 2000 and 2011 by Easement Holder

	Number of Conservation Easements			
	Held at the End of 2000	Acquired 2001 to 2011	Expired 2001 to 2011 ^a	Held at the End of 2011
Board of Water and Soil Resources ^b	2,555	3,174	157	5,572
Department of Natural Resources	710	276 ^c	0	986
Ducks Unlimited	0	9	0	9
Minnesota Land Trust	10	110	0	120
Total	3,275	3,569	157	6,687

^a Expired easements include easements that were acquired for a particular amount of time (between 20 to 50 years) and for which the terms of these easements ended between 2001 and 2011. The Department of Natural Resources also held a number of easements that expired in this time period, but these easements were not included in the exhibit because data on the number of easements and years of expiration were not available.

^b Board of Water and Soil Resources easement totals from 2000 to 2011 include 200 limited-term easements that lacked data on the expiration year but may have expired before 2011.

^c We included 27 Department of Natural Resources (DNR) easements that had not yet been finalized in DNR's data as acquired between 2001 and 2011.

SOURCE: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust.

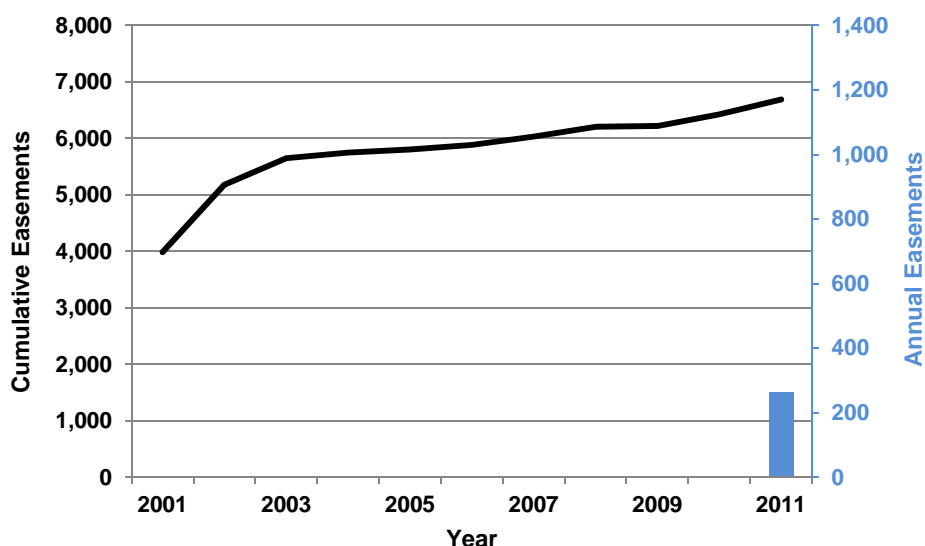
²³ A 2010 Minnesota Land Trust report indicated that as of October 2009, the federal government held 4,690 conservation easements covering 178,501 acres in Minnesota. Minnesota Land Trust, *An Inventory of Conservation Easement Activity in Minnesota* (St. Paul, January 2010), 9.

Also during this time, 157 of BWSR’s limited-term easements acquired before 2001 expired.²⁴ As a result, the number of state-funded conservation easements held in Minnesota rose from 3,275 to 6,687 from 2001 to 2011.

The number of conservation easements acquired each year from 2001 to 2011 has varied, as shown in Exhibit 1.7. The graph shows that the largest number of state-funded conservation easements acquired in one year was in 2002 (1,191 easements); the smallest number was in 2005 (54 easements).²⁵ In recent years,

Exhibit 1.7: Annual and Cumulative State-Funded Conservation Easement Acquisitions, 2001 to 2011

The total number of state-funded conservation easements has increased over the past ten years.



NOTES: The blue bars represent the number of new conservation easements acquired each year, as measured along the right (blue) axis. The line represents the cumulative number of conservation easements held each year, as measured along the left axis. Of the conservation easements acquired in 2002, 93 percent were Conservation Reserve Enhancement Program (CREP) easements. As explained in Exhibit 1.3, CREP easements are held by the Board of Water and Soil Resources (BWSR) and are joint state-federal conservation easements. Limited-term easements (easements that expire after a specified time period) are only included in the years in which the easements were active. Cumulative easements include 200 limited-term BWSR easements (acquired before 2001) that lacked data on the expiration year and may have expired before 2011. Both annual and cumulative easement totals in 2011 include 27 Department of Natural Resource (DNR) easements that had not yet been finalized in DNR’s data.

SOURCE: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust.

²⁴ DNR had also acquired conservation easements that have since expired, but data on the number of these easements were not available. Additionally, some easements were terminated when DNR obtained the fee title for the property. These easements are not included in the data for this section. BWSR easement totals from 2000 to 2011 include 200 limited-term easements that lacked data on the expiration year but may have expired before 2011.

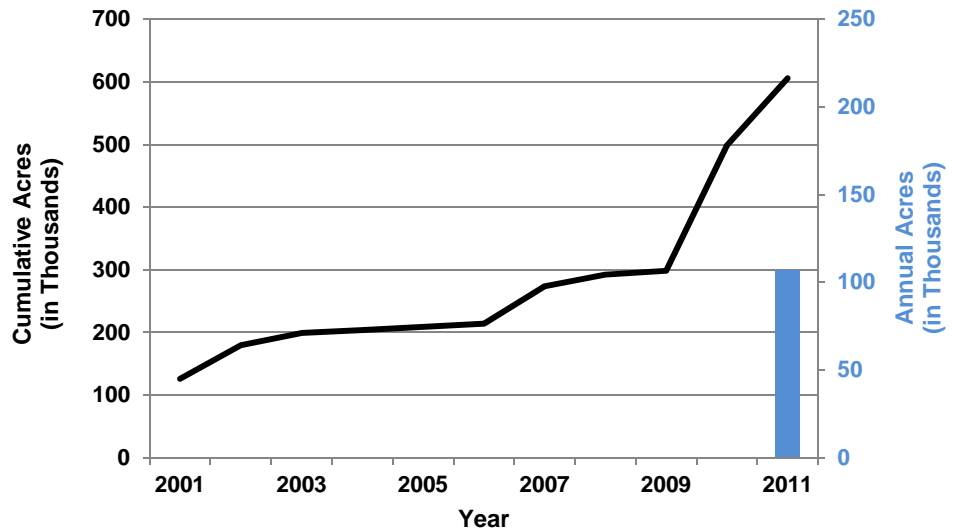
²⁵ Of the conservation easements acquired in 2002, 93 percent were CREP easements. As explained in Exhibit 1.3, CREP easements are held by the Board of Water and Soil Resources and are joint state-federal conservation easements.

the number of state-funded conservation easements acquired annually has been more than 200.

Corresponding with the increase in the cumulative number of conservation easements held over time, the amount of land protected by conservation easements has also increased. Exhibit 1.8 shows that the amount of new land protected by easements varied each year from 2001 to 2011, but Minnesota continued to accumulate more total acres under conservation easement protection during this time period. In 2010, DNR acquired the largest state-funded conservation easement, the Blandin Paper Company Forestry conservation easement. This single Forestry easement cost \$43.7 million dollars to acquire and includes more than 187,000 acres in seven counties.

Exhibit 1.8: Annual and Cumulative State-Funded Conservation Easement Acreage, 2001 to 2011

Several large conservation easements have been acquired in recent years.



NOTES: The blue bars represent the new conservation easement acres protected each year, as measured along the right (blue) axis. The line represents the cumulative state-funded conservation easement acres protected in Minnesota, as measured along the left axis. The years with the highest number of acres acquired (2007, 2010, and 2011) were due to several factors. In 2007, the Department of Natural Resources (DNR) acquired a Forestry conservation easement totaling 51,163 acres. In 2010, DNR acquired its largest easement—the Blandin Paper Company Forestry conservation easement—protecting more than 187,000 acres. For 2011, we included acreage data for 27 DNR easements that had not yet been finalized in DNR’s data; 7 of these are large forestry easements accounting for a large portion of the acreage acquired in that year. Acres protected by limited-term easements (easements that expire after a specified time period) are only included in the years in which the easements were active. “Cumulative acres” also includes acreage for 200 limited-term BWSR easements (acquired prior to 2001) that may have expired before 2011 but lacked data on the expiration year. Acreage data for 90 DNR easements may be undercounted due to incomplete data.

SOURCE: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust.

In contrast to this large Forestry easement, most state-funded conservation easements acquired from 2001 to 2011 protect relatively small properties. About 50 percent of the state-funded conservation easements acquired from 2001 to

2011 were fewer than 25 acres in size, and only 12 percent of state-funded easements acquired during this same time period were more than 100 acres. The average size of a state-funded conservation easement acquired during these ten years was 142.1 acres.

As more conservation easements have been acquired, the methods for obtaining the easements have changed. We found that:

- **In recent years, a greater percentage of conservation easements have been acquired through full-price purchases.**

Conservation easements can be acquired through full-price purchases, reduced-price purchases, and other methods.²⁶ Full-price purchases are when the easement holder pays the landowner for the full value of the conservation easement as determined by an independent appraiser or as calculated based on a statutory formula.²⁷ Reduced-price purchases are when the landowner donates part of the value of the easement. When landowners donate all or part of the value of the conservation easement, they may be eligible for tax deductions if the conservation easement meets federal code and regulations.²⁸ Based on data provided by DU and MLT, almost 50 percent of landowners who donated a qualifying conservation easement to them from 2001 to 2011 claimed a tax deduction.²⁹

Exhibit 1.9 shows that the proportion of full-price acquisitions has mostly increased over time. Specifically, full-price acquisitions comprised 75 percent of conservation easements acquired in 2001, and that percentage increased to 86 percent in 2011. As the percentage of full-price acquisitions increased, the percentage of conservation easements acquired at a reduced price decreased. In 2001, 25 percent of conservation easements were acquired at a reduced price, and by 2011, reduced-price acquisitions were only 8 percent of the total. Donated conservation easements or conservation easements acquired through other transactions accounted for less than 1 percent of all acquired conservation easements in 2001, and while this percentage increased to 20 percent in 2005, it dropped to 6 percent in 2011.

Increased funding for conservation easements has come largely from “Legacy” money.

The increase in the percentage of conservation easements acquired at full price was accompanied by an increase in state funding for conservation easements, among other economic factors. The 2001 Legislature appropriated \$11.6 million for conservation easements and to restore properties protected by certain easements; the 2012 Legislature appropriated more than \$37 million. Much of this increased funding for conservation easements comes from money raised through the Legacy Amendment to the Minnesota Constitution (which was

²⁶ “Other methods” include ways to obtain conservation easements that do not involve monetary compensation, such as donations or through a county board resolution.

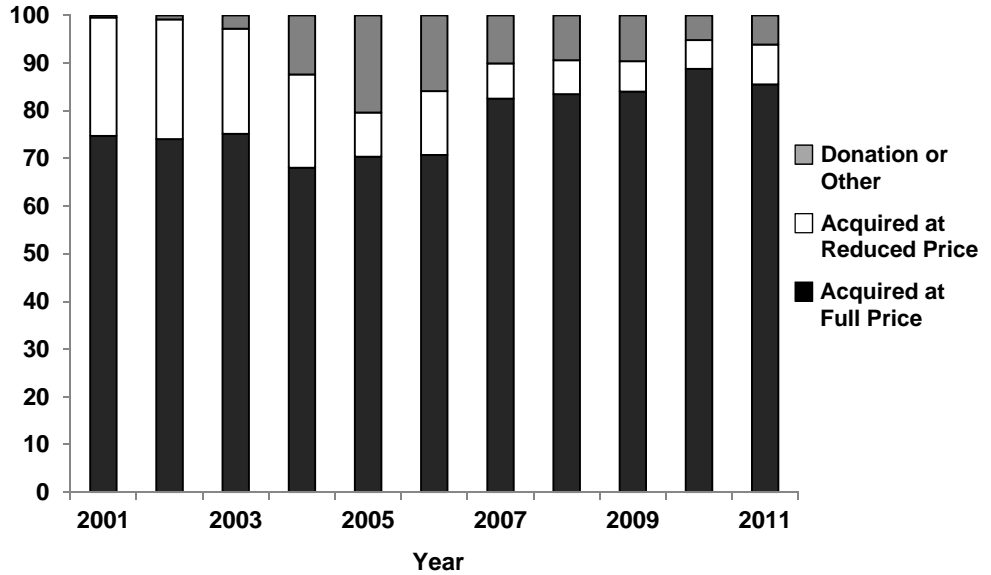
²⁷ We discuss appraisals and valuations based on statutory formula in more detail in Chapter 2.

²⁸ Federal code and regulations require conservation easements to protect certain types of property and easement holders to meet specified conditions. See *26 U.S. Code*, sec. 170(h) (2012), and *26 CFR* sec. 1.170A-14 (2012).

²⁹ We did not have data on the extent to which landowners claimed a tax deduction for conservation easement donations made to state agencies.

Exhibit 1.9: Transaction Types for State-Funded Conservation Easements Acquired 2001 to 2011

Percentage of Conservation Easements



Most state-funded conservation easements are acquired at full purchase price.

NOTES: "Donation or Other" includes all conservation easements that were donated to the easement holder by a landowner or were granted to the easement holder through some other means, such as a county board resolution. For 2011, we included 27 Department of Natural Resources (DNR) easements that had not yet been finalized in DNR's data.

SOURCE: Office of the Legislative Auditor, analysis of data provided by the Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust.

approved by the voters in 2008) and appropriated from the Outdoor Heritage and Clean Water funds.³⁰

As state appropriations for conservation easements increased, the types of conservation easements acquired shifted. In recent years, the Legislature appropriated money for certain types of conservation easements, while others were not funded. The types of conservation easements that received state funding more recently include: ACUB, Forestry, Native Prairie Bank, and RIM Reserve easements, among others. In contrast, the types of easements for which state acquisition funding has not been provided for 20 or more years include Water Bank, Wild and Scenic River, and Northern Pike Spawning conservation easements.³¹

³⁰ The Outdoor Heritage, Clean Water, Parks and Trails, and Arts and Cultural Heritage Amendment to the Minnesota Constitution authorizes a 25-year statewide sales tax increase of three-eighths of 1 percent and allocates the revenue toward environmental and arts activities. *Minnesota Constitution*, art. XI, sec. 15.

³¹ DNR acquired the last Wild and Scenic River conservation easement purchased with state funds in 1989; however, DNR accepted donations of Wild and Scenic River conservation easements in 1994 and 1999.

The Land Trust Alliance (LTA), a national association of land trust organizations, has developed a set of highly regarded standards for acquiring and managing conservation easements.

STANDARDS

The trends in Minnesota have paralleled those nationally, in which the number of conservation easements has grown in the past 20 years. Along with this growth nationally has been an increase in the number of land trust organizations—which often acquire and hold conservation easements—and the development and refinement of standard practices, laws, and regulations governing conservation easement transactions and oversight.

The Land Trust Alliance (LTA), a national association of land trust organizations, has developed a set of highly regarded standards and guidelines for land trusts acquiring and managing conservation easements.³² LTA standards encompass various aspects of running a land trust organization, including board accountability, fundraising, and evaluating and selecting projects. LTA standards also focus on providing adequate conservation easement stewardship, ensuring sound transactions, and mitigating conflicts of interest. Some LTA standards are based, in part, on federal code and regulations governing tax deductions for donated conservation easements. Nonprofit organizations can become “accredited” by the Land Trust Accreditation Commission upon going through a rigorous accreditation process and demonstrating compliance with LTA standards.³³

LTA standards and practices are designed primarily for nonprofit land trust organizations, and no equivalent standards exist for public agencies. However, some components of LTA standards, such as conservation easement stewardship standards, can provide guidance to public agencies. Many DNR staff we spoke with noted that they used LTA standards to inform their conservation easement practices. Unlike the nonprofit organizations, government agencies do not have their own conservation easement accreditation process.

We examined the extent to which easement holders in Minnesota used standards for obtaining and managing conservation easements and found that:

- **State agencies and nonprofit organizations have different standards for identifying, acquiring, and managing conservation easements.**

DU and MLT have developed organizational policies and procedures that align with LTA standards; both are also accredited by the Land Trust Accreditation Commission. To retain their accreditation, organizations must undergo a re-accreditation process and demonstrate compliance with LTA standards every five years. MLT will undergo this process in 2013; DU will not need to do so until 2016.

³² Land Trust Alliance, *Land Trust Standards and Practices, Revised 2004* (Washington, DC: Land Trust Alliance, Second Printing 2007), <https://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>, accessed November 13, 2012.

³³ The Land Trust Accreditation Commission is a separate program of the Land Trust Alliance. The program first became available in 2008. See <http://www.landtrustaccreditation.org>.

At the request of the Legislature, DNR worked with various stakeholders and reviewed LTA standards to develop minimum standards for conservation easements acquired with public funds.³⁴ The DNR standards cover four areas: 1) the selection process, 2) the acquisition process, 3) stewardship, and 4) working relationships between government and nongovernment organizations. DNR staff told us the minimum standards provide a framework for the agency to work from as it improves its management of conservation easements.

BWSR has developed a handbook that guides its conservation easement process.³⁵ BWSR's conservation easements are acquired in partnership with soil and water conservation districts. The handbook provides district staff with detailed procedures for all phases of the conservation easement process, from identifying land for conservation easements to managing existing easements. The handbook also provides specific procedures for conducting site inspections, addressing violations, and handling amendments.

Based on standards developed by BWSR, DNR, LTA, and others, we developed a set of key standards with which to evaluate conservation easement practices.

Based on the standards developed by LTA and the state agencies, along with federal code and standards of relevant federal agencies, OLA developed a set of key “consensus” standards for acquiring and managing conservation easements, as shown in Exhibit 1.10.³⁶ For example, key standards for property selection include using criteria to identify property for a conservation easement and verifying ownership of the property. The standards for the easement agreement include identifying the public benefit of the easement. Monitoring standards include establishing a minimum monitoring schedule of once every three years. In all cases, the OLA standard (or a higher standard) was included in the majority of organizations' and agencies' standards or guidelines.³⁷ The standards outlined in Exhibit 1.10 are discussed in more detail throughout the remainder of this report. These standards serve as “best practices” and are not, in most cases, requirements established in law. We used these key standards as the basis for evaluating the state-funded conservation easements discussed in subsequent chapters of this report.

³⁴ Minnesota Department of Natural Resources, *Minimum Standards for Conservation Easements Acquired with Public Money in Minnesota* (St. Paul, February 1, 2008), http://files.dnr.state.mn.us/lands_minerals/conservation_easements_minimum_standards.pdf, accessed November 13, 2012.

³⁵ Minnesota Board of Water and Soil Resources, *Conservation Easement Handbook*, <http://www.bwsr.state.mn.us/easements/handbook/index.html>, accessed June 26, 2012.

³⁶ We developed the OLA conservation easement standards by examining standards established by BWSR, DNR, LTA, U.S. Department of Agriculture – Forest Service, U.S. Department of Agriculture – Natural Resources Conservation Service, and federal code and regulations.

³⁷ For example, the OLA standard regarding monitoring frequency is to visit a conservation easement property at least once every three years. This is the standard adopted by DNR and BWSR (after the first five years of holding the easement), but LTA standards require annual monitoring visits.

Exhibit 1.10: Key OLA Standards for Conservation Easements

Property Selection

- Have an established property selection process that includes criteria and a ranking system.
- Ensure land selected is consistent with one or more state or federal conservation plan.
- Develop and follow a conflict of interest policy.
- Conduct a title search and verify ownership of property.

Easement Valuation

- Ensure that an appraisal, when required, is conducted by a qualified appraiser.
- Pay no more than the value of the easement as determined by the appraisal or statutory formula, unless authorized in law.

Easement Agreement

- Have clear and unambiguous easement agreement language.
- Identify the characteristics of the property protected and the public benefit served by the easement.
- Permit only activities that will not negatively impact the conservation benefits of the property.

Baseline Report

- Create a comprehensive baseline report of existing conditions at the time the conservation easement is acquired.
- Include key information in the baseline report:
 - maps showing the property line or a description of the easement boundaries,
 - a description of the land and vegetation,
 - on-site photographs taken at key locations (such as unique natural features or existing buildings),
 - an inventory of all property improvements, and
 - a statement signed by the landowner and a representative of the holder organization affirming that the baseline is an accurate and current representation of the protected property.

Monitoring

- Visit the conservation easement property at least once every three years, preferably more often.

Enforcement

- Establish a written policy for responding to conservation easement violations.
- Obtain a reasonable and appropriate remedy for all violations.

Amendments and Terminations

- Do not allow amendments to diminish the conservation benefit of the agreement.
- Prohibit amendments or terminations that result in more than an incidental private benefit.
- Establish a written policy for handling amendments and terminations.

NOTE: OLA key standards are based on standards and practices established by the Land Trust Alliance, Minnesota Department of Natural Resources, Minnesota Board of Water and Soil Resources, U.S. Department of Agriculture – Forest Service, U.S. Department of Agriculture – Natural Resources Conservation Service, and federal Treasury Regulations.

SOURCES: Office of the Legislative Auditor, based on Land Trust Alliance, *Land Trust Standards and Practices, Revised 2004* (Washington, DC: Land Trust Alliance, Second Printing 2007), <https://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>, accessed November 13, 2012; Minnesota Department of Natural Resources, *Minimum Standards for Conservation Easements Acquired with Public Money in Minnesota* (St. Paul, February 1, 2008); Minnesota Board of Water and Soil Resources, *Conservation Easement Handbook*, <http://www.bwsr.state.mn.us/easements/handbook/index.html>, accessed June 26, 2012; U.S. Forest Service, *Forest Legacy Program Implementation Guide* (Washington, DC: December 21, 2011); Natural Resources Conservation Service, *Wetland Reserve Program Manual* (Washington, DC: USDA, December 2010); and 26 *CFR* sec.1.170A-14 (2012).

Acquiring Conservation Easements

Acquiring conservation easements is a complex process.

The process of acquiring a conservation easement is complex. The organizations that want to obtain a conservation easement must first identify property on which a conservation easement would provide a benefit. Once the parcels of land have been identified, the organizations and landowners must come to an agreement on a number of terms, including the purchase price and the easement restrictions placed on the properties. Finally, these terms must be codified in the easement agreements and filed with the county recorder's office. Although each step is complicated by the unique nature of conservation easements and the specific properties being protected, there are key standards that organizations seeking to obtain easements should follow.¹ In this chapter, we discuss the key steps and their related standards for acquiring conservation easements, from property selection through writing the easement agreement.

PROPERTY SELECTION

How organizations select property on which to place an easement is a critical first step in managing and holding conservation easements.

OLA standards for property selection address different components of the process, as detailed in the box on the right.

To evaluate the property selection process for state-funded conservation easements, we reviewed files for 127 conservation easements managed by the four main easement holders in the state: Board of Water and Soil Resources (BWSR), Department of Natural Resources (DNR), Ducks Unlimited (DU), and Minnesota Land Trust (MLT) (see Exhibit 2.1). Based on our file review and interviews with the holders of these state-funded conservation easements, we found that:

Key OLA Standards for Property Selection:

- Have an established property selection process that includes criteria and a ranking system.
- Ensure land selected is consistent with one or more state or federal conservation plan.
- Develop and follow a conflict of interest policy.
- Conduct a title search and verify ownership of property.

- **Easement holders generally met OLA's key standards for selecting properties for conservation easements, but improvements in a few areas are needed.**

¹ As discussed in Chapter 1, the standards were developed to evaluate state-funded conservation easements and are not, in most cases, requirements established by law.

Exhibit 2.1: Number of Conservation Easement Files OLA Reviewed by Easement Holder

We reviewed files for 127 conservation easements managed by BWSR, DNR, DU, and MLT.

	<u>Total Reviewed</u>
Board of Water and Soil Resources	
All Types ^a	63
Department of Natural Resources (DNR)	
Aquatic Management Area	1
Army Compatible Use Buffer	1
Forestry	4
Metro Greenways	1
Native Prairie Bank	8
Scientific and Natural Area	3
Trout Stream	8
Water Bank	2
Wild and Scenic River	8
Wildlife	2
Other ^b	<u>3</u>
Total DNR	41
Nonprofit Organizations	
Ducks Unlimited	3
Minnesota Land Trust	20

^a“All types” includes Army Compatible Use Buffer (ACUB), Conservation Reserve Enhancement Program, Reinvest in Minnesota (RIM) Reserve, and Other easements.

^b“Other” includes conservation easements administered by various divisions within DNR, including Parks and Trails, Fisheries Section, and one not assigned to a specific division.

SOURCE: Office of the Legislative Auditor.

In this section, we provide more details about the extent to which the primary conservation easement holders in Minnesota met OLA’s property selection standards.

Criteria and Ranking Process

Ideally, state-funded conservation easements are acquired on land of high ecological and environmental value. Before organizations select property to protect with a conservation easement, they should evaluate the extent to which the land identified is a high conservation priority. To that end, a key OLA standard for selecting properties is that organizations or agencies should *use an established selection process that includes criteria and a ranking system* to identify priority land. In interviews and file reviews, we found that:

- **Easement holders used criteria to evaluate proposed properties for conservation easements, but they did not always rank and prioritize the properties among which they were selecting.**

For some types of easements, such as Native Prairie Bank easements, DNR uses specific criteria to select properties.

All easement holders included in our evaluation assessed the viability of potential properties according to a set of criteria.² DU and MLT used specific criteria to select land for conservation easements. For example, DU focused on properties surrounding shallow lakes that were critical for migrating ducks and had a high likelihood of being developed.³ MLT targeted properties with certain features, such as shorelines or wildlife corridors, and assessed the areas according to specific criteria, including size and proximity to other protected natural habitats.

For some types of easements, BWSR and DNR used well-defined criteria to select properties. BWSR's criteria for the Reinvest in Minnesota (RIM) Reserve easements specified that easements should protect a specific type of land, such as marginal agricultural land near public waterways. DNR placed Native Prairie Bank conservation easements only on land with native prairie—prairie land that has never been plowed—and that had a certain quality of habitat. For DNR Forestry easements, among the criteria for selecting properties were the threat of development; environmental, ecological, and habitat benefits; and the potential for generating economic activity through sustainable timber harvesting.

For some other easement types, DNR used less definitive criteria to evaluate potential properties. DNR Wildlife staff told us that in some cases, landowners approached DNR wanting to donate a conservation easement. In such instances, DNR did not use written criteria to evaluate these parcels. However, agency staff told us they considered factors, including proximity to other public property, when determining whether to agree to accept the easement on the proposed property.

Using their criteria, some easement holders ranked the individual parcels considered for conservation easements. A unique approach taken by MLT, in partnership with Saint John's Arboretum, involved ranking parcels using a comprehensive method of comparing the environmental benefits of each parcel to the cost of acquisition, which was determined through a landowner bid.⁴ For the acquisition of several types of DNR easements, including Army Compatible Use Buffer (ACUB), Forestry, Metro Greenways, and Native Prairie Bank, DNR staff told us they used a ranking system to identify which properties to protect. Additionally, for acquiring BWSR easements, some soil and water conservation district staff told us they prioritized landowner applications based on how well the properties met the easement criteria.

Rather than ranking specific *parcels* of land, staff from DU and MLT (for easements other than those in the Avon Hills Initiative) said they ranked specific *areas of the state* to focus on for obtaining state-funded conservation easements.

² Easement holders used criteria from various sources depending on the easement type. Some criteria were developed by the easement holders while others were based on funding requirements and state and federal laws.

³ According to DNR, a shallow lake is "a lake that is 50 acres or greater in size and has a maximum depth of 15 feet or less." See Department of Natural Resources, *Managing Minnesota's Shallow Lakes for Waterfowl and Wildlife* (St. Paul, December 2010), 4, <http://files.dnr.state.mn.us/recreation/hunting/waterfowl/shallowlakesplan.pdf>, accessed November 27, 2012.

⁴ The project, called the Avon Hills Initiative, was focused on lands within the Avon Hills region located in parts of Avon, Collegeville, Farming, St. Joseph, and St. Wendell townships.

DU and MLT identify priority areas to protect with easements.

In particular, DU targeted its selection of property for conservation easements on shallow lakes based on state conservation plans. MLT used analysis of ecological data, a review of state and regional conservation plans, and collaboration with other organizations and government agencies to identify its priority areas to protect with easements.⁵ Within their targeted areas, however, the nonprofit organizations evaluated the proposed parcels on a case-by-case basis rather than by ranking and prioritizing all possible parcels.

DNR did not use a ranking system for some easement types mostly acquired 20 or more years ago. Based on our file review of a number of Wild and Scenic River and Water Bank conservation easements, we determined that DNR staff did not have a system for ranking the parcels among those that met the program's criteria.⁶ While DNR prioritized the general areas where the Wild and Scenic River easements were acquired, there did not appear to be a method used to rank the individual parcels within the priority areas.⁷ For the Water Bank easements, it appeared that DNR acquired easements on properties when there was a willing landowner whose property met the minimum program criteria.⁸

For some easement types, it may be difficult to develop or implement an effective ranking system to identify priority properties. Properties do not always contain comparable features or the features are difficult to measure in quantifiable terms. Additionally, changing factors, such as landowner interest or funding availability, make using a ranking system to identify properties less practical in some cases.

Alignment with State Plans

Unlike state agencies, nonprofit organizations are private entities with missions and priorities separate from the state. Although nonprofit organizations may have different focuses than the state, state funding allocated to nonprofit organizations should be used in a manner that is aligned with the state's priorities. As such, one of OLA's standards requires that nonprofit organizations *select conservation easements that are consistent with state or federal plans.*

In reviewing the nonprofit organizations' conservation easement files, we found that:

⁵ MLT uses a range of data for each area, including U.S. Geological Surveys, DNR data, and county or other local land-use plans.

⁶ DNR is no longer acquiring these types of conservation easements.

⁷ The Wild and Scenic River conservation easements were acquired on property along one of the following designated Wild and Scenic rivers: Cannon, Kettle, Lower St. Croix, Minnesota, Mississippi, North Fork of Crow River, and Rum rivers. Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 10.

⁸ According to *Laws of Minnesota* 1976, chapter 83, sec. 9, subd. 2, Water Bank easements could be acquired on property with a wetland in which drainage was "lawful, feasible, and practical" and if drained, the land "would provide high quality cropland."

DU easements we reviewed are located along shallow lakes; MLT easements, which provide habitat for certain species, are located near public lands or critical shoreline areas.

- **For conservation easements acquired in recent years, Ducks Unlimited and Minnesota Land Trust mostly selected properties consistent with state plans.**

For the three DU conservation easements we reviewed, DU selected properties that were consistent with three state plans: (1) *Managing Minnesota's Shallow Lakes for Waterfowl and Wildlife*, (2) *Long-Range Duck Recovery Plan*, and (3) *Minnesota Statewide Conservation and Preservation Plan*.⁹ Among the objectives and strategies outlined in these plans are the need to improve habitat for ducks and waterfowl by protecting and managing shallow lakes. DNR has designated a number of shallow lakes as “management lakes” and is working to improve the quality of these lakes for wildlife. All three of the DU conservation easements we reviewed are located on properties along shallow lakes that are identified as DNR-designated management lakes. In two of the cases, the shallow lakes are also lakes with wild rice, which DNR has also recognized as important feeding and resting areas for ducks.

All but 3 of the 20 MLT conservation easements we reviewed had documentation indicating consistency with state conservation plans or that the property was located near a protected area. In many of the easement files we reviewed, MLT noted that the properties protected by conservation easements provide habitat for certain species documented in DNR's 2006 *Tomorrow's Habitat for the Wild and Rare* plan as being in “greatest conservation need.”¹⁰ Several MLT conservation easements we reviewed are located near public lands, including a state park and DNR-designated wildlife management area, or have critical shoreline areas. However, for three of the conservation easements that we reviewed—all acquired in 2003 or earlier—the easement files lacked documentation to show that the properties were consistent with state plans. MLT staff noted that ten years ago, the state's conservation plans were not as well developed as they are today.

Although we found that the nonprofit organizations mostly selected properties that were consistent with state plans, we noted that:

- **State law gives nonprofit organizations wide latitude to select property to protect with state-funded conservation easements.**

In a number of instances, the Legislature has appropriated state funding to DU and MLT based on broad programmatic areas of emphasis identified by the Lessard-Sams Outdoor Heritage Council (LSOHC) or the Legislative-Citizen Commission on Minnesota Resources (LCCMR).¹¹ Decisions regarding which

⁹ See Department of Natural Resources, *Managing Minnesota's Shallow Lakes for Waterfowl and Wildlife* (St. Paul, December 2010); Department of Natural Resources, *Long-Range Duck Recovery Plan* (St. Paul, April 21, 2006); Legislative-Citizen Commission on Minnesota Resources, *Minnesota Statewide Conservation and Preservation Plan* (November 1, 2008).

¹⁰ Department of Natural Resources, *Tomorrow's Habitat for the Wild and Rare: An Action Plan for Minnesota Wildlife* (St. Paul, 2006), 1.

¹¹ LCCMR and LSOHC are both advisory bodies consisting of legislators and citizen members. LCCMR makes recommendations to the Legislature on appropriations from the Environment and Natural Resources Trust Fund. LSOHC makes recommendations to the Legislature on appropriations from the Outdoor Heritage Fund.

Appropriations language gives organizations significant discretion to determine what property to protect with state-funded easements.

specific properties to protect with conservation easements are often left to the recipient organizations. For example, based on recommendations from LSOHC, the 2012 Legislature appropriated \$930,000 from the Outdoor Heritage Fund to MLT to acquire “interests in land in fee or permanent conservation easements and to restore and enhance natural systems associated with the Mississippi, Minnesota, and St. Croix Rivers....”¹² Given the broad language in the appropriations law, MLT has significant discretion in determining which land should be protected with this funding. Similarly, in accordance with recommendations from LCCMR, the 2011 Legislature appropriated \$440,000 from the Environment and Natural Resources Trust Fund to MLT for “planning, restoring, and protecting priority natural areas in the metropolitan area.”¹³ This broad appropriations language permits MLT to use its own priorities, rather than the state’s, to guide its easement acquisitions.

For appropriations from the Outdoor Heritage and the Environment and Natural Resources Trust funds, the recipient organizations typically must provide a list of proposed acquisitions to LSOHC or LCCMR. However, it is not clear that these advisory bodies scrutinize the proposed properties. Additionally, legislative and MLT staff told us that recipient organizations often change the properties on the list after receiving funding because circumstances change as the nonprofit organizations pursue acquisitions. Recipient organizations must comply with LSOHC and LCCMR requirements and submit accomplishment plans and work plans outlining expected and actual uses of the funding, among other things. Ultimately, however, Council and Commission staff told us if the expenditure of funds is consistent with the purposes stated in law, they cannot stop an easement acquisition even if they consider it questionable.

Conflicts of Interest

Conflicts of interest—whether real or perceived—are of special concern when considering the use of state money. There are several different types of conflicts of interest related to conservation easements and the easement acquisition process in particular. One conflict is when people use their position (as the funder or holder of conservation easements) to inappropriately gain a personal financial benefit for themselves or a landowner with whom they have a personal relationship. Another conflict is when people use their position as an easement holder or funder to inappropriately favor another organization with which they are aligned.¹⁴ For example, an easement holder may choose to protect land owned by an organization with which it frequently works, even if that property does not provide the best conservation value. Conservation organizations in Minnesota often work closely together, which can make the transactions more complicated and less transparent. These relationships may raise questions about

¹² *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subd. 5(b).

¹³ *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subd. 4(i).

¹⁴ The Minnesota Office of Grants Management provides a detailed explanation of different types of conflicts of interest and outlines suggested policies for preventing, disclosing, and resolving conflicts that arise. See Minnesota Department of Administration, Office of Grants Management, *Policy 08-01, Conflict of Interest Policy for State Grant-Making*, http://www.admin.state.mn.us/documents/grants_policy2012_08-01.pdf, accessed November 14, 2012.

conflicts of interest because it is not always apparent what role different organizations play in the transactions.

Because of the potential for conflicts of interest when acquiring conservation easements, one of OLA's key standards for property selection is that organizations should *develop and follow a conflict of interest policy* for selecting property to protect with a conservation easement. As part of our evaluation, we reviewed the policies of the four organizations that hold most of the state-funded conservation easements in Minnesota and found that:

- **The four organizations we evaluated that hold state-funded easements have adequate conflict of interest policies regarding the acquisition of conservation easements.**

Specifically, DU and MLT have adopted conflict of interest policies consistent with the Land Trust Alliance standards, which require organizations to have a written conflict of interest policy to “ensure that any conflicts of interest or the appearance thereof are avoided or appropriately managed through disclosure, recusal or other means.”¹⁵ Staff at both BWSR and DNR are subject to Minnesota statutes regarding conflicts of interest for executive branch employees.¹⁶ These policies and laws establish procedures for staff to follow when a potential conflict of interest exists. In particular, staff must disclose any potential relationship that could create, or be perceived to create, a conflict of interest. Particular to conservation easements, staff should disclose any relationships they have with landowners of property being considered for a conservation easement.

Having a policy is an important first step in avoiding conflicts of interest, but a policy alone is not sufficient. The organizations that seek and hold state-funded easements and their individual staff members should adhere to the established policies and be vigilant about recognizing and disclosing any possible conflicts of interest.¹⁷ Additionally, these organizations should be transparent about their partnerships and clearly delineate the role each organization assumes in a transaction. As part of our file review, we looked for potential conflicts of interest and did not identify any concerns.

Verifying Ownership

Another key OLA standard related to selecting properties for conservation easements is to *conduct a title search and verify ownership of property* before completing the easement transaction. Title searches identify who legally owns the property and uncover legal claims to the property that could affect the conservation easement, such as mortgages and liens. The point of conducting a

We did not identify any conflict of interest concerns among the files we reviewed.

¹⁵ Land Trust Alliance, *Land Trust Standards and Practices, Revised 2004* (Washington, DC: Land Trust Alliance, Second Printing 2007), Standard 4.

¹⁶ *Minnesota Statutes* 2012, 43A.38.

¹⁷ We discuss concerns about conflicts of interest in our 2011 evaluation of the Legacy Amendment. See Office of the Legislative Auditor, *The Legacy Amendment* (St. Paul, November 2011), 58-68.

All four easement holders we evaluated regularly ordered title searches for the easements we reviewed.

title search is to ensure that the landowner granting the conservation easement and relinquishing some rights is the legal owner of those rights. Depending on the results of the title search, organizations or agencies may find that certain issues need to be resolved prior to moving forward with the acquisition of a conservation easement. For example, if another party is listed as an owner to the property, the landowner would need to take appropriate steps to “clear the title” of other owners before the easement holder entered into an easement agreement. Based on our review of conservation easement files, we found that:

- **Organizations that obtained state-funded easements routinely verified ownership of the land and addressed issues requiring resolution for the conservation easements we reviewed.**

All easement holders regularly ordered title searches for the easements we reviewed. DU and MLT ordered title searches from title companies or attorneys for all their conservation easements. BWSR relied on soil and water conservation districts to order title searches, and DNR’s title searches were conducted by the Attorney General’s Office.

For the files we examined, documentation showed that easement holders reviewed the title report or opinion and identified potential issues that needed resolution. DU and MLT have attorneys on staff who performed these reviews. BWSR staff reviewed the title reports, alerted soil and water conservation district staff of issues, and obtained approval from the Attorney General’s Office. The Attorney General’s Office staff also identified in title opinion letters any issues that required attention prior to DNR acquiring easements.

In the easement files we reviewed, the most prevalent title issue easement holders had to resolve was pre-existing mortgages on the property.¹⁸ When a conservation easement is acquired on land for which there is a mortgage, there is a risk that the easement could be extinguished if the lender foreclosed on the property. To prevent the risk of extinguishment, easement holders should ensure that landowners obtain a legal agreement from the mortgage lender stating that the lender’s rights to the property are second to the conservation easement holder’s rights. In more than half of the cases we reviewed with a mortgage in place, the easement files included this legal agreement from the mortgage

¹⁸ Nearly 40 percent of the 127 conservation easements we reviewed had a mortgage on the property prior to the acquisition of the easement. Other less common issues identified in the title reports we reviewed included ownership discrepancies and the existence of other types of easements, including utility and telephone easements. Ownership issues in the files were resolved, but the files lacked documentation regarding the pre-existing utility and telephone easements. However, several easement holders told us that existing utility and telephone easements did not always require resolution prior to acquiring a conservation easement.

lender.¹⁹ In several other cases, the landowners were able to pay off the mortgage prior to finalizing the easement, thus resolving this concern.

Challenges with Selecting Suitable Property

Even when organizations follow the key standards for selecting property to protect with conservation easements, there can be obstacles to obtaining easements on land that meets the state's priorities. For example, landowners may not be willing to grant a conservation easement on their property, easement holders may have difficulty identifying priority land, and the rights to mine on the properties may be held by someone other than the property owner. Each of these limitations is briefly discussed below.

There can be obstacles to obtaining easements on land that meets the state's priorities.

As noted previously, conservation easements are voluntarily agreed to by the landowner. However, owners of land that organizations would like to protect with an easement are not always willing to sell an interest in their land or limit their ownership rights. Additionally, some landowners may be interested in granting a conservation easement but believe an easement restriction on their land is worth a higher price than what is offered. As a result, although organizations may have prioritized specific parcels of land to protect, the landowners may not agree to a conservation easement on that land. In these cases, the organizations or other conservation partners may need to consider other tools, such as landowner education, to achieve their conservation goals.

Another limitation to selecting property for conservation easements is that organizations may have difficulty identifying the best conservation easement opportunities for the state. One important criterion for property selection is proximity of the land to other protected property. If a conservation easement can be placed on property nearby land that is already protected, it can expand "habitat corridors" (a series of adjacent tracts of protected land). As such, it is important to know where existing protected properties and habitat corridors exist. However, we found that:

- **The state does not have a central database that identifies the location of all property protected by state-funded conservation easements.**

It may be difficult to know which properties already have conservation protections in place.

As a result, it may be difficult for organizations and their conservation partners to know which properties have conservation protections in place, a critical piece of information when trying to protect land to develop conservation corridors.

BWSR and DNR separately post information on their Web sites regarding the conservation easements they hold, but nonprofit organizations and local units of government do not post similar information. Individual counties and organizations may track recorded easements, but these are not widely available in

¹⁹ Of the conservation easement files we reviewed with mortgages on the property prior to the acquisition of the easement, 78 percent of the files indicated resolution of the issue through the following: (1) legal agreement from the lender (54 percent), (2) paying off the mortgage (14 percent), or (3) not specified or other (10 percent). Twenty-two percent of the files did not contain documentation indicating that the mortgage issue had been resolved prior to obtaining the conservation easement.

When mineral rights are “severed”—meaning they are owned by someone other than the landowner—such rights cannot be restricted in a conservation easement.

a central database. Many stakeholders we spoke with said they work closely with other conservation organizations and can learn about nearby protected properties through these partnerships. However, organizations and personnel can change over time, and partnerships that are effective now may change or be lost.

A third issue that may create challenges in selecting suitable property is when the property’s mineral rights—the right to explore and excavate the minerals on or below the surface of the land—are owned by someone other than the owner of the property.²⁰ Mineral rights are one of the “sticks” included in the “bundle of rights” (introduced in Chapter 1) that are associated with a property. In some cases, the mineral rights to the property are “severed,” meaning that the “stick” is owned by someone other than the landowner. The party owning the mineral rights has the right to explore and excavate minerals on that property, regardless of prohibitions in the conservation easement agreement, potentially putting the conservation easement benefits at risk. Even when the mineral rights are owned by the state and the state holds the conservation easement on the property, the state could decide to lease the mineral rights to an individual or private organization.²¹

When mineral rights on a property are severed, the federal government requires organizations to determine whether the likelihood of the existence and excavation of minerals is “so remote as to be negligible” for certain easement types it funds.²² Organizations have not been required to make similar determinations prior to obtaining state-funded conservation easements on property with severed mineral rights. We found that:

- **Ten percent of conservation easements we reviewed were acquired on property for which the mineral rights were severed, meaning they were owned by someone other than the property owner.**

Of the 127 conservation easements we reviewed, 6 easements were acquired on property with severed mineral rights held by a third party, and 7 easements were on property with mineral rights owned by the state. Four of these easements were acquired by nonprofit organizations, eight by DNR, and one by BWSR.

Prior to obtaining easements on properties where the landowner does not own the mineral rights, DU and MLT staff told us that they either commission a study or conduct a preliminary investigation to assess the likelihood that (1) minerals exist on the property and (2) the minerals would be extracted. In all four cases we

²⁰ Title searches typically indicate whether the mineral rights to a property have been “severed.” Further discussion of the risks of mining activities on conservation easements begins on page 50 of this chapter.

²¹ As noted in a 2008 DNR report, the state has approximately one million acres of severed mineral rights. The income generated from leasing these rights and related royalties goes into a state fund. DNR is obligated to maximize the economic return while balancing natural resource management. See Department of Natural Resources, *Minnesota Forests for the Future* (St. Paul, April 2008), 39.

²² For donated conservation easements receiving tax deductions that have severed mineral rights, federal code and regulations require that the likelihood and existence of minerals be “so remote as to be negligible.” See *26 U.S. Code*, sec. 170(h)(5)(B)(ii) (2012); and *26 CFR* sec. 1.170A-14(g)(4)(ii)(2-3) (2012). Additionally, the U.S. Department of Agriculture requires that surface mining activities be prohibited on federally funded Forestry easements.

All four easement holders we reviewed have acquired conservation easements on property with severed mineral rights.

reviewed where mineral rights were severed, we discovered through conversations with nonprofit organizations or documentation they provided that the determination was that the risk of mining on those properties was negligible.

DNR staff told us that the agency considers the likelihood of mineral excavation before it acquires a conservation easement on a property with severed mineral rights but, with some exceptions, it does not conduct a formal study. DNR staff noted that whenever it considers a possible easement acquisition, a “fact sheet” on the property is reviewed by regional staff who have knowledge of the area and may reject a proposed acquisition if the potential for mining on the property is likely. For some Forestry conservation easements it acquired, however, DNR staff told us that they conducted a mineral evaluation to determine the potential for minable substances; in most cases, the results were that the potential for mining was negligible.

BWSR’s approach to evaluating the potential for mining depends on who owns the severed mineral rights. For potential properties where the severed mineral rights are owned by an individual or organization, BWSR staff told us it requires landowners to obtain the mineral rights to their lands prior to moving forward with the easement acquisition. However, when mineral rights are owned by the state (as was the case for the one BWSR easement we reviewed with severed mineral rights), the state will not rescind its rights. In such cases, BWSR staff told us that it does not evaluate the likelihood of mineral development. Instead, BWSR staff told us they expect that DNR will work with BWSR if it ever planned to lease the rights to mine property protected by one of BWSR’s conservation easements.

BENEFITS AND COSTS OF CONSERVATION EASEMENTS

The second step in acquiring conservation easements is to identify the benefits of the property being protected and determine the easement’s value. As with any expenditure of public money, the purchase of a conservation easement should result in public benefits and, to the extent possible, those benefits should be demonstrated through tangible and measurable outcomes. For conservation easements, the benefits will vary depending on the type and purpose of the easement, as will the methods and difficulty of measuring the outcomes. In this section, we discuss the public benefits of conservation easements, some of the challenges involved in measuring tangible outcomes, and how the costs—both direct and indirect—associated with acquiring conservation easements are determined.

Public Benefits

As discussed in Chapter 1, the state spent almost \$190 million from 2001 to 2011 to acquire, manage, and monitor conservation easements in Minnesota. Despite this significant commitment of public money, we found that:

- **Easement holders do not regularly measure public benefits and tangible outcomes that result from state-funded conservation easements beyond the number of acres protected.**

All four easement holders we examined used scientific research as a basis for selecting properties to protect, but they often did not go further than providing the number of acres protected to measure the outcomes—for example, cleaner water or increased wildlife—their conservation easements were intended to achieve. While this may reflect inadequate attention to an important element of accountability, we also acknowledge that there are challenges in measuring specific public benefits and tangible outcomes from conservation easements.

First, measuring the overall public benefit of conservation easements (beyond the number of acres protected) can be difficult because the outcomes of many conservation easements are not comparable. As discussed in Chapter 1, there are more than 15 different types of conservation easements, each with its own purpose and goals. The desired outcomes of these different easement types vary. For example, a desired outcome of a Wild and Scenic River easement may be to preserve the scenic view of a river. In contrast, the desired outcomes of a Trout Stream easement may be to improve the health of the stream, increase the number of trout in the stream, and increase access for anglers. A measure of the scenic attributes of a parcel of land and a measure of the number of trout in a stream are not necessarily comparable, and the only common measure for these conservation easement types may be the number of acres protected. However, in both of these cases, simply identifying the number of acres protected by conservation easements fails to recognize the primary intended benefits of the specific easement types.

It can sometimes be difficult to measure the public benefits of conservation easements.

Measuring the outcomes of individual conservation easements can also be challenging. For example, a desired outcome of many RIM Reserve easements is to have rain and snow-melt stay on the land longer, flowing through wetlands and prairies in an effort to have cleaner rivers and streams. Measuring the time water stays on the land (especially for each individual parcel) is difficult and does not necessarily reflect the ultimate goal of a cleaner river. Furthermore, a variety of factors contribute to the cleanliness of a river, and determining the impact of a given conservation easement on water quality, particularly in isolation from other conservation efforts and environmental impacts, is difficult at best. Similarly, a desired outcome of Wildlife easements is to provide habitat for game or nongame wildlife. One could develop measures to evaluate the benefits of wildlife easements, such as the number of a particular species on a property, but collecting that kind of data for individual properties can be difficult and time consuming and may not be fully reflective of the benefits of a given conservation easement.²³ Additional challenges may arise when measuring the outcomes of

²³ There are statewide efforts to measure water quality, populations of game and nongame wildlife, and distribution of plant species, but these efforts are not on an individual location or parcel level. See, for example, Minnesota Pollution Control Agency, *Water Quality Assessments of Select Lakes within the Mississippi River (St. Cloud) Watershed* (St. Paul, September 2012); M.H. Dexter, editor, *Status of Wildlife Populations, Fall 2011* (Department of Natural Resources, Division of Fish and Wildlife: St. Paul, 2011); and the Department of Natural Resources' efforts on the Minnesota County Biological Survey, <http://www.dnr.state.mn.us/eco/mcbs/index.html>, accessed December 6, 2012.

But there have been some recent efforts to more systematically evaluate the impact of conservation easements.

conservation easements intended to maintain current conditions and prevent future development. Measuring the effect of easements that preserve protected habitat or shoreline conditions already in place could be difficult.

Despite these challenges, there have been some efforts to evaluate the impact of easements as part of broader conservation efforts. For example, DNR uses trout stream easements and land acquisitions as tools to allow the agency to protect and manage critical shoreland habitat, provide access for anglers, and provide areas for education and research. DNR field staff monitor the outcomes of their management efforts by periodically evaluating the protected streams, including measuring the size of the fish population, identifying the biological characteristics of the stream, and monitoring angler use of areas protected by trout stream easements.²⁴ There have also been efforts to measure the impacts of RIM Reserve and other conservation easements that retire marginal agricultural land. In particular, the United States Geological Survey, in cooperation with BWSR, recently conducted a study of the effects of these types of easements on the water quality in small watersheds in south-central Minnesota. The study found that conservation easements, especially those on properties adjacent to streams and near water, improved water and aquatic resource quality.²⁵

These and similar studies can provide information about the outcomes of certain types of conservation easements, although they typically do not identify the measurable benefits associated with protecting an individual parcel of land with an easement. Nevertheless, we found that:

- **Despite the difficulty of measuring specific public benefits and tangible outcomes, stakeholders consider conservation easements an important and effective tool in efforts to achieve certain conservation objectives.**

Stakeholders we spoke with praised conservation easements as a useful tool and one that is part of a broader effort to achieve specific conservation purposes. For example, conservation easements are identified in DNR's 2006 *Tomorrow's Habitat for the Wild and Rare* report as a priority conservation activity to maintain and enhance key habitats.²⁶ Similarly, conservation easements are identified as an important tool to permanently protect native prairies, wetlands, and other habitats in the 2010 *Minnesota Prairie Conservation Plan*.²⁷

²⁴ See, for example, Department of Natural Resources, *Fisheries Long-Range Plan for Trout Stream Resource Management in Southeast Minnesota 2010-2015 and Progress Report* (St. Paul, February 4, 2011).

²⁵ This study was funded in part with money from the Environment and Natural Resources Trust Fund. Victoria G. Christensen, Kathy E. Lee, James M. McLees, and Scott L. Niemela, "Relations between Retired Agricultural Land, Water Quality, and Aquatic-Community Health, Minnesota River Basin," *Journal of Environmental Quality* (2012), 1459-1472, <http://mn.water.usgs.gov/about/current/FINALjeq-41-5-1459.pdf>, accessed December 12, 2012. The complete study can be found at <http://pubs.usgs.gov/sir/2009/5215/pdf/SIR2009-5215.pdf>, accessed January 22, 2013.

²⁶ Minnesota Department of Natural Resources, *Tomorrow's Habitat for the Wild and Rare: An Action Plan for Minnesota Wildlife* (St. Paul, 2006), 43.

²⁷ Minnesota Prairie Plan Working Group, *Minnesota Prairie Conservation Plan 2010* (Minneapolis, June 2011), 3, and 17-18.

Stakeholders noted that some types of conservation easements, such as Native Prairie Bank, Trout Stream, and large Forestry easements, allow public access to the property; they also pointed out that some conservation easements protect undeveloped land in areas that are under imminent threat of development or provide buffers for state-owned parks or public land.

Stakeholders told us that conservation easements may provide the best, and sometimes the only, way to protect the conservation benefits of a given property. Several stakeholders noted that most land in the state is in private ownership. Even if the state were interested in owning more land for conservation purposes, much of the land is not available for public purchase. Conservation easements allow the land to remain in private ownership while the state protects its conservation benefits. In most cases, the conservation easements protect the land in perpetuity. Other conservation tools, such as local zoning ordinances, can change and may not protect the conservation benefits of the property indefinitely. Additionally, because the land remains in private ownership, the landowner typically continues to pay property taxes on the land. We discuss the impact on property taxes, and other public costs associated with conservation easements, in the following section.

Costs of Acquiring Conservation Easements

The cost of acquiring conservation easements varies significantly, depending on the size, location, and type of conservation easement, among other factors.²⁸

Some landowners donate conservation easements or accept compensation that is less than the easement's full value; in doing so, the landowners may be eligible to receive an income tax deduction. For easements that are purchased, there are two different methods for calculating the purchase price: (1) obtaining an appraisal of the property, which is the method used by nonprofit organizations and for some of DNR's easements; or (2) using a formula outlined in law. A statutory formula is in place for only certain types of BWSR and DNR easements, including ACUB, Native Prairie Bank, RIM Reserve, and Water Bank easements. Once a conservation easement is placed on a given property, the taxable value of the property may increase or decrease. Depending on the assessed value of the property, the conservation easement could have an impact on local property taxes.

The purchase price of conservation easements may be determined through an appraisal or based on a statutory formula.

In the following sections, we discuss the methods for determining the value of a conservation easement and the impact of easements on taxable property values. As outlined in Chapter 1, OLA developed several

Key OLA Standards for Easement Valuation:

- Ensure that an appraisal is conducted by a qualified appraiser.
- Pay no more than the amount determined by the appraisal or statutory formula.

key standards regarding the valuation of conservation easements, including (1) ensuring an appraisal is conducted by a qualified appraiser and (2) purchasing

²⁸ For the discussion in this section, the costs of acquiring conservation easements include only the purchase price of the easement; it does not include staff or administrative costs associated with the transaction.

the easement for no more than the amount determined by the appraisal or statutory formula, unless authorized in law. We used these standards to examine the valuation of a sample of 127 state-funded conservation easements. In general, we found that:

- **Organizations we evaluated generally followed OLA’s standards for valuing and purchasing conservation easements, although state oversight could be improved in some cases.**

We discuss this and other findings in more detail below.

Appraisals

Appraisals are a key aspect in the process of acquiring conservation easements.

An appraisal is an opinion about the value of an interest in real estate.²⁹ Appraisals are typically conducted by licensed private appraisers and are often critical to determining the value of a conservation easement. DNR maintains a list of “approved” appraisers that it uses when it obtains an appraisal of a conservation easement. Conservation easements acquired by BWSR are generally valued using a statutory formula and do not require an appraisal, as discussed in the following section.

DU and MLT are not required to use an appraiser from the approved list, although their standard practice is to follow Internal Revenue Code requirements, which mandate a “qualified appraisal” of conservation easements. To meet this requirement, the appraisal must be completed by someone who has met minimum education and experience requirements.³⁰ Staff from DU and MLT told us they use DNR’s list of approved appraisers and select the appraiser for each specific easement through a competitive bidding process.

There are two primary ways for an appraisal of a conservation easement to be conducted: (1) comparing the value of the conservation easement to similar conservation easements in the area that have recently sold (the “comparable sales” approach) and (2) conducting “before-and-after” comparisons.³¹ Federal law requires appraisers to use the comparable sales approach if there is a substantial record of sales of comparable conservation easements.³² However, because each conservation easement is unique and because the existence of comparable conservation easements is not always known, it is often difficult to find sales of comparable easements sufficient to use for an appraisal. Federal regulations allow for an alternate approach—the before-and-after comparison,

²⁹ For a more in-depth explanation of appraisals and the appraisal process, see Department of Natural Resources, Division of Lands and Minerals, Appraisal Management Unit, *Supplemental Appraisal and Appraisal Review Guidelines* (St. Paul, April 2, 2012), http://files.dnr.state.mn.us/lands_minerals/appraisal_mgmt/supplemental_appraisal_guidelines.pdf, accessed July 20, 2012.

³⁰ Internal Revenue Code applies only to donated conservation easements for which landowners are seeking a tax deduction. However, LTA appraisal standards are based on federal code and regulations. See 26 *U.S. Code*, sec. 170(h) (2012).

³¹ A third appraisal method—the “income approach”—was not commonly used for the conservation easements we reviewed. This method provides a value of the property based on the income the property generates.

³² 26 *CFR* sec. 1.170A-14(h)(3)(i) (2012).

described below—if there are not sufficient sales of comparable conservation easements. Appraisals for most of the conservation easements we reviewed that required an appraisal used the before-and-after method.

Exhibit 2.2 outlines the before-and-after appraisal process. In the exhibit, the property is appraised as having a market value of \$100,000 before the conservation easement is placed on the property. To determine this “before” value, the appraiser compares the property to other similar properties that have recently sold. The appraiser calculates the “after” conservation easement value of the property by also identifying similar properties that have recently sold, taking into consideration the restrictions on how the landowner may use the property. In the example illustrated in Exhibit 2.2, the appraiser determines the “after” value to be \$75,000. The difference in these two estimates is considered to be the value of the conservation easement; in the exhibit, the conservation easement is valued at \$25,000.

Exhibit 2.2: Before-and-After Appraisal Method for Conservation Easements

Property Value <i>before</i> Conservation Easement Granted (No Restrictions on Landowner)	-	Property Value <i>after</i> Conservation Easement Granted (Landowner Restrictions in Place)	=	Value of Conservation Easement
\$100,000	-	\$75,000	=	\$25,000

NOTE: Exhibit illustrates a hypothetical conservation easement; the values are for illustrative purposes only.

SOURCE: Office of the Legislative Auditor.

By its nature, the appraisal process is somewhat subjective; the appraiser must make a variety of assumptions when determining the appraised value of a property, and these assumptions can lead to large differences in values. Having an appraisal reviewed by a second qualified appraiser is one mechanism to mitigate the effect of incorrect assumptions that could over- or under-value a conservation easement.

Appraisals conducted for conservation easements acquired by DNR are reviewed by a second appraiser. DNR staff told us they have two levels of appraisal review: administrative and technical. Administrative reviews, which are used for conservation easements valued at less than \$500,000, ensure the appraisal has met DNR’s basic requirements, such as having the correct legal description and calculations. Staff from the agency told us the administrative reviews are conducted by DNR’s licensed appraisers. Technical reviews, which are conducted for conservation easements valued at more than \$500,000, are conducted by DNR staff or outside appraisers. In these reviews, the DNR staff

person or outside appraiser verifies and ensures the accuracy of the appraisal. In several cases we reviewed, the initial appraisers made adjustments to the appraisal based on feedback provided through these reviews. When considering the appraisal review process of easement holders, we found that:

- **Unlike the appraisals for Department of Natural Resources easements, state agency staff do not review appraisals for most state-funded conservation easements acquired by nonprofit organizations.**

DU and MLT staff review appraisals for easements they acquire with state money, but state agency staff are not involved.

DU and MLT staff told us they review the appraisal report for each conservation easement they acquire that is valued up to \$500,000. Staff told us they use DNR’s administrative review checklist, although this review is not conducted by an appraiser and there is generally no state review of appraisals for these easements. For easements valued between \$500,000 and \$1 million, DU and MLT select a technical reviewer from DNR’s approved list to review the appraisal. For easements valued more than \$1 million, the technical appraisal review is conducted by DNR staff. However, data provided by DU and MLT indicate that none of the organizations’ state-funded conservation easements have met this \$1 million threshold. DNR staff confirmed that the agency typically does not review appraisals for conservation easements acquired by nonprofit organizations.³³ Similarly, legislative staff from the Legislative-Citizen Commission on Minnesota Resources and the Lessard-Sams Outdoor Heritage Council told us they are not given the opportunity, nor are they equipped, to review the accuracy of an appraisal.

We included appraisals as part of our file review of 127 state-funded conservation easements, but we did not attempt to determine whether the appraisals resulted in appropriate valuations. We found an item of concern in one file we reviewed for a conservation easement held by MLT. For that easement, an MLT staff member sent a letter to the appraiser indicating the amount of funding available to purchase the easement and noting that the appraiser’s initial estimated value did not meet the landowner’s expectations. Based on the information available in the file, it was not clear whether this letter influenced the appraiser’s determination of the final value of the easement.

An appraisal is a key component of determining the value and purchase price of a conservation easement. Minnesota law permits state agencies to pay less than the appraised value for an interest in property and prohibits the department from paying “more than ten percent above the appraised value....”³⁴ As noted above, one of OLA’s key standards is that easement holders should *purchase the property for no more than the appraised value of the conservation easement, except as authorized in law*. For four of the conservation easements we reviewed, DNR—with statutory authorization—paid more than the appraised value for conservation easements. None of these payments were more than 10 percent above the appraised value; in two of the cases the difference was less than \$200. Payment for a large Forestry easement in northern Minnesota

³³ DNR staff noted one exception: the agency typically reviews appraisals for recipients of Conservation Partners Legacy grants.

³⁴ *Minnesota Statutes* 2012, 84.0272, subd. 1.

All of BWSR's easements are valued using statutory formulas.

exceeded the appraised value by more than \$2 million, which was almost 5 percent more than the appraised value.³⁵

Formula-Based Valuation

Although some conservation easements DNR holds are valued through an appraisal process, some of the agency's easements, and all of those held by BWSR, are valued using formulas outlined in law.³⁶ For example, payments for ACUB, RIM Reserve, and Native Prairie Bank easements are determined using statutory formulas.³⁷ Exhibit 2.3 illustrates the application of the ACUB and Native Prairie Bank formula calculations. As shown in the exhibit, the purchase price for ACUB easements is calculated as a percentage of the most recent assessed market value of the land.³⁸ The percentage is either 60 or 70 percent, depending on whether public access is allowed.

Several stakeholders we spoke with, particularly those who regularly work with formula-based valuations of conservation easements, told us that using a formula-based approach results in an "efficient" process, because landowners and the state know the approximate cost of the easement at the beginning of the negotiations. However, other stakeholders told us that formulas can result in questionable valuations. For example, a DNR staff person told us of a case where the appraisal to purchase outright native prairie land resulted in a lower valuation than the formula-based calculation for a Native Prairie Bank easement on the land. The staff person explained that the appraisal was based on valuing the land for recreational purposes while the easement formula was based on the cropland value of the land. In that location, land used for agricultural purposes had higher values than land used for recreation or hunting. In other cases, however, a formula resulted in values that were less than the appraised value of a conservation easement. For example, the formula-based valuation for several ACUB easements DNR was interested in obtaining was less than half the appraised value of those same easements. In one of these cases, the landowner did not agree to the conservation easement because the offer, which was between the appraised and statutory formula values, was too low.

³⁵ This Forestry easement is on the Blandin Paper Company property in northern Minnesota. The appraised value of the conservation easement was \$41.7 million. Overall, the conservation easement cost \$43.7 million; the state paid \$34.25 million and the Conservation Fund contributed \$9.45 million.

³⁶ None of the conservation easements acquired by nonprofit organizations were valued on a formula basis.

³⁷ *Minnesota Statutes* 2012, 84.0277, subd. 2, establishes the formula for ACUB easements; *Minnesota Statutes* 2012, 84.96, subd. 5, establishes the payment rates for Native Prairie Bank easements; and *Minnesota Statutes* 2012, 103F.515, subd. 6, gives the Board of Water and Soil Resources the authority to establish payment rates for RIM Reserve easements.

³⁸ As discussed in the following section, the market value of all land is assessed by county assessors on an annual basis for property tax purposes.

Exhibit 2.3: Sample Formula Calculations for Valuing Certain Conservation Easements

Army Compatible Use Buffer (ACUB) Easements

Assume the most recent assessed market value of the land = \$100,000

If the Easement Prohibits Construction	If the Easement Prohibits Construction and Allows Public Access
60% x market value of land	70% x market value of land
Easement Value: 60% x \$100,000 = \$60,000	Easement Value: 70% x \$100,000 = \$70,000

Different types of easements are valued using different formulas.

Native Prairie Bank Easements

Assume the permanent marginal agricultural land payment rate is \$100 per acre^a
Assume the easement will protect 50 acres

Permanent Easement	Limited-Term Easement
65% x permanent marginal agricultural land payment rate x acres	65% x permanent prairie bank easement value
65% x \$100 x 50 acres	65% x \$3,250
Easement Value: \$3,250.00	Easement Value: \$2,112.50

NOTE: Exhibit illustrates hypothetical conservation easements; the values are for illustrative purposes only.

^a The permanent marginal agricultural land payment rate is set by the Board of Water and Soil Resources and is a percentage of the average estimated market value of crop land.

SOURCES: Office of the Legislative Auditor; *Minnesota Statutes* 2012, 84.0277, subd. 2 (establishes the formula for ACUB easements); and *Minnesota Statutes* 2012, 84.96, subd. 5 (establishes the formula for Native Prairie Bank easements).

Assessed Taxable Values

Every year, property in Minnesota is assessed for property tax purposes. Local county assessors, using information about each property and comparable properties in the area that sold within the previous year, determine the property’s estimated market value (also referred to as its *assessed* value). This value is then used to calculate local property taxes. If the assessed value is too high, the landowner may have an unfairly high property tax bill; if the assessed value is too low, the tax burden could be unfairly shifted to other property owners in the community.

In recent years, conservation easement stakeholders and landowners have expressed concern that the *assessed* value of a property with a conservation easement (as determined by the local assessor) does not always reflect the *appraised* value of the property (as determined by a private appraiser) after a conservation easement has been placed on the land. Similar to an appraisal, an

The “appraised” value of an easement and its “assessed” value (for property tax purposes) can differ.

assessment evaluates the value of the property by estimating its sale price in the current market. Similar to an appraiser, the assessor relies on current market activity, such as recent comparable sales, to estimate this value. Typically, an appraisal indicates a decrease in value after the property is subject to a conservation easement. Stakeholders told us that many landowners expect a reduction in their tax liability as a result of granting a conservation easement on their property (and thus removing some “sticks” from their bundle of landowner rights discussed in Chapter 1). A reduction, however, has not always been the case.³⁹ County assessors with whom we met told us they often do not agree with values established in the appraisals they have seen of the property either “before” or “after” the conservation easement is placed on the parcel. As a result, the *assessed* value of the property can differ from its appraised value.

County assessors told us that sometimes the easement restrictions do not affect the current “best use” value of the property.⁴⁰ If a parcel had the same use before and after the conveyance of a conservation easement, the easement may not affect the value of the property for tax purposes. For example, assume a given parcel is undeveloped, used as hunting land, and located in a rural township with a low probability of being developed. County assessors told us if a conservation easement was placed on this property, the easement would likely not change the assessed value of the land. They told us the property’s highest and best use would likely continue to be recreational land, which would be the same classification it had before the conservation easement was put in place.

County assessors also told us the effect of a conservation easement on a property’s value depends on the specifics of the easement agreement and the location of the property. For example, if the property is located in an area that has high demand for development and the easement agreement restricts residential buildings, then the easement would likely reduce the assessed value of the property. However, if the property is in an area that is not under development pressure and the landowner retains the right to build, then the conservation easement may not impact the assessed value. Assessors told us in some cases a conservation easement might even increase the assessed value of a property, particularly in areas where the demand for hunting or recreational land is high.

While we did not examine the assessed values of specific properties, we did speak with a group of county assessors, representatives from the Minnesota

³⁹ In a 2007 report, the Montana Legislative Audit Division evaluated the impact of conservation easements on property tax collections. They found that “easement creation has not resulted in decreased property tax collections.” However, unlike Minnesota law, the Montana law includes some provisions that may minimize the affect of a conservation easement on the assessed taxable value of land subject to a conservation easement. See Montana Legislative Audit Division, *Conservation Easements* (Helena, January 2007), S-1 and 37-38.

⁴⁰ County assessors we met with explained that standard assessment practice is to determine the market value of a property with a conservation easement based on its “highest and best use.” As explained in documents prepared by DNR, “highest and best use” is the “legal use to which a property can logically be put or adapted, for which there is a current market, and which may reasonably be expected to produce the greatest net return to land over a given period of time, or to yield to land its highest present value.” Department of Natural Resources, “Highest and Best Use Example,” September 3, 2002, http://files.dnr.state.mn.us/lands_minerals/appraisal_mgmt/bestuseexample.pdf, accessed November 2, 2012.

Department of Revenue, and a number of stakeholders on this topic. Additionally, we reviewed the relevant statutes and a 2007 report on county assessors' practices published by the Department of Revenue.⁴¹ We found that:

- **County assessors may not know that a conservation easement has been placed on a property they are assessing.**

There is no requirement that the local county assessor's office be notified when a conservation easement is acquired. When a landowner and an easement holder enter into a conservation easement agreement, the agreement is filed with the local county recorder. This ensures the easement agreement is included with the title to the property. Easement holders may encourage landowners to provide notification of the conservation easement agreement to the county assessor's office; however, there is no requirement that the landowner or easement holder do so. Additionally, there is no requirement that the local county recorder notify the local assessor of such a transaction.

County assessors told us they do not always know when there is a conservation easement on a given property.⁴² The 2007 Department of Revenue report mentioned earlier also identified problems with information on conservation easements and cited the "significant lack of data available to assessors on property that is subject to such conservation easements" as a major issue.⁴³ County assessors told us that it would be too time consuming for them to identify every conservation easement filed with the county recorder's office, particularly in areas of the state where there are hundreds of easements. Therefore, county assessors told us that often the only way they learn about the presence of a conservation easement on a given property is when the landowner provides them with that information.

A lack of data can make it difficult for county assessors to assess a property affected by a conservation easement.

The lack of information about conservation easements can impact the assessed value of a property in two ways. First, if the assessor does not know about a conservation easement on the property, the assessor cannot take the easement restrictions into consideration when calculating the value of the property. Second, if the assessor does not know about conservation easements on comparable properties, the assessor may not be using the best properties for determining comparison values. As noted above, assessors typically make valuation decisions based on sales data of comparable properties. But if conservation easements on properties are not reported to the assessors, then it is difficult for them to identify comparable properties because they do not know when conservation easements are present—either on the property they are assessing or on the properties that have recently sold.

⁴¹ Minnesota Department of Revenue, Property Tax Division, *Assessment and Classification Practices Report, Lands Enrolled in State or Federal Conservation Programs* (St. Paul, February 21, 2007).

⁴² One exception to this is in Cass County. The Cass County assessor told us the Cass County auditor's office provides him with a copy of each easement agreement once it is recorded.

⁴³ Minnesota Department of Revenue, Property Tax Division, *Assessment and Classification Practices Report, Lands Enrolled in State or Federal Conservation Programs* (St. Paul, February 21, 2007), 2.

County assessors use different methods to determine the assessed value of properties with conservation easements.

Complicating matters further is that methods for determining the value of property with a conservation easement vary among county assessors in the state. As a result, landowners with similar conservation easements and similar properties may have different assessed values, only because of the method used by the local county assessor. A survey of assessors conducted by the Department of Revenue and published in the agency's 2007 report reflected a wide range of county assessment practices regarding properties with certain types of conservation easements.⁴⁴ For example, among the 82 counties responding to the questionnaire, several said they do not make a value adjustment for acres in the RIM Reserve program; 9 said they base the value adjustment for property with RIM Reserve easements on market sales; and several identified a flat percentage reduction in value for property with a RIM Reserve conservation easement. Additionally, Department of Revenue staff told us the department has not provided substantive guidance to county assessors regarding how to value land with conservation easements.

This variation in assessors' practices may be permissible by recent changes in law. We found that:

- **A 2008 statutory change gave assessors discretion whether to consider the impact of a conservation easement on a given parcel.**

Prior to 2008, *Minnesota Statutes*, 273.117, stated that property subject to a conservation easement *shall be entitled to reduced valuation* if the easement is for a conservation purpose and is recorded on the property, and the property is being used in accordance with the terms of the easement.⁴⁵ On the recommendation of county assessors and the Minnesota Department of Revenue, the law was changed from "shall be entitled to reduced valuation" to "may be adjusted by the assessor."⁴⁶ Reflecting this change, *Minnesota Statutes* 2012, 273.117, states:

The value of real property which is subject to a conservation restriction or easement *may* be adjusted by the assessor if:
 (a) the restriction or easement is for a conservation purpose...
 and is recorded on the property; (b) the property is being used in accordance with the terms of the conservation restriction or easement. (*Italics added for emphasis.*)

County assessors and the department recommended this change because the previous language incorrectly assumed the presence of a conservation easement would necessarily lower the value of the property. However, the current language in law gives assessors discretion about whether to consider at all the impact of a conservation easement on the value of a parcel.

⁴⁴ Minnesota Department of Revenue, Property Tax Division, *Assessment and Classification Practices Report, Lands Enrolled in State or Federal Conservation Programs* (St. Paul, February 21, 2007), 17-21.

⁴⁵ *Minnesota Statutes* 2006, 273.117.

⁴⁶ *Laws of Minnesota* 2008, chapter 154, art. 13, sec. 27.

EASEMENT AGREEMENTS AND RESTRICTIONS

An easement agreement is the legal document that outlines the terms of the conservation easement.

An easement agreement is the legal document that outlines the terms of the conservation easement. As such, easement agreements are written to protect the conservation benefits of the property. In doing so, the agreements typically identify restrictions placed by the easement holder on the property; they also may

Key OLA Standards for Easement Agreements:

- Have clear and unambiguous language.
- Identify the characteristics of the property protected and the public benefit served by the easement.
- Permit only activities that will not negatively impact the conservation benefits of the property.

identify rights retained by the landowner. The agreement is vital to the success of a conservation easement as it forms the basis for future enforcement of the easement. Additionally, having a well-crafted easement agreement can help reduce the need for amendments over time. OLA identified three key standards related to the easement agreement: (1) the agreement should be written clearly with unambiguous terms; (2) the agreement should identify the conservation benefits of the property and the public benefit of the easement; and (3) any activities permitted should not negatively impact the conservation benefits of the property. Reviewing the conservation easement files with these standards in mind, we found:

- **There are several opportunities to improve the contents and oversight of conservation easement agreements.**

In this section, we discuss the terms and provisions included in the easement agreements we reviewed and compare them to OLA's key standards more specifically.

Clarity of Easement Agreements

As noted above, one of OLA's key standards is that *the easement agreement should have clear and unambiguous terms*. More than half of the easement agreements we reviewed that were entered into by state agencies are standard documents. Standard agreements exist for many types of conservation easements, including Native Prairie Bank, RIM Reserve, Trout Stream, and Wild and Scenic River easements. In a few cases, we saw language added to these standard agreements, typically to grant landowners additional rights such as the right to harvest native prairie seeds on a portion of the property with a Native Prairie Bank easement. But this tended to be the exception more than the rule. Other conservation easements held by the state, and those held by DU and MLT, had some standard language, but many of the provisions were tailored to the specific landowner and property.

For the most part, the easement agreements entered into by DU and MLT were clearly written. However, we found that:

- **Provisions in some state agency easement agreements we reviewed were not clear, which could affect the conservation benefits of the property and the state’s ability to enforce the agreement.**

For example, one of DNR’s easement agreements, which was negotiated and entered into by The Nature Conservancy and subsequently transferred to DNR, prohibits building new roads except for “roads relating to the uses for agriculture, forestry, personal residence, and recreational use” that are described elsewhere in the document. The landowner in this case built a road on his property, which DNR and Attorney General’s Office staff initially thought was a violation of the easement terms. However, after reviewing the easement agreement, the Attorney General’s Office determined that the lack of clarity in the agreement made it difficult to enforce the prohibition on building roads. In the end, the landowner was not required to remove the road or restore the property.

In another example, the standard RIM Reserve conservation easement agreement states that landowners “shall not place any materials, substances or objects, nor erect or construct any type of structure, temporary or permanent, on the easement area, except as provided in the Conservation Plan.” However, BWSR and soil and water conservation district staff told us they regularly allow portable deer stands and camping equipment on the RIM easement properties. While these temporary structures may not have an impact on the conservation benefit of the property, the language in the agreements is incongruent with the actions of the landowners and easement holders.

We found other examples of unclear agreement terms in our file review. For example, in the Wild and Scenic River easement agreements written in the 1990s and earlier, the easement agreement permits structures or devices that are “the usual items associated with single family residential use” if there was an existing dwelling on the property. However, there is no explanation in the agreement of what constitutes these “usual items.” In a Native Prairie Bank easement agreement we reviewed, one clause states that grazing is prohibited but another clause states that “visitation [to the Premises] must not interfere with the grazing operations of the Grantors.” The agreement does not specify where on the property grazing operations are allowed.

Landowner Reserved Rights

Organizations seeking to obtain an easement may need to negotiate terms to entice landowner participation.

As discussed in Chapter 1, conservation easements are entered into voluntarily. As a result, in some cases, the organizations seeking to obtain an easement may need to negotiate terms to entice landowner participation. For example, the easement holder may need to permit the landowner to engage in certain activities—such as building expansions or gardening—to obtain protections on the property as a whole. The landowner’s needs, however, must be balanced with protecting the conservation benefits of the property. As mentioned previously, one of OLA’s key standards is to *permit only activities that will not negatively impact the conservation benefits of the property*. However, we found that:

- **Terms in several easement agreements negotiated by the Minnesota Land Trust and intended to protect habitat, shoreland, and scenic views permit building expansions and commercial or agricultural uses.**

A few of MLT's conservation easements intended to protect habitat, shoreland, and scenic views permit significant increases in the size of buildings located on the protected land. For example, one easement agreement that protects a 39-acre property allows for an increase from the existing 7,300 square-foot ground area covered by buildings to 14,700 square feet. The easement agreement also permits, with MLT's permission, the landowner to move the structures to other locations on the property. Another agreement we reviewed that was negotiated by MLT allows the owner to subdivide the 244-acre property and build a structure on the second part of the property.

Additionally, some MLT conservation easements intended to protect habitat, shoreland, and scenic views permit commercial uses on the protected property. Several of the MLT easement agreements contain the following, or similar, language:

The Protected Property may be used for professional offices, day care, production and sale of crafts, and other home businesses conducted by and in the home of a person residing on the Protected Property. The Protected Property may also be used for customary rural enterprises such as a bed and breakfast, retreat cabin or similar small inn.

Similarly, a few of MLT's easement agreements permit agricultural activity on the protected property. These easement agreements contain the following, or similar, language:

Protected Property may be used to raise or produce crops, livestock, and livestock products and for all related agricultural activities. This includes the right to establish, reestablish, maintain, and use cultivated fields, orchards, nurseries, woodlots, tree farms and pastures [within a designated agricultural area].

Although the activities identified above may seem questionable given the purpose of these conservation easements, they should be viewed in the context of the size and conservation benefits of the entire conservation easement. MLT also includes a general clause in its easement agreements stating that any activities that take place on the property cannot impact the conservation benefits of the easement. Nevertheless, MLT is responsible for enforcing this clause and ensuring that any permitted activities do not affect the conservation purpose of the easement. For example, if the landowner is allowed to cultivate crops on the property, MLT must ensure that any agricultural runoff from the crops does not affect protected habitat or shorelines on the property. For state-funded conservation easements, the state is trusting that MLT will uphold this responsibility.

While some activities permitted in an easement agreement may seem questionable, they should be viewed in the context of the size and benefits of the entire conservation easement.

Another consideration is that there is an important distinction between the easement agreements entered into by MLT and most of those entered into by the state agencies we reviewed. MLT easements often protect the entire property, including buildings or potential building sites, while the conservation easements held by state agencies typically exclude from the easement agreement portions of land with buildings or future building sites. As a result, agreements entered into by MLT more often addressed how landowners are permitted to use their residence or other buildings on the property. MLT staff and other stakeholders commented that this approach, while seeming to permit activities contrary to the conservation benefit of the property, in fact provided better protection over the long term because the agreement outlined allowable and restricted activities on this nearby property. In contrast, when the residence or building sites are excluded from the easement agreement, landowners are free to use that adjacent property however they choose, subject only to local ordinances and rules and not subject to the easement agreement.

State Approval

Despite the commitment of significant state funds to conservation easements acquired by nonprofit organizations, we found that:

- **There is no state approval of state-funded conservation easement agreements entered into by nonprofit organizations.**

As discussed in Chapter 1, nonprofit organizations have received significant state funding to acquire, administer, and monitor conservation easements. Much of this funding has come from the Outdoor Heritage Fund (as recommended by the Lessard-Sams Outdoor Heritage Council [LSOHC]) or the Environment and Natural Resources Trust Fund (as recommended by the Legislative-Citizen Commission on Minnesota Resources [LCCMR]). Recipient organizations must develop accomplishment plans (for Outdoor Heritage Fund projects) and work plans (for Environment and Natural Resource Fund projects) that detail planned and actual spending. However, legislative staff told us that neither the Council nor the Commission—nor their staff—approve the easement agreements. In particular, LSOHC staff told us they do not review the agreements before they are finalized. LCCMR staff told us they are given limited time to review easement agreements but do not have the authority to approve the documents or require changes. Additionally, LSOHC and LCCMR staff told us they do not have the expertise to evaluate the appropriateness of conservation easements or the associated agreements.

State agency staff have the expertise—but not the authority—to review easement agreements entered into by nonprofit organizations.

Although staff at BWSR and DNR have the expertise to review the easement agreements entered into by the nonprofit organizations, they do not have the authority or resources to do so for most conservation easements. Additionally, DNR staff have the expertise to review appraisals for conservation easements but have limited authority to do so. As noted earlier, appraisals for easements purchased with Outdoor Heritage Fund or Environment and Natural Resources Trust Fund money that are valued at more than \$1 million must be reviewed by DNR. Thus far, however, no easements purchased by nonprofit organizations have exceeded this threshold.

In addition, easement agreements entered into by nonprofit organizations are not reviewed by the Attorney General’s Office, which is a departure from the oversight provided for state agencies. Staff from the Attorney General’s Office told us they often review conservation easement agreements entered into by state agencies and provide input on draft agreements. We saw evidence of this in our file review.

Key Agreement Provisions

Although each conservation easement is unique, there are certain key provisions—such as identifying the parties to the agreement and including a legal description of the property being protected—that should be addressed in every easement agreement. However, we found that:

- **Some key provisions are not routinely included in agreements for state-funded conservation easements.**

In particular, easement agreements we reviewed often did not include provisions identifying (1) *the conservation benefits of the protected property*, which is an OLA key standard, (2) the process for amending or terminating the easement, or (3) the extent to which mining activities are permitted on the property. Each of these is briefly discussed below.

Some of the easement agreements we reviewed, including DNR’s Trout Stream and BWSR’s Army Compatible Use Buffer (ACUB) easements, do not identify the conservation benefits of the property being protected, such as a description of the property or the unique natural characteristics of the land. For example, if a conservation easement is obtained because of the land’s unique location on a shallow lake that is used for migrating fowl, the easement agreement should identify these benefits of the property being protected by the easement. A description of the conservation benefits can provide context and a rationale for the land-use restrictions in the conservation easement agreement.

Additionally, the majority of conservation easement agreements we reviewed, namely the RIM Reserve and many DNR easements, do not address what happens in the case of a termination of the easement. As shown in Exhibit 2.4, none of BWSR’s easements and only 24 percent of DNR’s easements include such language. If a conservation easement is terminated, remuneration may need to be made to the easement holder or the state, depending on how the easement was initially acquired and why it is being terminated. The process for determining these amounts should be included in the initial easement agreement. Similarly, the majority of easement agreements we reviewed do not detail the criteria upon which amendments to the agreements may be permitted. Amendments have the potential to change the conservation benefits of the easement and may have an effect on the value of the easement. As such, the process for making amendments should also be set forth in the easement agreement. Both amendments to and terminations of conservation easement agreements are discussed in more depth in Chapter 3.

Easement agreements we reviewed often did not include provisions regarding mineral activities, amendments, or terminations.

Exhibit 2.4: Conservation Easement Agreements with Amendment and Termination Language by Easement Holder

	Total Reviewed (N)	Percentage with Amendment Language	Percentage with Termination Language
Board of Water and Soil Resources	63	0%	0%
Department of Natural Resources	41	12	24
Ducks Unlimited	3	100	100
Minnesota Land Trust	20	100	100

NOTES: Exhibit provides the percentages of conservation easement agreements we reviewed that include language related to amendments or terminations. An amendment is a change to the easement agreement document, and a termination is the extinguishment of the conservation easement agreement on the entire or a portion of the property protected by an easement.

SOURCE: Office of the Legislative Auditor.

Unlike federal regulations, state law does not require conservation easements to restrict certain mining activities.

Finally, some conservation easements we reviewed do not explicitly address the permissibility of mineral development.⁴⁷ Mineral development is classified into two types: (1) surface mining, which is used to remove minerals such as hard rock materials, sand, gravel, or coal; and (2) subsurface mining, which may involve drilling to extract oil and gas. Depending on the circumstances, mining activities could potentially threaten the conservation benefits of the easement. For example, mining may impact surface or groundwater quality, disturb vegetation, change water levels, contribute to a loss in habitat, or disrupt wildlife species.

Federal code and regulations prohibit certain mining activities for particular types of federally funded conservation easements, while state statutes have no equivalent restrictions. Specifically, federal code and program requirements do not allow *surface* mining activities for (1) donated easements in which landowners seek tax benefits or (2) federally funded Forestry easements.⁴⁸ However, federal regulations and program guidelines may allow *subsurface* mineral development when such activities would not affect the conservation benefit of the properties.⁴⁹ State statutes do not require that conservation

⁴⁷ As noted earlier, in cases where a third party owns mineral rights, mining activities of the third party are not subjected to conservation easement restrictions.

⁴⁸ 26 U.S. Code, sec. 170(h)(5)(B) (2012); 26 CFR sec. 1.170A-14(g)(4) (2012); and U.S. Department of Agriculture, *Forest Legacy Program Implementation Guidelines* (Washington, DC, 2003).

⁴⁹ For donated conservation easements, regulations allow subsurface mineral activities that have a “limited, localized impact” on the land and are “not irretrievably destructive of significant conservation interests.” See 26 CFR, sec. 1.170A-14(g)(4)(i) (2012). For federally funded Forestry easements, subsurface mining may be allowable if the impact of such activities is “limited and localized.” U.S. Department of Agriculture Forest Service, *Forest Legacy Program Implementation Guidelines* (Washington, DC, as amended December 21, 2011), 58.

easements restrict surface or subsurface mining activities, and neither the LCCMR nor the LSOHC has included such restrictions in its guidelines.⁵⁰

Although state statutes may not require prohibitions of such activities, organizations or agencies may determine that mining could threaten the conservation benefits of the easement and include such restrictions in the easement agreement. We examined restrictions on mining and found that:

- **Easement agreements vary in the extent to which surface or subsurface mining is prohibited; in a few cases, landowners or the state are given explicit rights to mine on land protected by a state-funded conservation easement.**

About one-third of the easement agreements we reviewed explicitly prohibit surface and subsurface mining. For instance, all of MLT's easements we reviewed explicitly prohibit surface mining and all but one expressly prohibit subsurface mining. Also, agreements for several easement types, including both DNR's and BWSR's ACUB easements, explicitly extinguish rights to mine the surface and subsurface of the land protected by the easement.

Some state agency easements explicitly prohibit mining activity, but others allow it.

More than 60 percent of the easement agreements we reviewed, including all RIM Reserve and Native Prairie Bank easements, do not include a direct statement that mining is prohibited. However, other clauses in these documents imply that mining activities are not allowed. For example, the Native Prairie Bank easement agreements prohibit "topographic changes or alteration of the natural landscape within or upon said premises by excavation, cultivation, drainage, filling, or any other means...."

Five of the easement agreements we reviewed allow surface mining or subsurface mining. Two of the DNR Forestry easements give the state permission to authorize exploration of any state-owned minerals on the property.⁵¹ In such cases, the easement agreements outline specific conditions, such as causing a disturbance of 10 percent or more of the surface area, under which the state would have to substitute new lands to be protected by the easement. All three of the DU easements grant rights to subsurface mining under certain terms.⁵² Among the terms detailed in the agreement are that landowners must provide advance notice to DU prior to undertaking exploration or extraction and must restore any surface disturbance caused by subsurface mining activities. As noted earlier, the state has placed substantial trust in nonprofit organizations

⁵⁰ In 2007, LCCMR developed guidelines for Forestry easements that stated that priority should be given to lands with minimal or no potential for mining and that if mining is to occur, the impacted lands must be replaced with other lands as specified in the guidelines. See Legislative-Citizen Commission on Minnesota Resources, *Minimum Standards and Guidelines for State Forest Legacy Easements in Minnesota* (St. Paul, October 9, 2007).

⁵¹ For a discussion of mineral development and Forestry easements, see Minnesota Department of Natural Resources, *Minnesota Forests for the Future* (St. Paul, April 2008), 39-41.

⁵² In two of the three cases, the mineral rights are partially owned by either a third party or the state so mining activities are not subject to any mining restrictions in the easement document. DU staff informed us that it no longer includes a standard provision to permit landowners to undertake subsurface mining activities in its Minnesota conservation easement agreements.

to ensure that the permitted activities will not harm the conservation benefits of the easement.

RECOMMENDATIONS

Selecting property on which to place a conservation easement, determining the value of the easement, and ensuring the easement agreement adequately protects the property are critical to the success of conservation easements. Below, we make a number of recommendations to improve these processes for state-funded conservation easements.

Conservation Easement Database

One of the key criteria for selecting property for a conservation easement is the proximity to other protected land. As discussed earlier, there is no centralized database for identifying land protected with state-funded conservation easements. Therefore, we recommend that:

RECOMMENDATION

The Legislature should require the Board of Water and Soil Resources and the Department of Natural Resources to develop and maintain a central database of all state-funded conservation easements in Minnesota. Additionally, the Legislature should require all holders of state-funded conservation easements to report easement acquisitions and terminations to the state for inclusion in the database.

A centralized conservation easement database could provide useful information to easement holders, county assessors, and the state.

A centralized conservation easement database could provide three distinct benefits. First, such a database would help provide a central source of information about existing protected land and conservation corridors, which would help identify where future easements could be beneficial. Second, the database would serve as a repository of state-funded conservation easements. If an organization that holds conservation easements does not comply with certain state statutes, by law the easements would transfer to the state.⁵³ Having a record of all state-funded conservation easements would help facilitate such a transition. Finally, depending on the information collected, a conservation easement database could be used by county assessors to identify the location of conservation easements for assessment purposes.

Several other states maintain similar conservation easement databases. For example, Maine's 2007 reform to its conservation easement law requires all easement holders in the state to register their conservation easements with the

⁵³ *Minnesota Statutes* 2012, 97A.056, subd. 15(a); and 116P.15, subd. 1.

Maine Department of Agriculture, Conservation, and Forestry.⁵⁴ Massachusetts, New York, and California also have some form of easement registration.⁵⁵

Developing a conservation easement database and reporting process will require significant effort by state agencies and other easement holders. BWSR, DNR, and other stakeholders will need to collaborate to identify pertinent data—such as location information, easement holder, and duration of easement—to collect. The database could possibly be merged with the ongoing development of DNR’s land management system (a database currently being developed for conservation easement records, among other things). However, such an effort will necessitate additional funding and resources. The start-up costs to develop a database would likely need to be appropriated specifically for this purpose; ongoing costs could possibly be paid for with a small filing fee for each conservation easement.

Appropriations Guidelines

It would be difficult and unrealistic for the Legislature to approve each specific parcel on which a state-funded conservation easement is acquired. However, it is important to ensure that the properties selected for easements are consistent with state goals and the Legislature’s intent. As noted previously, some recent appropriations language has been very broad, giving nonprofit organizations significant freedom to select properties. We therefore recommend that:

Properties selected to be protected by state-funded easements should be consistent with state goals.

RECOMMENDATION

The Legislature should ensure that appropriations for conservation easements include clear and specific programmatic objectives.

Providing more specific parameters for state-funded conservation easements in the appropriations language will help ensure state funding is used to protect properties that meet the state’s goals. Additionally, more specific appropriations language will give advisory councils, commissions, and their staff tools to help them provide more oversight. For example, the Legislature could require that state money for conservation easements be used to acquire only easements consistent with specified state conservation plans or that protect property along certain habitat corridors.

Mineral Potential Review

For property protected by a conservation easement but on which the mineral rights are owned by someone other than the landowner, there is a potential risk to the conservation benefits because the owner of the severed mineral rights is not bound by the conservation easement restrictions. The risks, however, are not the same for all properties in the state because the existence of mineral resources and

⁵⁴ *Maine Revised Statutes* 2012, title 33, chap. 7, subchap. 8A, sec. 479C.

⁵⁵ Jeff Pidot, *Reinventing Conservation Easements, A Critical Examination and Ideas for Reform* (Cambridge, MA: Lincoln Institute of Land Policy, 2005), 12.

Conservation easements on property with severed mineral rights require additional due diligence.

the likelihood that they would be mined vary. Nevertheless, before state funds are used to acquire a conservation easement on a property that could later be subjected to mining activities, it is important for the organization seeking to obtain a conservation easement to evaluate the risks that such activities would take place. As a result, we recommend that:

RECOMMENDATION

Prior to acquiring a conservation easement on property for which the landowner does not own the mineral rights, organizations seeking to obtain a conservation easement should evaluate the potential for mining activities.

Organizations should develop and follow a process for assessing the likelihood of mining prior to acquiring a conservation easement on a property with severed mineral rights. Organizations could follow a process similar to MLT's, which includes a preliminary evaluation by staff that examines particular factors important for indicating the potential for mining, such as the location in the state. If a preliminary evaluation determines the likelihood is unclear or could exist, then the organization should commission an evaluation of the mineral potential by a geologist. Easement holders should also document the basis for their conclusions. Carrying out due diligence in this area will help minimize the potential for a property protected by a conservation easement to be mined in such a way that places the conservation benefits of the easement at risk.

Conservation Easement Outcomes

The state has invested almost \$190 million in conservation easements over the past ten years and should have some reassurance of the benefits of this investment. While documenting the outcomes of each individual conservation easement may not be feasible, easement holders should be able to demonstrate how their easements help the state meet its conservation goals.

RECOMMENDATION

The Legislature should require holders of state-funded conservation easements to submit a biennial report documenting how the easements have produced outcomes that are consistent with state conservation plans and goals.

In this biennial report, easement holders should reference state conservation plans and relevant scientific research to justify the selection of property protected with state-funded conservation easements. Easement holders should also document the measurable benefits and outcomes of their easements, to the extent this information is available. The exact format and nature of these outcome reports will depend, in part, on the purpose of the conservation easements. For example, those easements that protect existing natural features and prevent future development will likely require different metrics than easements that restore land to its natural condition.

Effect of Conservation Easements on Property Values

The effect of a conservation easement on a parcel's property value depends on a number of factors, including the location of the property and the restrictions included in the easement agreement. Current law states that the value of property subject to a conservation easement "may be adjusted by the assessor."⁵⁶ This language gives the local tax assessor significant discretion whether to consider the impact of the easement on the property. Instead, we recommend that:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, 273.117, to require tax assessors to consider the effect of a conservation easement on the property value of real property when the presence of an easement is known.

This language would not suggest how the existence of a conservation easement affects the value of the property, but it acknowledges that an easement could have an impact (either positive or negative). The change in law recommended above would require the assessor to consider the impact a conservation easement has on a given parcel. Such a requirement, however, is limited by information available to the assessors regarding the presence and conditions of conservation easements.

Filing Notice of Conservation Easements

One of the challenges county assessors face is that they often do not know about the existence of conservation easements on a given property. County assessors told us that, with a few exceptions, information about conservation easements is not routinely shared with them by property owners, easement holders, or other county departments. This lack of information was also discussed in a 2007 report by the Minnesota Department of Revenue. To alleviate this information gap, we recommend that:

RECOMMENDATION

The Legislature should require easement holders to submit a copy of the conservation easement agreement to the county assessor's office when a conservation easement agreement is filed with the county.

To ensure the easement is recorded on the title for a given property, the conservation easement holder currently files a copy of the easement agreement with the county recorder. It would not be a significant burden for the easement

⁵⁶ Minnesota Statutes 2012, 273.117.

holder to also submit a copy of the recorded agreement to the county assessor. If the county assessors were to receive these agreements on a regular basis, they could improve their understanding of conservation easements' affects on property values in their county. This could lead to more accurate and more consistent assessed property values for land with conservation easements.

Standard Easement Agreement Provisions

As we have discussed throughout this report, every conservation easement, and therefore every easement agreement, is unique. However, there are certain agreement provisions that apply to all state-funded conservation easements. As such, we recommend that:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, chapter 84C, to require all state-funded conservation easement agreements to contain certain standard provisions.

All state-funded conservation easement agreements should include provisions regarding amendments, terminations, and the permissibility of mining.

Based on our evaluation, we recommend the standard provisions include language regarding (1) amendments to and terminations of easement agreements and (2) permissibility of mining. To flesh out these and other provisions, we suggest that the Legislature establish a taskforce of conservation easement stakeholders to identify the provisions to be included in agreements for state-funded conservation easements. The taskforce could provide suggested language for certain provisions that could be used by all holders of state-funded conservation easements and modified to fit the needs of a particular easement agreement.

State Approval of Conservation Easement Agreements

The current process of relying on nonprofit organizations to acquire state-funded conservation easements requires significant trust in these organizations. While, according to the information we obtained, there has not been a breach of that trust, we think more state oversight for large conservation easement investments is appropriate. As a result, we recommend that:

RECOMMENDATION

The Legislature should require the state fiscal agent—typically the Board of Water and Soil Resources or the Department of Natural Resources—to review and approve easement agreements with a state investment of \$500,000 or more that are entered into by nonprofit organizations.

BWSR and DNR typically serve as the fiscal agents for money appropriated to nonprofit organizations to acquire conservation easements. Both of these state

More state oversight of state-funded easements acquired by nonprofit organizations should be considered.

agencies have substantial experience related to conservation easements and would have the staff expertise to conduct a review of easement agreements entered into by nonprofit organizations. Among other things, state agency staff could review the benefits that would be gained from acquiring the proposed conservation easement, ensure such a public investment is consistent with state conservation plans, and ensure the easement agreement is written to protect the conservation benefits of the property.

DNR could also review appraisals of conservation easements to ensure that appraisal standards are met and the values are credible. Review of conservation easement appraisals is important because they often establish the purchase price of an easement and can be somewhat subjective. State agency review of easement appraisals for easements with a state investment of \$500,000 or more would not be a major change from current practice. DNR is already required to review appraisals for easement holders using Outdoor Heritage or Environment and Natural Resources Trust fund money to acquire conservation easements valued at more than \$1 million. Based on information provided to us by DU and MLT, none of the state-funded easements currently held by these organizations meets the review threshold in our recommendation.

We acknowledge that there are several challenges to implementing this recommendation. Most notably, there are concerns about the timeliness of such a review and DNR's struggles to manage its own conservation easement workload. Additionally, the specific standards and criteria for state review and approval will need to be developed by BWSR and DNR in cooperation with other stakeholders. Nevertheless, we think this additional state review and approval is warranted for easements that involve a significant state investment.

Easement Stewardship

Easement stewardship helps ensure that the public purpose of a conservation easement is achieved.

Easement stewardship is the ongoing monitoring, management, and enforcement of conservation easements. The purpose of such activities is to ensure that the conservation benefits of the easement are being protected. Ongoing stewardship is essential to protect the state's initial investment made to acquire the easement.

In this chapter, we explore the extent to which easement holders have provided effective stewardship of state-funded conservation easements. As shown in Exhibit 1.10 in Chapter 1, OLA developed a set of key standards related to the different components of conservation easement stewardship.¹ Through our file review and interviews with easement holders, we found that:

- **Nonprofit organizations and the Board of Water and Soil Resources generally met key standards for stewardship of state-funded conservation easements. However, several divisions within the Department of Natural Resources failed to meet key stewardship standards.**

In the following sections, we explore the extent to which easement holders met OLA's standards for the central components of easement stewardship, including preparing baseline reports and monitoring. We also discuss several challenges the Department of Natural Resources (DNR) faces in meeting the standards in these areas. We then examine the frequency of enforcement issues and amendments to and terminations of easements.

BASELINE REPORTS

A baseline report is a document that records the condition of the property when the conservation easement is first acquired. When easement holders monitor a property, they compare the current conditions of the property to the conditions documented in the baseline report. As such, a baseline report serves as a critical benchmark record for easement holders if a violation is found. A baseline report can also provide useful background information about the conservation easement to guide future staff in managing the easement and future landowners in how they can use their property.

Key OLA Standards for Baseline Reports:

- Create a comprehensive baseline report of existing conditions at the time the conservation easement is acquired.
- Include key information in the baseline report.

¹ As discussed in Chapter 1, the standards were developed to evaluate state-funded conservation easements and are not, in most cases, requirements established by law.

Because of their importance for stewardship, OLA has two standards regarding baseline reports. The first standard is that easement holders should create a comprehensive baseline report of existing conditions at the time the conservation easement is acquired. The second standard outlines key information the baseline should include, such as:

To ensure stewardship is effective, baseline reports should be created at the time of easement acquisition.

- maps showing the property line or a description of the easement boundaries,
- a description of the land and vegetation,
- on-site photographs taken at key locations (such as unique natural features or existing buildings),
- an inventory of all property improvements, and
- a statement signed by the landowner and a representative of the holder organization affirming that the baseline is an accurate representation of the protected property.

Based on our review of conservation easement files, we found that:

- **The nonprofit organizations that hold state-funded conservation easements generally completed comprehensive baseline reports by the time of easement acquisition.**
- **In contrast, the Board of Water and Soil Resources completed less comprehensive baseline reports, and the Department of Natural Resources had comprehensive baseline reports for fewer than half of the conservation easements we reviewed.**

Among the easement files we reviewed, all of the conservation easements held by Ducks Unlimited (DU) and Minnesota Land Trust (MLT) had baseline reports completed with the content required by OLA's standard (see Exhibit 3.1). Additionally, all three of DU's baseline reports were completed by the date the respective easement was recorded. About 70 percent of MLT's baseline reports we reviewed were completed by the date the relevant easement was acquired, and all were completed within seven months of the easement acquisition.²

The Board of Water and Soil Resources (BWSR) easement files we examined also had baseline reports; about 80 percent were completed on or before the date the easement was acquired.³ However, BWSR's baseline reports did not include all items outlined in OLA's standard: the reports delineated the property boundaries and included a signed statement by landowners, but they did not include photographs taken at key points on the property or a list of property

² MLT staff told us that since its accreditation in 2008, MLT completes every baseline report by the time of easement acquisition.

³ BWSR requires the soil and water conservation districts to prepare a "conservation plan" for each property. We considered the conservation plan as the easement's baseline report.

Exhibit 3.1: Conservation Easement Files with Baseline Reports by Easement Holder

	Number with Baseline Reports	Number without Baseline Reports	Total Reviewed
Board of Water and Soil Resources			
All Types ^a	63	0	63
Department of Natural Resources (DNR)			
Aquatic Management Area	1	0	1
Army Compatible Use Buffer	1	0	1
Forestry	4	0	4
Metro Greenways	1	0	1
Native Prairie Bank	2	6	8
Scientific and Natural Area	1	2	3
Trout Stream	1	7	8
Water Bank	0	2	2
Wild and Scenic River	2	6	8
Wildlife	1	1	2
Other ^b	1	2	3
Total DNR	15	26	41
Nonprofit Organizations			
Ducks Unlimited	3	0	3
Minnesota Land Trust	20	0	20

NOTE: Exhibit includes the number of files reviewed by OLA, not the total number of conservation easements held.

^a “All types” includes Army Compatible Use Buffer (ACUB), Conservation Reserve Enhancement Program, Reinvest in Minnesota (RIM) Reserve, and Other easements.

^b “Other” includes conservation easements administered by various divisions and sections within DNR, including Parks and Trails, Fisheries Section, and one not assigned to a specific division.

SOURCE: Office of the Legislative Auditor.

BWSR, DU, and MLT had baseline reports for all easements we reviewed.

“improvements,” such as existing trails or fences. Additionally, BWSR’s easements focused on restoring land used for agricultural purposes back to its natural state. As such, the baseline reports described the properties’ desired land cover after restoration, such as native grasses or wetlands, rather than the condition of the land at the time of acquisition.

DNR had baseline reports for less than half of the easements we reviewed.

Of the DNR conservation easements we reviewed, only about 37 percent had baseline reports prepared, as shown in Exhibit 3.1, and fewer than half of these were completed by the date of acquisition.⁴ All easement types other than the Aquatic Management Area, Army Compatible Use Buffer (ACUB), Forestry, and Metro Greenways easements did not have baseline reports for many or all of the files. For example, only one of the eight Trout Stream easements had a baseline report, and none of the Water Bank easements had baseline reports.

⁴ DNR staff told us that the standard practice of completing baseline reports by the time an easement was acquired was not established until recent years. Slightly more than half of the easements we reviewed were acquired more than ten years ago.

Developing baseline reports is a relatively new practice.

In the DNR easement files we reviewed that had baseline reports, we found that the reports were comprehensive and met OLA's standard for content. Of the easement files that did not have baseline reports, some had maps and property descriptions that could be combined to serve as a baseline report. In particular, for most of the Native Prairie Bank easements, DNR developed detailed management plans that described the natural features and conditions of the lands and included maps of the properties. However, these management plans did not meet the Native Prairie Bank program's standards for its baseline reports. DNR has recently hired staff to prepare comprehensive baseline reports for the Native Prairie Bank easements that do not yet have one.

In interviews with OLA and in a 2011 report to the Legislative-Citizen Commission on Minnesota Resources, DNR acknowledged that it did not have baseline reports for the majority of easements it holds.⁵ DNR staff told us that the standard practice in the field of conservation easements has only recently been to prepare baseline reports. DNR staff from divisions actively acquiring conservation easements stated that their current practice is to complete a baseline report before an easement is acquired.⁶ DNR staff have also been working to complete the backlog of baseline reports for the easements it already holds.⁷

MONITORING

Once the condition of the land is documented, it is important for the easement holder to ensure on an ongoing basis that the conservation benefits of the easement are protected and the landowner complies with the easement agreement. To do this, the easement holder "monitors" the conservation easement, which involves a periodic inspection of the property to determine compliance with the easement agreement. Typically, monitoring consists of an onsite visit to the property and some form of communication with the landowners.⁸ According to the Land Trust Alliance, monitoring helps easement holders:

- develop a relationship with landowners,
- identify changes in property ownership,
- observe if the easement is effective,
- discover violations,

Periodic monitoring is important to ensure the conservation benefits of the easement are achieved.

⁵ Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 24-25.

⁶ The conservation easement types that DNR may continue to acquire include Aquatic Management Area, Forestry, Native Prairie Bank, Scientific and Natural Area, and Trout Stream.

⁷ Further discussion about DNR's progress to address its backlog of baseline property reports begins on page 69.

⁸ In some cases, the landowner may accompany the person monitoring the property, and in other cases, landowner communication consists only of a letter or form mailed to the landowner following the monitoring visit.

- reduce time and money spent on enforcement actions, and
- prepare a record if judicial action is required.⁹

In this section, we examine the standards and practices used by different easement holders for monitoring conservation easements and discuss the extent to which easement holders have met OLA's monitoring standards.

Monitoring Standards and Practices

The frequency and method of monitoring required to effectively ensure compliance with the terms of the easement may vary based on the type of easement, but periodic easement monitoring should be conducted for all conservation easements. We examined the extent to which Minnesota statutes require monitoring for conservation easements and found that:

- **Minnesota law requires regular monitoring for only certain types of conservation easements.**

Minnesota statutes require DNR to establish a long-term program for monitoring and enforcing Forestry easements.¹⁰ The U.S. Forest Service requirements for federally funded forestry easements are more stringent than Minnesota law and require monitoring on an annual basis. Because many of the DNR Forestry easements are funded, in part, using federal dollars, these annual monitoring requirements apply to several of its Forestry easements.

State law does not establish monitoring frequency requirements.

As a condition of the appropriation, the 2011 Legislature required organizations that received money from the Environment and Natural Resources Trust Fund to develop a long-term stewardship plan and establish a fund for monitoring and enforcing the easement agreements acquired with Trust Fund money.¹¹ Easement holders receiving Trust Fund dollars for monitoring and enforcement must provide documentation each year about the uses of the money to support such activities. The 2012 Legislature required easement holders to have a similar monitoring and enforcement fund for conservation easements funded with Outdoor Heritage Fund dollars.¹² The four easement holders we examined received both Environment and Natural Resources Trust Fund and Outdoor Heritage Fund dollars to acquire certain types of conservation easements. While these easement holders must have a monitoring plan for the easements acquired with these funds, the advisory bodies for the funds have not established minimum monitoring frequency requirements.

Aside from the DNR Forestry easements and those acquired with money from specific funding sources, monitoring and long-term stewardship activities are not

⁹ Land Trust Alliance, *Background to the 2004 Revisions of Land Trust Standards and Practices* (Washington, DC: Land Trust Alliance, 2004), <http://www.landtrustalliance.org/training/sp/standards-and-practices-bkg.pdf>, accessed November 13, 2012.

¹⁰ *Minnesota Statutes* 2012, 84.66, subd. 11(a).

¹¹ *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subds. 4(i) and 4(j).

¹² *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subds. 2(a), 3(a), 4(a), and 5(a).

required for any other state-funded conservation easement. Nevertheless, easement holders have recognized the importance of monitoring and have established standards for the frequency of monitoring easements. We compared the standards different easement holders have established for monitoring frequency and methods and found that:

- **Holders of state-funded conservation easements have different standards and practices for monitoring conservation easements.**

DU and MLT follow Land Trust Alliance (LTA) standards for monitoring, which require annual visits to conservation easements, as shown in Exhibit 3.2.

Exhibit 3.2: Minimum Monitoring Standards for Conservation Easements by Easement Holder

	Annual	Once Every Three Years
Board of Water and Soil Resources		
All Types ^a	√ (first 5 years)	√ (after 5 years)
Department of Natural Resources (DNR)		
Aquatic Management Area	√	
Army Compatible Use Buffer		√
Forestry	√	
Metro Greenways		√
Native Prairie Bank		√
Northern Pike Spawning		√
Scientific and Natural Area		√
Trout Stream		√
Water Bank	√	
Wild and Scenic River		√
Wildlife	√	
Other ^b	√ (2 easements)	√ (1 easement)
Nonprofit Organizations		
Ducks Unlimited	√	
Minnesota Land Trust	√	

^a "All types" includes Army Compatible Use Buffer (ACUB), Conservation Reserve Enhancement Program, Reinvest in Minnesota (RIM) Reserve, and Other easements.

^b "Other" includes conservation easements administered by various divisions and sections within DNR, including Parks and Trails, Fisheries Section, and one not assigned to a specific division.

SOURCES: Office of the Legislative Auditor, based on Minnesota Board of Water and Soil Resources, *Conservation Easement Handbook*, <http://www.bwsr.state.mn.us/easements/handbook/index.html>, accessed June 26, 2012; Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011); and information provided by Board of Water and Soil Resources, Department of Natural Resources, Ducks Unlimited, and Minnesota Land Trust staff.

Easement holders have established different monitoring standards.

BWSR's standard for all of its conservation easements is annual monitoring visits for the first five years and then visits every three years thereafter. However, if a violation is found or the land has undergone a restoration that requires repeated inspection, BWSR will schedule more frequent easement monitoring.

**DNR's
monitoring
standards vary
by program.**

DNR's agency-wide standards require programs with conservation easements to conduct regular monitoring, as defined by the needs of the particular program. The standard for some easement types, such as Forestry and Water Bank easements, is to conduct monitoring on an annual basis. Annual monitoring for Forestry easements is important because for some properties, the landowners retain the rights to harvest timber.¹³ Yearly visits allow DNR staff to verify that timber harvesting is consistent with approved plans and that no other unapproved activities have occurred. Other DNR conservation easement types, including Trout Stream and Native Prairie Bank, have standards to monitor a minimum of once every three years, unless a violation has been discovered. More frequent monitoring may not be necessary for these types of easements because DNR field staff also intermittently visit these properties to perform management activities, such as stream management or controlled burns.

Easement holders have varied practices for monitoring, which are established to accommodate different circumstances, such as the size of the easement property, restrictions included in the easement agreement, and the resources of the easement holder. We accompanied representatives of the four easement holders on monitoring visits to observe their monitoring practices. DU has one staff member who visits all conservation easement properties in Minnesota; MLT uses a mix of volunteers and staff to conduct its monitoring activities. Standard practice for DU and MLT is that staff or volunteers contact the landowner prior to the visit. Staff or volunteers walk along paths inside and around the perimeter of the property to view the entire property, compare the conditions to those described in the baseline report, and complete a monitoring form noting any concerns. They occasionally take photographs of key locations on the property, particularly if they encounter potential violations of the easement agreement.

**BWSR relies on
soil and water
conservation
district staff to
monitor its
easements.**

BWSR relies on the 90 soil and water conservation districts around the state to monitor its conservation easements. Each year, BWSR sends a list of properties requiring inspection to the appropriate district. For certain properties, soil and water conservation district staff inspect the perimeter and key locations on the property. To inspect other easements, such as those that prohibit farming and structures on a strip of land near a waterway, the district staff may only drive past the property to determine whether the landowner has complied with easement terms. For some districts, including the Renville County Soil and Water Conservation District, one or two staff members monitor hundreds of easements from the spring to the fall. Due to time limitations, district staff typically do not contact all landowners prior to the visit. Following the visit, district staff complete a monitoring form, a copy of which is sent to the landowner. Staff also contact landowners when there are concerns.

¹³ Many of DNR's Forestry conservation easements protect large tracts of land owned by timber companies. Under the conservation easement agreement terms, the timber companies are permitted to harvest timber according to sustainable forestry practices.

In some cases, DNR uses field staff to monitor its easements.

Depending on the easement type, DNR has different approaches to monitoring. For Forestry easements covering thousands of acres, DNR staff undertake a number of activities to conduct easement monitoring, such as inspecting aerial photographs of the property, meeting with the landowners to discuss upcoming plans for timber harvesting, and visiting specific locations of concern. For other types of easements, including Water Bank and Wildlife easements, regional field staff visit the properties and do not typically meet with landowners. For certain easements, documentation of prior visits did not always note whether the landowners complied with specific easement terms. However, DNR has recently developed a standard monitoring form to document this information.¹⁴

Monitoring Activities

In recognition of the different monitoring standards in place for easement holders, OLA established a minimum standard that easement holders should visit the conservation easement property at least once every three years, preferably more often.

Key OLA Standard for Monitoring:

- Visit the conservation easement property at least once every three years.

As part of our review of conservation easement files, we examined the extent to which conservation easements held for more than one year were monitored and found that:

- **The nonprofit organizations and the Board of Water and Soil Resources met monitoring standards for nearly all easements we reviewed, but the Department of Natural Resources did not regularly monitor most of its conservation easements.**

The nonprofit organizations met OLA standards by regularly monitoring the conservation easements we reviewed, as shown in Exhibit 3.3. In particular, DU staff annually visited its three conservation easements. MLT staff or volunteers annually visited almost all of the conservation easements. In two cases, MLT easements were not monitored in one or two of the years since the easement was acquired.¹⁵

Nearly all of the BWSR easements we reviewed also met OLA monitoring standards. All but two of the easements were monitored at least once every three years. However, 9 of the 61 easements that had been held for more than a year did not meet the BWSR standard of annual monitoring visits for the first five

¹⁴ To help facilitate easement monitoring, DNR is currently developing a monitoring component of a new land records database that will provide staff with an electronic form with the terms and conditions of a specific conservation easement. The system will allow staff to fill out the form on a handheld device and upload the completed form into the database, making tracking monitoring activities easier. DNR staff have also developed monitoring training and have held several training sessions for field office staff.

¹⁵ MLT staff told us that since its accreditation in 2008, MLT monitors all of its easements on an annual basis.

Exhibit 3.3: Performance on Monitoring Standard for Conservation Easements by Easement Holder

BWSR, DU, and MLT met our monitoring standard for almost every easement we reviewed.

	Met Standard	Did Not Meet Standard		
		Less Than Once Every Three Years ^a	Management Visit Only ^b	No Visits
Board of Water and Soil Resources (N=61)	97%	3%	–	–
Department of Natural Resources (N=40)	23%	45%	18%	15%
Ducks Unlimited (N=3)	100%	–	–	–
Minnesota Land Trust (N=17)	100%	–	–	–

NOTES: Exhibit provides the percentages of conservation easements we reviewed that met and did not meet OLA's standard to monitor conservation easement property at least once every three years. Percentages may not sum to 100 due to rounding. Percentages were calculated based on conservation easements included in our file review that had been held for more than one year and excluded one DNR easement that was later terminated.

^a "Less than once every three years" identifies the percentage of conservation easements that were visited at least one time but less frequently than once every three years.

^b "Management Visit Only" identifies the percentage of conservation easements that were not formally monitored but had been visited by the easement holder staff to manage the natural resources on the property.

SOURCE: Office of the Legislative Auditor.

years and every three years thereafter. In eight of the cases, the soil and water conservation districts missed monitoring the property in only one of the designated years, and in one case the easement property was not monitored until two years following its acquisition. Additionally, one district manager told us that staff often visit conservation easement properties for management purposes at times other than the formal monitoring visits.

As illustrated in Exhibit 3.4, DNR met OLA's monitoring standards for some of the easement types we reviewed, including ACUB, Forestry, Water Bank, and Wildlife easements. These easement types are a relatively small proportion (9 percent) of the total number of easements held by DNR.

Most other easement types DNR holds that we examined were either monitored infrequently (less often than once every three years) or not at all. For the easements infrequently monitored, in almost all cases, the properties were only monitored once since the easement was acquired. For example, most of the Wild and Scenic River easements were acquired in the 1970s and 1980s, but almost all had only been visited once until recently. For some DNR easement types, such as Native Prairie Bank and Trout Stream, field staff intermittently visited the properties for management purposes. DNR staff told us that on management visits, field staff observed whether activities on the property had violated the easement agreement, even though the properties were not formally monitored. Lastly, DNR conservation easement properties that had not been visited since their acquisition included four Trout Stream and two Wild and Scenic River easements.

Exhibit 3.4: Department of Natural Resources Conservation Easement Monitoring Performance by Easement Type

Some DNR programs met our monitoring standard.

	Met Standard	Did Not Meet Standard		
		Less Than Once Every Three Years ^a	Management Visit Only ^b	No Visits
Aquatic Management Area	–	1	–	–
Army Compatible Use Buffer (ACUB)	1	–	–	–
Forestry	4	–	–	–
Metro Greenways	–	1	–	–
Native Prairie Bank	–	5	2	–
Scientific and Natural Area	–	1	2	–
Trout Stream	–	1	3	4
Water Bank	2	–	–	–
Wild and Scenic River	–	6	–	2
Wildlife	1	1	–	–
Other ^c	<u>1</u>	<u>2</u>	<u>–</u>	<u>–</u>
Total	9	18	7	6

NOTES: Exhibit identifies the number of conservation easements that met and did not meet OLA's standard to monitor the conservation easement property at least once every three years. The numbers include only the Department of Natural Resources conservation easements we reviewed that had been held for more than one year and exclude one Native Prairie Bank conservation easement that was later terminated.

^a "Less than once every three years" includes conservation easements that were visited at least one time but less frequently than once every three years.

^b "Management Visit Only" includes conservation easements that were not formally monitored but had been visited by the easement holder staff to manage the natural resources on the property.

^c "Other" includes conservation easements administered by the Parks and Trails Division, Fisheries Section, and one not assigned to a particular division.

SOURCE: Office of the Legislative Auditor.

DNR has developed a plan to improve its monitoring practices.

In interviews and in its 2011 report, DNR has admitted that it did not conduct regular monitoring in the past for several types of conservation easements.¹⁶ Similar to baseline reports, DNR staff noted that standard practices when many DNR easements were acquired, particularly those obtained in the 1970s and 1980s, did not include monitoring. To improve its monitoring practices, DNR developed a plan that established a goal of monitoring each of its easements at least once every three years. For some easement types, including Trout Stream, Scientific and Natural Area, and Wild and Scenic River, however, DNR noted that monitoring would occur to the extent that funding permitted.

¹⁶ Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011).

DEPARTMENT OF NATURAL RESOURCES CHALLENGES

As discussed previously, DNR has not met OLA standards for baseline reports or monitoring for many of its conservation easements, but the agency has taken steps in recent years to improve its management of conservation easements. In examining DNR's recent efforts, we found that:

- **As the result of longstanding inattention, the Department of Natural Resources faces challenges to providing proper management of some of its conservation easements.**

Many of DNR's easements were acquired before easement stewardship was standard practice.

One of the conservation easement types DNR had managed poorly until recent years is the Wild and Scenic River easements. The majority of DNR's 133 Wild and Scenic River easements were acquired in the 1970s and 1980s. At that time, preparing baseline reports was not a standard practice, so no baseline reports were developed for any of the Wild and Scenic River conservation easements when they were acquired. For many years, DNR did not visit or monitor most of these easements and did not contact landowners of these properties.¹⁷ DNR has also acknowledged that over time it had even lost track of the location of many of the Wild and Scenic River easements.¹⁸

Since 2008, DNR has taken substantial steps to improve its management and monitoring of these easements. As part of a broader effort to improve its long-term conservation easement stewardship, DNR hired staff in 2008 to coordinate and implement monitoring and enforcement efforts for the Wild and Scenic River easements. Since then, staff have worked to identify all Wild and Scenic River easement locations, contact all landowners, visit two-thirds of easement properties, collect baseline information and prepare reports for about one-third of easements, and track potential enforcement issues. As DNR has undertaken this work, staff have encountered many challenges, including:

- many easements have been divided into numerous parcels requiring staff to contact many more landowners per easement;¹⁹
- many of the properties have changed ownership and some subsequent landowners were not aware of the easements on their property;
- in some cases, landowners made changes to the properties that may not have been permitted by the easement agreements;

¹⁷ According to a 2010 DNR report, DNR staff conducted an aerial review of Wild and Scenic River easements on the Kettle and Rum rivers in 1990 and contacted some landowners about potential violations. Minnesota Department of Natural Resources, *The History of Wild and Scenic River Protection in Minnesota* (St. Paul, November 2010), 25.

¹⁸ Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 41.

¹⁹ As the result of subdividing properties with conservation easements into smaller parcels, the number of landowner parcels has increased from the original 133 to 288—an increase of 117 percent.

Challenges with DNR's Wild and Scenic River easements illustrate the importance of regular monitoring.

- many files lack documentation about the properties' conditions at the time of acquisition, making enforcement of easement terms more challenging; and
- in a few cases, the section of the river has moved since it was acquired, which has resulted in a substantial change in the easement boundaries.

As DNR staff have visited Wild and Scenic River easement properties and collected information for baseline reports, staff have encountered several issues that appear to be inconsistent with the conservation easement agreement terms. DNR staff told us that many of the issues are seemingly minor, such as the placement of a hunting stand on the property; but on a few properties, there have been some major changes, including substantial tree clearing and road construction. DNR staff are addressing the minor issues as they finalize baseline reports, but for some of the more serious issues, DNR staff told us that they will develop a strategy to resolve the issues after they have collected information for all the Wild and Scenic River easements. Exhibit 3.5 illustrates one of the most challenging Wild and Scenic River conservation easement cases DNR has encountered thus far. The case involves a conservation easement in which there are multiple issues, including several violations and an inaccurate legal description. Addressing these issues is likely to be difficult and time consuming.

In addition to these challenges, we found that:

- **Although the Department of Natural Resources has made progress in preparing baseline reports and monitoring conservation easements, the department told us it lacks adequate staff to meet OLA's monitoring standards.**

DNR staff have begun working toward meeting DNR's minimum easement standards and have secured funding to do so.²⁰ In the past few years, staff have prepared baseline reports for 80 of the 583 Trout Stream easements and 45 of the 133 Wild and Scenic River easements. Additionally, a staff person was recently hired to begin preparing baseline reports for 70 Native Prairie Bank easements. DNR staff reported that they have recently monitored more than 70 percent of the Wild and Scenic River conservation easements as part of collecting information for baseline reports. DNR staff also noted that it has monitored 83 Trout Stream easements and 31 Native Prairie Bank easements in recent years. DNR staff administering the Metro Greenways easements told us that field staff will have prepared baseline reports and monitored all 16 Metro Greenways easements by June 2015.

While these efforts are helping DNR improve the management of its conservation easements, DNR staff told us that the temporary staff hired to prepare baseline reports will be unable to complete the entire backlog.

²⁰ In 2008, DNR was appropriated \$520,000 to "inventory and digitize [its] conservation easements and prepare a plan for monitoring, stewardship, and enforcement." *Laws of Minnesota* 2008, chapter 367, sec. 2, subd. 5(h). In 2011, DNR was appropriated \$500,000 to complete some of the backlog of baseline reports for Trout Stream, Wild and Scenic River, and Native Prairie Bank easements. *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subd. 4(m).

Exhibit 3.5: Wild and Scenic River Conservation Easement with Several Challenging Issues

Background	In 2002, the Department of Natural Resources (DNR) accepted a conservation easement from a development company as part of a negotiated agreement to allow development along the Mississippi River.
Inaccurate Legal Description	The developer submitted the conservation easement agreement to the county with an incorrect legal description of the easement boundaries.
Division of Property and Multiple Landowners	The developer divided the property covered by the conservation easement into nine parcels and sold them to landowners, most of whom then built homes on the land. Because the legal description of the conservation easement was inaccurate, the easement boundaries extend through several landowners homes, one of which is shown below. Amending the conservation easement legal description will require working with the landowners of each of the parcels.



The photograph above shows the current legal boundaries of the conservation easement in yellow and the intended easement boundaries in orange.

Lack of Regular Monitoring	As with most other Wild and Scenic River conservation easements, DNR has not monitored the properties regularly or contacted landowners over the years.
Easement Violations	As the result of a complaint about tree cutting to a local DNR field office, DNR visited the property in 2007. Since that time, DNR has discovered the following issues that are not consistent with the easement agreement terms: <ul style="list-style-type: none"> • several instances of tree cutting on two parcels, one of which involved the destruction of more than 100 trees, • acceptance of a drainage and utility easement over the easement property, • construction of stairs to the river on at least two parcels, and • dumping of grass clippings and erosion of river banks caused by activities on the conservation easement property.

SOURCE: Office of the Legislative Auditor, based on information provided by the Department of Natural Resources.

Additionally, even when DNR finishes the backlog of baseline reports, it will still face challenges to completing the regular monitoring activities for some easement types. DNR staff told us that at current staffing levels, it would be difficult for Fisheries field staff to conduct regular monitoring for the nearly 600 Trout Stream easements. According to DNR staff, once the Wild and Scenic River baseline reports are completed, DNR will not have sufficient staff to continue monitoring these easements once every three years. However, DNR staff noted that the agency is actively pursuing a long-term solution to fund conservation easement monitoring and other aspects of easement stewardship.

ENFORCEMENT

Easement holders are responsible for ensuring that the terms of the conservation easement agreement are upheld. As such, easement holders must be prepared to enforce the easement when the terms are violated. In the next section, we discuss the extent to

Key OLA Standards for Enforcement of Conservation Easements:

- Establish a written policy on responding to easement violations.
- Obtain a reasonable and appropriate remedy.

which easement holders have an enforcement policy, the frequency of easement violations, and the ways in which easement violations have been resolved.

Enforcement Policy

When they discover a potential conservation easement violation, easement holders must decide what steps they should take to resolve the issue. While easement holders may want to consider the unique circumstances of an easement violation when determining the appropriate response, they should also have a policy that defines their process for responding to violations of conservation easement agreements. Having an enforcement policy allows easement holders to: (1) act more quickly when issues are discovered and (2) apply enforcement actions consistently, which can be critical if an easement holder has to enforce an easement in court.²¹ As a result, one of OLA's standards for enforcement is that easement holders *establish a written policy on responding to easement violations*. Among the easement holders we evaluated, we found that:

- **Most conservation easement holders had written enforcement policies, but some Department of Natural Resources divisions have not yet developed a policy for their easements.**

Both DU and MLT have enforcement policies that outline the organizations' general framework for addressing and documenting violations. BWSR's enforcement procedures note that soil and water conservation districts have the "primary responsibility" to resolve issues when landowners have not complied with easement terms. The procedures also provide specific actions the districts should take if they are unable to obtain a resolution, including involving BWSR staff to help remedy the issue.

Easement holders must determine how to resolve violations of conservation easements.

²¹ Leslie Ratley-Beach, *Managing Conservation Easements in Perpetuity* (Washington, DC: Land Trust Alliance, 2009), 265.

Currently, DNR's minimum standard is that each division or section with conservation easements should have an easement enforcement policy. To date, only a few divisions, including those responsible for Forestry, Native Prairie Bank, and Scientific and Natural Area easements, have written conservation easement enforcement policies. The staff from other DNR divisions told us they either plan to develop policies or will tailor those policies developed by other DNR managers to fit the needs of the particular easements they administer. Absent enforcement policies, DNR staff have sought guidance in handling suspected conservation easement violations from managers responsible for other conservation easement types.²² As part of DNR's effort to improve management of easements, it has received funding to develop and implement agency-wide conservation easement protocols. DNR staff told us the protocols will provide guidance to staff about what steps to take when a possible violation of an easement is detected.

Frequency of Violations

Conservation easement violations are often categorized into groups based on their severity. Common categories for easement violations include: technical, minor, and major. We adapted the Land Trust Alliance's definitions of these categories into the following:²³

Easement violations may have different levels of severity.

- **Technical:** A procedural lapse that does not adversely affect the conservation attributes or conflict with the conservation purpose of the easement. *Example: Failure to notify the easement holder when the property has been sold to a new landowner.*
- **Minor:** Actions that have a negative effect on the conservation attributes protected by the conservation easement. The violations may be remediated through restoration or another solution. *Examples: Trash dumping or clearing vegetation on a small area of the property.*
- **Major:** Actions that have a serious and often permanent negative impact on the conservation attributes protected by the easement; they also violate one or more of the express conservation purposes and terms of the easement. *Examples: Construction of houses not permitted on the easement property or widespread tree cutting.*

We examined the prevalence of violations among easements held by BWSR, DNR, DU, and MLT since the easements were acquired, but we were limited by a lack of comprehensive tracking by easement holders. In particular, none of the easement holders track technical violations. Additionally, the only easement holder for which we have systematic data on the prevalence of easement

²² DNR has convened a working group of managers from the divisions or sections that have conservation easements to discuss policies and practices. In 2 of the 15 DNR easement violations we found, staff brought the issue to the working group to discuss how best to handle the problems.

²³ Leslie Ratley-Beach, *Managing Conservation Easements in Perpetuity* (Washington, DC: Land Trust Alliance, 2009), 272-275.

violations is MLT. Given these limitations, we relied on the files we reviewed and concluded that:

- **The nonprofit organizations and the Board of Water and Soil Resources have had very few enforcement issues. In contrast, the Department of Natural Resources has had a higher incidence of violations and due to lack of monitoring, the prevalence of violations on some of its conservation easements is unknown.**

The nonprofit organizations we evaluated had a low rate of violations per easement.²⁴ Of its three conservation easement files we reviewed, DU did not encounter any violations of easement terms, as shown in Exhibit 3.6.²⁵ Also, DU staff told us that, as of June 2012, they had not discovered violations of any of its state-funded conservation easements in Minnesota. Among the MLT files we reviewed, the rate of violations per easement was 0.18, but among *all* of MLT's state-funded conservation easements, the violations per conservation easement was only 0.11.²⁶ The three violations in the MLT files we evaluated were all

Exhibit 3.6: Rate of Known Conservation Easement Violations by Easement Holder

Thus far, major violations of conservation easements have been rare.

	Total Easements Considered (N)	Number of Minor Violations	Number of Major Violations	Rate of Violations per Easement
Board of Water and Soil Resources	61	7	0	0.11
Department of Natural Resources	20 ^a	14	1	0.75
Ducks Unlimited	3	0	0	0.00
Minnesota Land Trust	17	3	0	0.18

NOTE: Exhibit includes only conservation easement files OLA reviewed that had been held for more than one year and had been monitored at least once in the past three years. We also included one Department of Natural Resources (DNR) easement that had not been monitored, but the landowner had self-reported a violation.

^a We excluded 1 DNR easement that was later terminated and 20 DNR conservation easements due to lack of recent monitoring. Without monitoring, the existence of a violation on the properties is unknown.

SOURCE: Office of the Legislative Auditor.

²⁴ Landowners may violate different terms of a conservation easement agreement with one activity. In these cases, we counted each term violation as a separate violation.

²⁵ In calculating the rate of violations per easement, we included only the easement files we reviewed that had been held for more than one year and had been monitored at least once in the past three years. We also included one DNR easement that had not been monitored, but the landowner had self-reported a violation. We counted all violations that have occurred since the easements were acquired by the easement holder.

²⁶ For all of MLT's easements, regardless of funding source, the rate of violations per easement is 0.19. Overall, it has had 12 major violations and 67 minor violations for its 417 conservation easements acquired by July 2011.

“minor.” In one instance a landowner dug a hole on the easement property, and, in another instance, someone built a dirt bike track on a portion of the protected land, which violated two separate terms of the easement agreement.

BWSR has also had very few violations of its easement agreements. Of the BWSR easement files we reviewed, the rate of violations was 0.11 per easement. The violations included growing crops on the easement property where it was prohibited and failing to restore portions of the property with native plants. Both BWSR and soil and water conservation district staff told us that the incidence of violations, particularly major violations, has been infrequent. However, there have been a few cases involving more serious issues, such as the construction of a new building entirely within the easement boundaries.

Among the files we reviewed, DNR had a higher rate of violations than the other easement holders. When excluding the conservation easements that had not been monitored in the past three years (half of the files we reviewed), the rate of violations per easement was 0.75. The rate was higher for DNR, in part, because one Wild and Scenic River conservation easement had seven violations (as described earlier in Exhibit 3.5), one of which we considered a major violation.²⁷ The other violations were minor and consisted of a couple incidences of minor tree cutting, the construction of a road and a trail, the placement of a deer stand and drainage pipes on the property, and two instances involving the construction of structures extending onto or completely on the easement property.

However, DNR may not know of all violations of its conservation easements.

The 20 DNR conservation easements we reviewed that had not been formally monitored may have violated the easements terms since the easements were acquired, but we did not consider them in this analysis because it is not known whether violations exist. For those easements that were not monitored but were visited regularly for management purposes, DNR staff told us that field staff have handled several instances of minor violations in the past and have not observed any major violations. Nevertheless, as DNR begins more formal monitoring of such easements, additional violations on these properties may be discovered.²⁸

Despite easement holders' frequent monitoring and regular contact with landowners, violations may occur in the future. Some easement holders told us that they expect that as the easement properties change ownership over time, subsequent landowners—who were not parties to the initial agreement but are bound by it—are more likely to commit violations than the original landowners. LTA has also noted that most violations happen with subsequent landowners and, therefore, it is important to provide new landowners information about the

²⁷ Another factor that may have contributed somewhat to the higher rate is that some of the conservation easements we reviewed were acquired many years ago, increasing the chances of a violation. In contrast, nearly all of the easements we reviewed from BWSR, DU, and MLT were acquired in the past ten years.

²⁸ In a 2011 report, DNR estimated that about 15 to 20 percent of the easements it had not regularly monitored would have at least one violation; however, it did not estimate the number of violations on each easement. Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 50.

easement agreement when the property changes hands.²⁹ It is also important to ensure that violations are resolved appropriately, as we discuss in the next section, to dissuade landowners from additional noncompliant activities.

Resolution of Violations

Among the OLA standards for enforcement is that easement holders should *obtain a reasonable and appropriate remedy* to any violation of a conservation easement agreement. Depending on the circumstances of the violation, an easement holder might resolve the issue in various ways, including landowner resolution or remediation, easement holder consent or approval, easement amendment, and judicial action, as shown in Exhibit 3.7. We reviewed the extent to which the easement violations were resolved and found that:

- **Easement violations were resolved for some of the conservation easements we reviewed, but more than half of the cases are ongoing.**

Of the 25 easement violations we identified through our file review, 9 had been resolved and 16 were ongoing. Most resolved violations were addressed through landowner remediation or restoration of the property. For example, for the MLT easement in which a dirt bike track was constructed on the property, the landowner restored the land and replanted the area with native vegetation. For the BWSR easements with crop encroachment and vegetation disturbance, the landowners replanted the land with the appropriate vegetation.

Violations can be resolved in a variety of ways, including judicial action.

Exhibit 3.7: Methods for Resolving Conservation Easement Violations

	Description
Landowner Resolution or Remediation	Easement holder persuades the landowner to take action to resolve the violation or restore the property.
Easement Holder Consent or Approval	Easement holder issues approval for certain activities that the easement agreement allows with the easement holder's consent.
Amendment of Easement Agreement	Easement holder and landowner agree to revise the easement agreement to allow for the activity that was considered a violation.
Judicial Action	Easement holder pursues judicial remedies, typically as a last resort, to seek restitution and to force the landowner to stop a restricted activity. Judicial remedies may include seeking a restraining order or a temporary injunction and filing a lawsuit.

SOURCE: Office of the Legislative Auditor, based on Leslie Ratley-Beach, *Managing Conservation Easements in Perpetuity* (Washington, DC: Land Trust Alliance, 2009), 298-310.

²⁹ Elizabeth Byers and Karen Marchetti Ponte, *The Conservation Easement Handbook* (Washington, DC: Land Trust Alliance and The Trust for Public Land, 2005), 136-137; Renee Bouplon and Brenda Lind, *Conservation Easement Stewardship* (Washington, DC: Land Trust Alliance, 2008), 73.

In a couple of cases, DNR resolved easement violations by providing consent or approval after the fact. In one minor violation, a landowner had built a woodshed on the conservation easement property despite easement agreement terms that prohibited structures outside of a specified location on the property without prior approval of the easement holder. However, because the easement agreement allowed a structure with DNR's permission and because the structure was placed in a location that staff determined would not affect the conservation attributes of the property, DNR staff allowed the structure to remain with a few conditions.³⁰

Among the easement violations that have not yet been resolved, some were discovered relatively recently, and the easement holder is still working with landowners to identify a solution. A number of other issues involved Wild and Scenic River easements, which as discussed earlier in the chapter, DNR staff said are being addressed as DNR finalizes the baseline reports or for more serious cases, will be handled after staff develop a strategy for enforcing these issues. In another case we reviewed involving minor tree cutting, DNR told us it is not pursuing a remedy. In this instance, a third party (that is, someone other than the landowner or easement holder) cut down a number of trees on the conservation easement property. Enforcement of violations committed by third parties are challenging to resolve because easement holders might have difficulty obtaining a remedy from a third party and might be reluctant to hold landowners responsible for a violation they did not commit. When a violation is committed by a third party, the landowner typically needs to identify the third-party violator to seek a resolution. DNR staff told us that in this case, it would be difficult to resolve the violation because the landowner did not know who had cut down the trees.

DNR and BWSR have both been involved in legal action regarding violations of conservation easements.

Although none of the files we reviewed have required judicial action thus far, a few state-funded conservation easement violations have risen to that level. More than 10 years ago, DNR sued a landowner over major violations of a Wild and Scenic River easement that involved extensive tree cutting and vegetation removal. DNR prevailed in this case and the landowner was required to restore the property; however, the cost of enforcement action for DNR was more than \$44,000.³¹ In another instance involving a conservation easement in which vegetation was removed, DNR ended up settling the issue with the landowner after filing a case in the district court.³² BWSR staff also told us it had one case that went to court, which resulted in a settlement in favor of the state.

³⁰ DNR staff required that the landowner submit a written request to place the structure on the conservation easement property and prohibited the landowner from adding any additional structures outside of designated areas of the property.

³¹ Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 50.

³² The total cost of Attorney General's Office services for this action was \$8,688. *Ibid.*

EASEMENT AMENDMENTS AND TERMINATIONS

There may be instances where changes to a conservation easement agreement are needed.

With some exceptions, a conservation easement agreement is a permanent document. However, unexpected changes due to natural causes, landowner desires, or new practices, may arise over time and require changes to the easement agreement. Additionally, some portions of property protected by a conservation easement may be taken by local government entities through eminent domain to be used for public purposes, such as roads or utility lines.

Minnesota statutes state that a conservation easement may be amended or terminated with the agreement of the easement holder and property owner.³³ Before approving changes to conservation easement agreements, however, easement holders should consider standards, funding requirements, and laws and regulations that may limit the circumstances in which an amendment or termination is acceptable.³⁴ In particular, for conservation easements funded with Outdoor Heritage or Environment and Natural Resources Trust funds, statutes require that termination of an easement (or termination of the easement on a portion of the property) be approved by the respective advisory body.³⁵ Additionally, the Lessard-Sams Outdoor Heritage Council (the advisory body for the Outdoor Heritage Fund) requires staff approval of minor amendments to conservation easement agreements and Council approval of major amendments to the agreements; no such requirements exist for easements funded by the Environment and Natural Resources Trust Fund.³⁶

Key OLA Standards for Conservation Easement Amendments and Terminations:

- Do not allow amendments to diminish the conservation benefit of the agreement.
- Prohibit amendments or terminations that result in private benefit.
- Establish a written policy for handling amendments and terminations.

Because amendments to or terminations of the conservation easement agreements can affect the conservation benefits of the land being protected, easement holders' decisions to allow these changes should be made carefully. For effective stewardship of conservation easements, OLA has established three

³³ *Minnesota Statutes* 2012, 84C.02(a).

³⁴ According to LTA, holders of conservation easements, particularly nonprofit organizations, may be confined in decisions about amendments and terminations by federal and state laws governing charitable organizations and federal code and regulations governing donated conservation easements. See Land Trust Alliance, *Amending Conservation Easements: Evolving Practices and Legal Principles* (Washington, DC: Land Trust Alliance, August 2007); and Jessica Jay, "When Perpetual is Not Forever," *Harvard Environmental Law Review*, 36 (2012): 1-78.

³⁵ *Minnesota Statutes* 2012, 97A.056, subd. 15(c)(4); and *Minnesota Statutes* 2012, 116P.15, subd. 2(c)(4).

³⁶ Staff for the Legislative-Citizen Commission on Minnesota Resources (the advisory body for the Environment and Natural Resources Trust Fund) told us they expected easement holders to request approval from the Commission for any major amendment to a conservation easement agreement.

standards for easement holders regarding amendments to the terms of the conservation easement agreement:

1. *Do not allow amendments to diminish the conservation benefit of the agreement;*
2. *Prohibit amendments or terminations that result in more than an incidental private benefit; and*
3. *Establish a written policy for handling amendments and terminations.*

We spoke with easement holders about conservation easement amendments and terminations and examined the circumstances in which they occurred in the files we reviewed. We concluded that:

- **Amendments to or terminations of state-funded conservation easement agreements have occurred infrequently and mostly with minimal effect on the conservation benefits of the property.**

Thus far, easement amendments and terminations have been infrequent.

Of the 127 files we reviewed from all easement holders, 6 had amendments to the agreements or substantial changes. The majority of these cases involved minor corrections to the legal description of the conservation easement or involved adding land to the easement property. Two of the more substantive changes were made to relatively small portions of the nearly 188,000 acres of DNR's Blandin Paper Company Forestry conservation easement. Both resulted in other types of easements being placed over one portion of the conservation easement property.³⁷ One change was agreed to after legal action was taken and the other was in exchange for restoration of another section of land.³⁸

In the files we reviewed, only two conservation easements involved termination or a potential termination. In one case, a Native Prairie Bank easement was terminated because the department acquired the property.³⁹ The other case is pending and is a request by Great River Energy to place two transmission lines on a portion of the property protected by a DNR Forestry easement. The board of Great River Energy has stated it will exercise eminent domain to obtain the land needed for the transmission lines, if necessary, to move forward with its plans.

³⁷ Aside from conservation easements, there are many different types of easements, including utility easements, which allow a specified company to use the land covered by the easement for particular purposes, and access easements, which permit the easement holder to travel across the property to get to another place or road.

³⁸ In the case involving an exchange of land, the Lessard-Sams Outdoor Heritage Council approved the proposal.

³⁹ In its 2011 stewardship report, DNR noted that seven of its conservation easements were extinguished when DNR acquired the property. DNR holds seven other conservation easements on property it has since acquired, but those conservation easement agreements specifically prohibit the extinguishment of the easement agreement if the easement holder acquired the property. Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 27.

Overall, easement holders told us that amendments to and terminations of conservation easements were rare. For example, BWSR staff told us that only about 2 percent of their conservation easements have been amended, and the majority of these amendments were technical in nature, such as corrections due to errors or ambiguities in the legal description. MLT was the only easement holder for which we had comprehensive data about changes to their easement agreements. Only 3 percent of state-funded MLT easements acquired by 2011 have had an amendment to the agreement. Additionally for all MLT easements acquired by 2011, 13 percent have had an amendment to the agreement; nearly half of these were due to technical corrections, such as an error in the legal description of the property.

However, as landowners and technology change, amendments and terminations may become more prevalent.

Although there have been few instances of conservation easement amendments or terminations, LTA has noted that as conservation easements “expand and age,” such changes are expected to be more prevalent.⁴⁰ Some of the easement holders we spoke with echoed this concern and noted that easement boundary issues may arise for some of the easements that were acquired before agencies routinely mapped the legal descriptions using mapping software. Also, DNR staff noted that there may be instances of natural disruption, such as floods or fires, and changes to the land that may require amendments to easement agreements in the future. In a 2011 DNR report, DNR stated that it is considering whether to extinguish a small number of conservation easements it holds that provide “very limited natural resource protection value or benefit to the public.”⁴¹

Despite the likelihood of future easement amendments and terminations, we found that:

- **Not all easement holders have established policies to guide decisions about easement amendments and terminations.**

DU and MLT have policies guiding amendments and terminations and are bound by federal laws for charitable organizations. A tax-exempt nonprofit organization cannot dissolve its assets in a manner that results in a private benefit (beyond any incidental benefit) or that benefits any individual or organization with a close relationship to the organization.⁴² BWSR has specific provisions in its handbook outlining the circumstances in which an amendment or termination might occur.

Similar to the standard on enforcement discussed previously, DNR’s standard is that each division responsible for easements should have a policy on amendments and terminations, but some divisions within DNR do not yet have a policy. The

⁴⁰ Land Trust Alliance, *Amending Conservation Easements: Evolving Practices and Legal Principles* (Washington, DC: Land Trust Alliance, August 2007), 10.

⁴¹ DNR staff told us that the number of easements it is considering extinguishing is fewer than ten. Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 28, 2011), 28.

⁴² 26 U.S. Code, sec. 501(c)(3) (2012). See also Land Trust Alliance, *Amending Conservation Easements: Evolving Practices and Legal Principles* (Washington, DC: Land Trust Alliance, August 2007), 25.

only divisions with such policies are those responsible for Forestry, Native Prairie Bank, and Scientific and Natural Area conservation easements. Additionally, these divisions' policies discuss easement agreement amendments but do not outline the conditions or processes that should be followed in the case of a potential termination.

MARKETABLE TITLE ACT

An important part of conservation easement stewardship is that the easement holder maintains and preserves its interest in the protected land. The intention when acquiring a perpetual conservation easement is that the land will be protected forever. However, we found that:

- ***Minnesota Statutes 2012, 541.023, commonly referred to as the “Marketable Title Act,” could imperil the permanence of perpetual conservation easements.***

The intent of the Marketable Title Act is that “ancient records” of real estate claims “shall not fetter the marketability of real estate.”⁴³ Under this Act, title to or interest in a given property expires after 40 years unless the owner demonstrates possession or re-records the claim within the 40-year period.⁴⁴ More than 20 states, including Florida, Iowa, Kansas, and Michigan, have similar laws.⁴⁵ Because conservation easements are, by their nature, nonpossessory, it may be difficult for easement holders to demonstrate “possession” as required by the Act. Instead, easement holders may need to re-file notice of their interest in the properties every 40 years to ensure the easements are not extinguished under this law.

Without further action, the Marketable Title Act may cause otherwise permanent conservation easements to expire.

It is not clear what effect this Act has on the permanence of perpetual conservation easements. We spoke with a number of easement holders and a representative from the Attorney General's Office regarding the applicability of the Marketable Title Act to conservation easements. The easement holders were generally aware of the Act and some had consulted attorneys on this issue. The easement holders generally based their interpretation on *Minnesota Statutes 2012, chapter 84C*, which explicitly states that conservation easements are assumed to be permanent unless noted otherwise. Because this section of law was enacted after the Marketable Title Act, and because it is more specific to conservation easements, easement holders told us they believed the Marketable Title Act would not extinguish their conservation easements after 40 years.

However, OLA's conversations with staff from the Attorney General's Office indicate the Marketable Title Act's possible effect on the permanence of conservation easements is a concern. The application of the Marketable Title Act

⁴³ *Minnesota Statutes 2012, 541.023, subd. 5.*

⁴⁴ Possession is most often demonstrated by residing on a property or through regular use.

⁴⁵ See, for example, *Florida Statutes 2012, chapter 712; Iowa Code 2011, 614.31; Kansas Statutes 2012, 58-3403; and Michigan Compiled Law 2012, 565.101-565.109.*

to conservation easements has not yet risen to the appellate court system.⁴⁶ As a result, it is not yet known whether the Act applies to conservation easements or what standard of “possession” for conservation easements would be required to satisfy the Act’s requirements.

STEWARDSHIP FUNDING

As discussed throughout this chapter, ongoing stewardship is important to protect the state’s investment in conservation easements; but ongoing stewardship requires funding and resources. In fact, an LTA standard, which must be met for organizations to be accredited, is that the organization has a “secure and lasting source of dedicated or operating funds sufficient to cover the costs of stewarding its land and easements over the long term and enforcing its easements....”⁴⁷

It is difficult to estimate how much money is needed to monitor and enforce easements in perpetuity.

It is difficult to determine how much stewardship funding an organization will need to adequately monitor and enforce a conservation easement in perpetuity. MLT, using a variety of assumptions about staff costs, investment income, and enforcement risks, determined an upfront, one-time amount (\$18,000 to \$22,000 in 2012) that it anticipated will cover its perpetual stewardship expenses for each easement. BWSR recently estimated its anticipated monitoring costs (\$2,400 per easement) for the next 25 years, and DNR estimated its annual anticipated monitoring costs by easement type (ranging from less than \$1,000 to \$130,000 annually); neither agency has estimated how much it would cost to provide easement stewardship in perpetuity.

In Minnesota, stewardship funding comes from several sources. In recent years, the Legislature has provided funding for some easements at the time of acquisition to cover the related stewardship costs in perpetuity; the Legislature has also provided biennial stewardship funding as part of its General Fund appropriations to state agencies. Nonprofit organizations have at times relied on private donations to pay for their stewardship costs. Additionally, sometimes the landowners of the property being protected by easements will make a contribution to pay for stewardship expenses associated with monitoring their property in perpetuity. We found that:

- **Funding for stewardship varies by easement holder and type of conservation easement.**

In general, the nonprofit organizations we evaluated—DU and MLT—manage dedicated stewardship funds, while the state agencies included in our evaluation—BWSR and DNR—rely on a mix of dedicated and one-time

⁴⁶ Several cases involving the Marketable Title Act and other types of easements (access, signage, etc.) have been heard by state courts. However, these rulings may not be applicable to cases involving conservation easements. See, for example, *Hersh Properties, LLC v. McDonald’s Corp.*, 1999, 588 N.W.2d 728.

⁴⁷ Land Trust Alliance, *Land Trust Standards and Practices, Revised 2004* (Washington, DC: Land Trust Alliance, Second Printing 2007), Standard 6G.

funding.⁴⁸ Perhaps as the result of the dedicated stewardship funding, the nonprofit organizations more consistently met higher monitoring standards, as discussed earlier in this chapter.

Although DU and MLT both meet the LTA standard and maintain dedicated conservation easement stewardship funds, they have taken different approaches.⁴⁹ To date, DU has not used state funds to pay for stewardship expenses.⁵⁰ The organization maintains a segregated fund dedicated for its conservation easement stewardship responsibilities; money for this fund comes from private donations and landowner contributions.

MLT has received a significant amount of state money dedicated for easement stewardship purposes.

In contrast, MLT has received a significant amount of state funding for conservation easement stewardship. Exhibit 3.8 illustrates the state funds MLT has received—for stewardship purposes only—for conservation easements acquired from 1998 to 2011. These funds are intended to cover the costs of stewardship in perpetuity for each easement acquired. As shown in the exhibit, the average amount of state funding MLT has received per conservation easement for perpetual stewardship purposes has increased over time, from \$2,500 per easement in 1998 to more than \$14,000 in 2011.⁵¹ MLT calculates its expected stewardship costs for each conservation easement based on its estimates of a variety of factors, such as how often monitoring is conducted, the likelihood of enforcement issues, and the frequency of changes in land ownership. MLT's recent calculations have increased expected conservation easement stewardship costs further, as the result of inflation and increasingly complex transactions, among other factors. MLT now estimates it will need between \$18,000 and \$22,000 per conservation easement to pay for typical stewardship expenses.⁵²

Similar to DU, MLT pools its stewardship money in a dedicated fund. Because all of MLT's land conservation activities are in Minnesota, MLT has not been required to segregate state funding for conservation easement stewardship from other stewardship funds. As of June 2012, MLT had a pooled conservation

⁴⁸ A supplement to individual easement holders' dedicated funds is an enforcement insurance pool. In 2011, LTA established a "charitable risk pool," called Terrafirma, which insures its members against the legal costs of enforcing a conservation easement. See <http://www.terrafirma.org/about>, accessed December 3, 2012.

⁴⁹ To achieve and maintain accreditation by the Land Trust Accreditation Commission, nonprofit organizations must have a dedicated and segregated fund for stewardship expenses.

⁵⁰ The Legislature appropriated money to DU for stewardship purposes from the Environment and Natural Resources Trust Fund in 2005, 2007, and 2008. However, requirements that DU segregate state stewardship money from other stewardship money to ensure the funds are used only in Minnesota was too burdensome for the national organization, and it returned \$136,840 to the state that had been intended to cover conservation easement stewardship costs. The organization now plans to use other funding to pay for stewardship expenses associated with its conservation easements in Minnesota.

⁵¹ MLT also receives stewardship funding from landowners and other conservation partners.

⁵² Minnesota Land Trust, *Conservation Easement Project Cost Analysis Updated 2012* (St. Paul, 2012), 2.

Exhibit 3.8: State Funding for Minnesota Land Trust's Conservation Easement Stewardship, 1998-2011

	State Funding for Stewardship	Number of Easements with State Stewardship Funding	Average State Stewardship Funding per Easement
1998	\$ 7,500	3	\$ 2,500
1999	15,000	6	2,500
2000	5,000	1	5,000
2001	11,000	1	11,000
2002	63,000	5	12,600
2003	127,000	12	10,583
2004	124,500	13	9,577
2005	32,000	5	6,400
2006	81,500	12	6,792
2007	110,500	14	7,893
2008	99,500	8	12,438
2009	64,000	7	9,143
2010	212,000	15	14,133
2011	198,500	14	14,179
Total	\$1,151,000	116	\$ 9,922

NOTES: This exhibit reflects only state funding provided for stewardship of conservation easements that were acquired from 1998 to 2011 by Minnesota Land Trust (MLT). MLT also receives stewardship funding from landowners and other conservation partners. Only 116 of MLT's 341 conservation easements acquired from 1998 to 2011 received state funding for stewardship purposes. This funding represents one-time appropriations that, in combination with other stewardship contributions and anticipated investment returns, are intended to cover all future stewardship costs associated with these easements.

SOURCE: Office of the Legislative Auditor, analysis of conservation easement data provided by Minnesota Land Trust.

easement stewardship fund with a balance of about \$2.8 million.⁵³ MLT is responsible for investing these funds and using any gains for conservation easement stewardship purposes.

In general, state agencies do not have comparable funds dedicated for easement stewardship.

State agencies are more constrained in how they can fund ongoing stewardship costs, which may affect the monitoring and oversight they can provide. Unless an agency is given statutory authority to establish a stewardship fund to pay for monitoring conservation easements over time, agencies cannot retain funding for this purpose beyond the two-year budget period. Only recently has the Legislature authorized such stewardship funds and appropriated money for stewardship from the Outdoor Heritage and the Environment and Natural Resources Trust funds for conservation easements acquired with these funds. For example, the 2012 appropriations from the Outdoor Heritage Fund included \$90,000 for BWSR to establish a "monitoring and enforcement fund" for "permanent conservation easements to enhance habitat by expanding clean water fund riparian wildlife buffers on private land."⁵⁴ The appropriations also

⁵³ Minnesota Land Trust, *Financial Statements and Independent Auditor's Report for the Years Ended June 30, 2012 and 2011* (St. Paul, November 2012), 13.

⁵⁴ *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subd. 2(a).

**BWSR and DNR
rely on
General Fund
appropriations
to fund some of
their easement
stewardship
activities.**

included \$25,000 for DNR to establish a monitoring and enforcement fund for conservation easements for Aquatic Management Areas.⁵⁵ The 2011 appropriations from the Environment and Natural Resources Trust Fund also included language permitting money appropriated from the trust fund for easement acquisition to be used “to establish a monitoring, management, and enforcement fund as approved in the work program.”⁵⁶

These recent appropriations for stewardship notwithstanding, BWSR and DNR have primarily relied on General Fund appropriations to fund their stewardship activities. BWSR allocates stewardship funding each year to soil and water conservation district staff to monitor its easements. BWSR and district staff told us the amount of stewardship funding provided per easement has decreased considerably over the years. DNR has similarly relied on General Fund or Game and Fish Fund money to pay for stewardship of many of the types of conservation easements for which it is responsible, including Trout Stream, Water Bank, and Wildlife conservation easements. In its 2011 report, DNR estimated the annual costs to provide adequate stewardship for each type of easement it holds.⁵⁷ The agency is currently working on plans to identify additional funding sources to address this need.

One notable exception in DNR is stewardship funding for Forestry conservation easements. The 2011 Legislature authorized the creation of the Forests for the Future Conservation Easement Account and deposited \$750,000 into the fund.⁵⁸ By law, the money may be spent:

...only to cover the costs of managing forests for the future conservation easements held by the Department of Natural Resources, including costs incurred from monitoring, landowner contracts, record keeping, processing landowner notices, requests for approval or amendments, and enforcement.⁵⁹

Through this account, DNR has received a small amount of dedicated stewardship funding for its Forestry conservation easements; DNR staff told us they currently expect a 1-percent rate of return on the fund.

While the dedicated stewardship funds authorized by the Legislature have provided money for conservation easement stewardship purposes, we found that:

⁵⁵ *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subd. 5(a).

⁵⁶ See, for example, *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subd. 4(i). Subsequent language in the appropriations law identified specific dollar amounts of funding to be deposited in monitoring and enforcement accounts. See *Ibid.*, subd. 20.

⁵⁷ These annual costs ranged from less than \$1,000 to adequately monitor DNR’s Northern Pike Spawning easements to \$130,000 to adequately monitor DNR Trout Stream easements. See Minnesota Department of Natural Resources, *Conservation Easement Stewardship and Enforcement Program Plan* (St. Paul, February 2011), 49.

⁵⁸ *Laws of Minnesota* 2011, First Special Session, chapter 6, art. 1, sec. 3; codified in *Minnesota Statutes* 2012, 84.68.

⁵⁹ *Minnesota Statutes* 2012, 84.68, subd. 2.

- **Some state officials and legislative staff have expressed concerns about nonprofit organizations holding state-appropriated stewardship funds outside of the State Treasury.**

As discussed above, the Legislature appropriated state funding for stewardship of conservation easements and directed nonprofit organizations and state agencies to hold and manage these funds on an ongoing basis. In particular, the law requires that:

Money received for monitoring and enforcement, including earnings on the money received, shall be kept in a monitoring and enforcement fund held by the organization and is appropriated for monitoring and enforcing conservation easements in the state.⁶⁰

By law, recipient organizations must provide an annual financial report on the easement monitoring and enforcement fund to the funding council or commission (for example, the Lessard-Sams Outdoor Heritage Council [LSOHC] or the Legislative-Citizen Commission on Minnesota Resources [LCCMR]).⁶¹ Additionally, the law requires the appropriated money to revert to the state if (1) the easement transfers to the state, (2) the easement holder fails to file an annual report on a timely basis, or (3) the easement holder fails to comply with the terms of the monitoring and enforcement plan.⁶²

Concerns have been raised about having dedicated stewardship money outside of the state's control.

Despite these reporting requirements, the Commissioner of the Department of Minnesota Management and Budget and some legislative staff have expressed concerns about dedicated stewardship funds being managed by nonprofit organizations. In a letter to legislative leaders, the commissioner recommended against having state money outside of the State Treasury.⁶³ The commissioner's and legislative staff's specific concerns include: (1) stewardship funds held by nonprofit organizations are outside of the state's control and therefore are subject to less oversight; (2) nonprofit organizations are responsible for managing the investments of these funds and, if the funds experience losses, protection of state-funded easements may be in jeopardy; (3) state money for conservation easements has been pooled with other funds, leading to less transparency of the use of state money; and (4) except in a few cases (for example, DNR Forestry conservation easements), state law does not permit state agencies to create similar dedicated accounts and hold funding for future conservation easement stewardship needs.

⁶⁰ *Minnesota Statutes* 2012, 97A.056, subd. 17.

⁶¹ *Minnesota Statutes* 2012, 97A.056, subd. 17 (LSOHC); and *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subd. 19 (LCCMR).

⁶² *Minnesota Statutes* 2012, 97A.056, subd. 17; and *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subd. 19.

⁶³ Jim Schowalter, Commissioner, Department of Minnesota Management and Budget, letter to the Speaker of the House, Majority Leader of the Senate, Chairs of the House and Senate Environment committees, and Minority Leaders of the House and Senate, *Methods for Financing Land Management Report*, January 26, 2011, 7.

RECOMMENDATIONS

Ongoing stewardship of conservation easements is an important step to ensure the conservation benefits acquired through an easement are protected. Based on our evaluation, we have several recommendations for the Legislature to consider.

Stewardship Plans and Funding

Monitoring and long-term stewardship plans are an important part of protecting the state's investment in conservation easements. Establishing a plan for regular monitoring will help to provide needed oversight of these investments. As a result, we recommend that:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, chapter 84C, to require all holders of state-funded conservation easements to have long-term stewardship plans and funding identified for monitoring.

Several holders of state-funded conservation easements, including DU, MLT, and DNR's Forestry Division, already meet this standard. Additionally, recent appropriations from the Outdoor Heritage and the Environment and Natural Resources Trust funds have allocated money for monitoring and required recipients to establish long-term stewardship plans as a condition of receiving the money.⁶⁴ However, these appropriations and their conditions do not apply to all easement holders or all easements acquired with state funds.

Neither BWSR nor DNR has dedicated funding sufficient to regularly monitor all of their conservation easements on an ongoing basis. BWSR has implemented a long-term easement stewardship plan but does not have sufficient dedicated funding for this purpose. As discussed earlier, soil and water conservation district staff monitor conservation easements annually for the first five years and then visit the properties every three years thereafter. BWSR provides stewardship money to each soil and water conservation district based on the number of conservation easements it needs to monitor that year. DNR has established minimum monitoring standards and individual divisions are working towards this goal. However, most divisions within DNR that manage conservation easements do not have dedicated funding sources for easement stewardship purposes.

Identifying funding for monitoring purposes will be challenging for BWSR and DNR divisions unless easement stewardship funding mechanisms change. A subsequent recommendation in this report provides several stewardship funding options for the Legislature to consider.

⁶⁴ See, for example, *Laws of Minnesota* 2012, chapter 264, art. 1, sec. 2, subds. 2(a), 3(a), and 4(a); and *Laws of Minnesota* 2011, First Special Session, chapter 2, art. 3, sec. 2, subd. 4(i).

Regular Monitoring

As discussed throughout this chapter, regular monitoring of conservation easements is an important function of the easement holder. During monitoring visits, the easement holder can ensure that the conservation benefits of the property are protected and that the terms of the easement agreement are being upheld. Regular monitoring can also help prevent landowner violations and subsequent enforcement actions. Because of the importance of regular monitoring, we recommend that:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, chapter 84C, to require easement holders to monitor state-funded conservation easements at least once every three years.

OLA's conservation easement standards, outlined in Exhibit 1.10, recommend that monitoring visits be conducted at least once every three years. We recommend the Legislature adopt a similar standard. Based on our file review, BWSR, DU, and MLT have largely met this standard. OLA's standard is less stringent than standards required by LTA and BWSR. As discussed previously, LTA requires annual monitoring visits, and BWSR requires annual monitoring visits the first five years the easement is in place and visits every three years thereafter.

Regular monitoring will help protect the state's investment in conservation easements.

In 2011, DNR published its minimum conservation easement stewardship standards. The plan established a minimum monitoring frequency of every one to three years, depending on the easement type. As revealed through our file review, and as acknowledged by the agency, DNR is not yet meeting this standard for all of its easements. The importance of regular monitoring can be demonstrated through the problems we identified with DNR's Wild and Scenic River easements. Many of the properties protected by Wild and Scenic River easements have only recently been visited for the first time by DNR staff. DNR staff have found a number of violations of these easement agreements and the conservation benefits of these properties may now be in jeopardy.

In addition to requiring regular monitoring of conservation easements, we recommend that:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, chapter 84C, to require holders of state-funded conservation easements to regularly report to the Legislature on their monitoring activities.

Currently, organizations that receive money for conservation easement stewardship from the Environment and Natural Resources Trust or the Outdoor Heritage funds must submit an annual financial report to LCCMR or LSOHC

Monitoring is a critical component of a successful conservation easement program and warrants additional legislative oversight.

documenting their use of the money. We think this reporting makes sense, and we think it should be extended to include monitoring activities associated with all state-funded conservation easements.

We recommend that all holders of state-funded conservation easements biennially report to the Environment and Natural Resources committees in the Minnesota House and Senate regarding their easement stewardship activities, regardless of the funding source. As we have discussed throughout this chapter, DNR has faced significant challenges to providing adequate oversight of its conservation easements. The Legislature has made—and continues to make—substantial investments in conservation easements; it should be assured that DNR is making progress on providing adequate oversight of these investments. Regular reporting on monitoring activity from other holders of state-funded conservation easements would also be useful for the Legislature to receive. Monitoring is a critical component of a successful conservation easement program and warrants additional legislative oversight. Depending on their format, these biennial monitoring reports could be combined with the reports on easement outcomes recommended in Chapter 2.

Marketable Title Act

As discussed earlier, it is not clear what effect the Marketable Title Act has on the permanence of conservation easements. One interpretation is that “permanent” conservation easements could expire after 40 years unless the holders of these easements re-file notice of their interest in the property. Until the question of the Act’s application to conservation easements is resolved in a court of law, its true impact may not be known. We therefore recommend:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, 541.023, to provide an exception to the Marketable Title Act for conservation easements.

The state has made a significant investment in perpetual conservation easements—through funding both the acquisitions and the ongoing stewardship of these easements. As a result, the state has an interest in ensuring that the permanent nature of these easements is protected. Amending *Minnesota Statutes* 2012, 541.023, is an efficient way to help protect the state’s interest in the perpetual conservation easements it has acquired. The alternative—relying on easement holders to re-file their interest in thousands of conservation easements every 40 years—is less efficient and more susceptible to errors.

More than 20 states have adopted a Marketable Title Act similar to Minnesota’s; several states, including California, Iowa, Massachusetts, and Wisconsin, have amended their Marketable Title acts to exempt conservation easements.

Stewardship Funding Options

Ongoing stewardship is an important part of preserving the state's interest in state-funded conservation easements. Access to reliable stewardship funding is an important factor in easement holders' ability to provide adequate monitoring and enforcement of conservation easements. However, the primary holders of state-funded conservation easements have different access to resources for these purposes. We recommend that:

RECOMMENDATION

The Legislature should consider different options for ongoing funding of conservation easement stewardship.

Below and in Exhibit 3.9, we present several different funding options for the Legislature to consider. As is often the case, different options present advantages and disadvantages. For this reason, we do not recommend one option over the others.

Exhibit 3.9: Stewardship Funding Options

	Summary
Status Quo	Legislature provides up-front, dedicated stewardship funding for some easement holders and types of conservation easements. The Legislature provides stewardship funds for other easements held by state agencies through General Fund or other biennial appropriations.
Stewardship Advisory Committee	Legislature establishes a state advisory committee to review and approve requests for state stewardship funding. The advisory committee manages a dedicated stewardship fund or receives biennial appropriations to allocate for stewardship purposes.
Conservation Easement Stewardship Fund	Legislature establishes a conservation easement stewardship fund in the State Treasury. Easement holders would be reimbursed from the Fund for their stewardship expenses; the Department of Administration (or another state agency) would manage the reimbursement process.
General Fund Appropriations	Legislature appropriates money from the General Fund each biennium to pay for conservation easement stewardship expenses.
Private Donations	Nonprofit organizations are required to provide stewardship funding as a condition of receiving state funding for acquiring conservation easements.

SOURCE: Office of the Legislative Auditor.

Status Quo

Under the current system, funding for stewardship is part of the initial appropriation of funds for conservation easements acquired by MLT and some divisions within DNR.⁶⁵ Recently, some of the easements acquired by BWSR have also received funding for stewardship. Easement holders that receive

⁶⁵ As of 2012, DU has not used state funding for conservation easement stewardship purposes.

stewardship funding from the Outdoor Heritage or the Environment and Natural Resources Trust funds must annually submit reports to the advisory body documenting the use and status of their stewardship funds. For the remainder of their conservation easements, BWSR and DNR have relied on existing funds—from the General Fund, the Game and Fish Fund, or other resources—to pay for costs associated with easement stewardship. DU relies on private donations and funding from other sources to pay for its easement stewardship expenses.

Advantages

An advantage to the current system is its relative efficiency: state funding is appropriated once to MLT and some state agency easement holders for all aspects of an easement. Additionally, providing the funding to the easement holders at the beginning of the transaction gives them the flexibility to use the money as needed. Of note, the Land Trust Accreditation Commission requires accredited organizations to have a dedicated account with sufficient funds to meet their stewardship responsibilities. If the Legislature adopts OLA's final recommendation of requiring nonprofit organizations that hold state-funded conservation easements to be accredited, then continuing to fund a dedicated stewardship account for those organizations for each conservation easement would help them comply with this standard.⁶⁶

Disadvantages

The disadvantages to the current system are two-fold: (1) funding appropriated to nonprofit organizations for stewardship resides outside of state control and (2) different easement holders have different access to dedicated stewardship funding.

As noted previously, the Commissioner of the Department of Minnesota Management and Budget has expressed concern about the current arrangement of stewardship funds residing outside of the state's control. Additionally, when stewardship funds are provided up front to MLT, the nonprofit organization, rather than the state, is responsible for investing the funds and ensuring adequate returns to provide the needed oversight.

The current system also creates different access to stewardship funding. MLT and some divisions within state agencies have dedicated funding for stewardship purposes. Other state agency divisions must rely on General Fund appropriations, to the extent they are available, to pay for their stewardship expenses. The differences in oversight provided by MLT and certain DNR divisions is at least partly attributable to the differences in stewardship resources.

If the Legislature continues to use this model to fund conservation easement stewardship expenses, it should consider providing dedicated funding for all easements acquired with state funds. Accordingly, the Legislature should authorize the creation of dedicated stewardship accounts for the different types of conservation easements held by state agencies.

The current system creates different access to stewardship funding.

⁶⁶ As noted previously, DU meets the Land Trust Accreditation Commission requirement by holding a dedicated stewardship account funded by private donations and other non-state sources.

Stewardship Advisory Committee

Rather than providing funds in advance for easement stewardship purposes, the Legislature could establish a stewardship advisory committee to review and approve requests for state stewardship funding. The committee would be composed of a variety of conservation stakeholders and could be located within or outside of state government. If the committee was established outside of state government, it could be housed in an organization with expertise in conservation or in managing dedicated funds. The advisory committee would either manage a dedicated stewardship fund or receive biennial legislative appropriations to allocate for stewardship purposes.

Advantages

If the stewardship advisory committee was located within state government, funds appropriated to the committee would be under state control; this would allow the funds to be invested by the State Board of Investment.⁶⁷ Additionally, the funds would be subject to state oversight and financial audits by the Office of the Legislative Auditor. If instead the committee is established outside of state government, it could leverage the expertise of community organizations. The committee would provide oversight of these funds and ensure the money is being used for its intended stewardship purposes. Vermont follows a model somewhat similar to a stewardship advisory committee. The Vermont Housing and Conservation Board has strict conservation easement stewardship standards and provides funding to help easement holders meet these standards.

Disadvantages

Currently, conservation easement stewardship funds constitute a relatively small amount of money, which may not warrant a stand-alone advisory committee. Additionally, having a committee review and approve stewardship expenses would add another layer to the process of managing conservation easements. There is no reason, at this time, to believe such oversight of stewardship expenses is needed. Finally, having this committee hold all stewardship funds would not satisfy Land Trust Accreditation Commission requirements regarding having a dedicated stewardship fund.⁶⁸ Under this option, nonprofit organizations that hold state-funded easements would have to rely on stewardship funding sources other than the state to maintain their accreditation.

Conservation Easement Stewardship Fund

Similar to the advisory committee outlined above, the Legislature could establish a conservation easement stewardship fund in the State Treasury. Easement holders would be reimbursed from the fund for their stewardship expenses; the Department of Administration (or another state agency) would manage the reimbursement process.

⁶⁷ The Minnesota State Board of Investment is the state agency responsible for the investment management of state retirement funds, trust funds, and cash accounts.

⁶⁸ In Vermont, the Vermont Housing and Conservation Board co-holds the conservation easements, which may help organizations meet the LTA standards, which are a requirement for accreditation.

There are advantages and disadvantages to creating a special committee to control stewardship money.

Having a centralized stewardship fund would place the money under state control but would add an administrative layer to the easement stewardship process.

Advantages

As with the advisory committee, the largest advantage to this option is that the stewardship money would be under state control. Funding would be provided to easement holders on a reimbursement basis only, providing a mechanism to ensure the funds were used appropriately. The Department of Administration would be responsible for verifying that expenses met the purposes of the conservation easement stewardship fund. Additionally, the funds would be subject to state oversight, including financial audits by the Office of the Legislative Auditor.

Disadvantages

Because this option simply creates a fund, without organizational expertise, there may not be significant oversight of the use of the money. The Department of Administration has minimal experience or expertise with conservation easements, and the agency would largely fill a grants-management role with respect to the funds. Similar to the advisory committee option, the stewardship fund adds another layer to the process of managing conservation easements. And, as with the previous option, having a stewardship fund under state control would not satisfy Land Trust Accreditation Commission requirements if the nonprofit organization relied solely on the state for its stewardship funding.

Rely on General Fund Appropriations

A fourth option is for easement holders to rely on General Fund appropriations each biennium to pay for conservation easement stewardship expenses. This would be similar to how some state agency divisions currently receive easement stewardship funding.

Advantages

The primary advantage to this option is that the Legislature would retain control over the use of these funds. The Legislature could determine in any given year the relative priority of conservation easement stewardship.

Disadvantages

Likely the biggest disadvantage to this approach is that it could result in funding that is inadequate to maintain the desired level of stewardship. If the state has made an investment to acquire a conservation easement, it follows that the state would want to continue to protect its investment through regular monitoring and other stewardship activities. Relying on General Fund appropriations every two years for stewardship activities requires action by the Legislature on a regular basis and does not provide certainty for easement holders. Again, this option would not satisfy Land Trust Accreditation Commission requirements if the easement holders relied solely on state funds for stewardship purposes.

Relying on biennial appropriations gives the Legislature more control but creates uncertainty for easement holders.

Relying on private donations to pay for stewardship of easements held by nonprofit organizations would leverage private dollars but may result in inadequate monitoring.

Rely on Private Donations (Nonprofit Organizations)

Finally, the Legislature could decide to not provide nonprofit organizations funding for conservation easement stewardship. Instead, stewardship funding could be required as a “match” as a condition of receiving state funding for acquiring conservation easements.

Advantages

This approach would provide a way for the state to leverage private dollars for the protection of conservation easements. If nonprofit organizations were required to use outside dollars for stewardship activities, there would not be concerns about state funding for stewardship being outside of the state’s control. It is noteworthy that this is the current model followed by DU; additionally, this option would not conflict with Land Trust Accreditation Commission requirements.

Disadvantages

Although this approach is currently being used by DU, there is no guarantee that nonprofit organizations would be able to raise the required stewardship funds. If they lacked sufficient stewardship money, it could result in inadequate monitoring of state-funded conservation easements. In the future, requiring nonprofit organizations to raise their own stewardship funds may put too large of a burden on nonprofit organizations and dissuade them from partnering with the state.

Accreditation of Private Easement Holders

This evaluation demonstrates the importance of easement holders meeting high standards for the acquisition and stewardship of conservation easements. As discussed in Chapter 1, LTA has developed widely accepted national standards for acquiring and managing conservation easements. These standards were used as a benchmark for BWSR’s and DNR’s standards, as well as for the standards developed by OLA and used throughout this evaluation. Because holding conservation easements requires ongoing responsibility for managing conservation easements, and the accreditation process ensures organizations meet rigorous standards, we recommend:

RECOMMENDATION

The Legislature should amend Minnesota Statutes 2012, 84C.01, to require all nonprofit organizations that hold state-funded conservation easements to be accredited by the Land Trust Accreditation Commission or a comparable national organization.

DU and MLT—the two primary nonprofit organizations that hold state-funded conservation easements—are currently accredited by the Land Trust

Accreditation Commission.⁶⁹ Because the process is quite rigorous, requiring accreditation for any nongovernment easement holder would create a high standard for any new organization that wants to hold state-funded conservation easements. However, the state is placing significant trust in these nonprofit organizations to acquire and manage conservation easements on behalf of the public. Ensuring that these organizations meet high standards is appropriate.

In this recommendation, we identify Land Trust Accreditation Commission requirements as the standard-bearer. The law could be written to allow for changes in national leadership regarding conservation easements and acknowledge other national standards as they are developed in the future.

⁶⁹ The Nature Conservancy, which currently holds one state-funded conservation easement, was accredited by the Land Trust Accreditation Commission in August 2012.

List of Recommendations

- The Legislature should require the Board of Water and Soil Resources and the Department of Natural Resources to develop and maintain a central database of all state-funded conservation easements in Minnesota. Additionally, the Legislature should require all holders of state-funded conservation easements to report easement acquisitions and terminations to the state for inclusion in the database. (p. 52)
- The Legislature should ensure that appropriations for conservation easements include clear and specific programmatic objectives. (p. 53)
- Prior to acquiring a conservation easement on property for which the landowner does not own the mineral rights, organizations seeking to obtain a conservation easement should evaluate the potential for mining activities. (p. 54)
- The Legislature should require holders of state-funded conservation easements to submit a biennial report documenting how the easements have produced outcomes that are consistent with state conservation plans and goals. (p. 54)
- The Legislature should amend *Minnesota Statutes* 2012, 273.117, to require tax assessors to consider the effect of a conservation easement on the property value of real property when the presence of an easement is known. (p. 55)
- The Legislature should require easement holders to submit a copy of the conservation easement agreement to the county assessor's office when a conservation easement agreement is filed with the county. (p. 55)
- The Legislature should amend *Minnesota Statutes* 2012, chapter 84C, to require all state-funded conservation easement agreements to contain certain standard provisions. (p. 56)
- The Legislature should require the state fiscal agent—typically the Board of Water and Soil Resources or the Department of Natural Resources—to review and approve easement agreements with a state investment of \$500,000 or more that are entered into by nonprofit organizations. (p. 56)
- The Legislature should amend *Minnesota Statutes* 2012, chapter 84C, to require all holders of state-funded conservation easements to have long-term stewardship plans and funding identified for monitoring. (p. 87)
- The Legislature should amend *Minnesota Statutes* 2012, chapter 84C, to require easement holders to monitor state-funded conservation easements at least once every three years. (p. 88)
- The Legislature should amend *Minnesota Statutes* 2012, chapter 84C, to require holders of state-funded conservation easements to regularly report to the Legislature on their monitoring activities. (p. 88)

- The Legislature should amend *Minnesota Statutes* 2012, 541.023, to provide an exception to the Marketable Title Act for conservation easements. (p. 89)
- The Legislature should consider different options for ongoing funding of conservation easement stewardship. (p. 90)
- The Legislature should amend *Minnesota Statutes* 2012, 84C.01, to require all nonprofit organizations that hold state-funded conservation easements to be accredited by the Land Trust Accreditation Commission or a comparable national organization. (p. 94)



January 29, 2013

James R. Nobles, Legislative Auditor
Room 140 Centennial Building
658 Cedar Street
Saint Paul, Minnesota 55155

Dear Mr. Nobles:

Thank you for the opportunity to respond to the findings and recommendations included in the evaluation report “Conservation Easements.” Overall, we believe the report does a good job of highlighting a number of key issues related to the acquisition and stewardship of conservation easements. As the agency responsible for 83 percent of the state-funded conservation easements, we value the careful and thorough assessment accomplished in your report. We offer comments in three specific areas.

Public Benefits of Conservation Easements

While there can be challenges to measuring specific conservation benefits of easements over the long-term, we believe conservation easements are an important tool to preserve wetlands, protect environmentally sensitive areas, and restore and protect land for multiple public benefits. Several statewide conservation plans acknowledge these benefits and the importance of private land protection to achieving Minnesota’s conservation goals. Specifically, the Board of Water and Soil Resources (BWSR) Reinvest In Minnesota (RIM) Reserve easements provide multiple public benefits, including protecting and restoring valuable wildlife habitat, protecting and/or improving water quality, and reducing damages from severe flooding. These benefits are measureable, and estimates of such benefits are made as part of an evaluation before a project is selected and the site restoration design is finalized.

Central Database of State-Funded Conservation Easements

We recognize the potential benefits of your recommendation for a central database of all state-funded conservation easements in Minnesota, but we also believe that the purposes of such a database must be clearly delineated, and the effort to both develop and maintain the database must be adequately funded. As your report describes, BWSR maintains a database for the easements that it holds, and the information that it contains is readily accessible on the Web. Other easement holders have their own individual databases or other tracking systems, and to merge various independent systems into one central system may be an expensive and time-consuming endeavor. We agree with the point made in your recommendation, that the effort to develop and maintain a central database of easements “will necessitate additional funding and resources.” We also believe the costs must be weighed against the potential benefits of a central database, particularly when BWSR (and presumably other easement holders) would need to continue to maintain its own, agency-specific database for monitoring purposes.

<i>Bemidji</i>	<i>Brainerd</i>	<i>Duluth</i>	<i>Fergus Falls</i>	<i>Mankato</i>	<i>Marshall</i>	<i>New Ulm</i>	<i>Rochester</i>
403 Fourth Street NW Suite 200 Bemidji, MN 56601 (218) 755-2600	1601 Minnesota Drive Brainerd, MN 56401 (218) 828-2383	394 S. Lake Avenue Suite 403 Duluth, MN 55802 (218) 723-4752	1004 Frontier Drive Fergus Falls, MN 56537 (218) 736-5445	1160 Victory Drive South Suite 5 Mankato, MN 56601 (507) 389-6784	1400 East Lyon Street Marshall, MN 56258 (507) 537-6060	261 Highway 15 South New Ulm, MN 56073 (507) 359-6074	3555 9 th Street NW Suite 350 Rochester, MN 55901 (507) 206-2889

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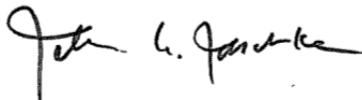
Stewardship Funding

We agree with your recommendation that the Legislature should consider options for funding conservation easement stewardship on an ongoing basis. The report correctly notes that BWSR and DNR have primarily funded easement stewardship activities out of General Fund appropriations, and such funds may not keep up with the growth in the number of easements and the need for continual, regular monitoring. It is essential that any future funding option provides secure, ongoing, and timely funds, or it may actually decrease the state's capacity to respond to ongoing stewardship needs.

Minnesota has used conservation easements as a primary and cost-effective means of investing in flood protection, habitat enhancement, clean water, and recreational opportunities for several decades. The enabling statutes were well developed and have been occasionally updated to assure they are adaptable and responsive to opportunities to use state investments to leverage federal and private sector funding. For example, the RIM program, created in 1986, has leveraged federal funding well in excess of the \$108 million state portion BWSR was responsible for during the 2001-2011 period cited in the report. We will continue to pursue adjustments and opportunities to use conservation easements to achieve the public benefits noted above in the decades ahead.

We value the work by the OLA staff to evaluate our programs and process, and we appreciate their professionalism and the respect they accorded our mission and that of our local partners to advance conservation in Minnesota. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John G. Jaschke". The signature is written in a cursive, flowing style.

John G. Jaschke
Executive Director

cc: Brian Napstad, BWSR Board Chair

Minnesota Department of Natural Resources

500 Lafayette Road · Saint Paul, Minnesota · 55155-4037

Office of the Commissioner

651-259-5555



January 29, 2013

Mr. James Nobles
Legislative Auditor
Centennial Office Building, Room 140
685 Cedar Street
St. Paul, Minnesota 55155-1603

RE: Evaluation of Conservation Easements

Dear Legislative Auditor Nobles:

Thank you for the opportunity to respond to the Conservation Easements report. Overall, DNR generally agrees with the key findings and recommendations. Changes implemented by the DNR over the last few years have been designed to address many of the findings identified in the report. Our current administration of easements lines up favorably with the best practice standards developed by your office to measure our performance.

Conservation easements are a commonly used tool to protect land for natural, scenic, or open-space values. They are also used to protect natural resources, such as forests, in which harvesting may occur. Conservation easements are often used as an alternative method of land acquisition when the acquisition of the land in fee simple is not possible. Many times landowners are not interested in selling the land in fee, but are willing to sell some of their rights to the land. Conservation easements thus provide flexibility to accommodate a landowner's interest in protecting the land while still retaining ownership.

While the report encourages more standardization for conservation easements, there is a wide variety of conservation easements in place with varying purposes. For example, a working forest conservation easement, which protects private, working forests for future forestry activities is significantly different from a native prairie bank easement that protects prairie land from plowing.

Several examples identified in the report focus on easements acquired from a period of time over 20 years ago. These easements were acquired at a time when conservation easements were a new real estate tool in Minnesota. Since that time, more exacting standards have been developed in the drafting of the terms of the conservation easements, the preparation of baseline reports at the time the easements are acquired, and the monitoring and enforcement of the easements. Given the large number of older easements in DNR's portfolio, the DNR has had a major challenge to enhance its monitoring and baseline reporting efforts to bring its work in line with current standards.

DNR has undertaken significant work to monitor its conservation easements. The funding appropriated for the Conservation Easement Stewardship and Enforcement Program, Phase II in 2011 includes funding to monitor at least 180 conservation easements. To date, 83 trout stream easements, 56 Wild and Scenic River easements and 31 Native Prairie Bank easements have been monitored by Phase II



program staff. The Phase II program also provides for completion of at least 180 baseline property reports for existing easements, and DNR will meet or exceed this goal. The work program submitted to the LCCMR for the Phase III project (and recommended for \$200,000 in funding) also includes conservation easement monitoring components. Finally, the DNR is actively pursuing a long-term solution to funding for conservation easement monitoring and other aspects of stewardship.

This report does recommend databases and state agency reviews that may be costly and would need to be funded by the legislature. Also, the report often fails to identify who would enforce the proposed new requirements and how would they do so as to private holders of conservation easements.

DNR's responses to the specific recommendations addressed in the report are as follows:

Recommendation: The Legislature should require the Board of Water and Soil Resources and Department of Natural Resources to develop and maintain a central database of all state-funded conservation easements in Minnesota. Additionally, the Legislature should require all holders of state-funded conservation easements to report easement acquisitions and terminations to the state for inclusion in the database. (p. 52)

Neither agree nor disagree. Requiring a central database of all state-funded conservation easements would be costly and would need to be continuously funded by the legislature. Funds would be needed to develop the database and to provide staffing to maintain the database. The report does not weigh the benefit of a centralized database against the cost, especially in light of the fact that the information is available in county records. Also, the report doesn't identify how the agencies would enforce a requirement for all holders of state-funded conservation easements to report their acquisitions or terminations.

Recommendation: The Legislature should ensure that appropriations for conservation easements include clear and specific programmatic objectives. (p. 53)

Agree.

Recommendation: Prior to acquiring a conservation easement on property for which the landowner does not own the mineral rights, organizations seeking to obtain a conservation easement should evaluate the potential for mining activities. (p. 54)

Agree. Knowledge of mineral rights ownership and mineral development potential should be a component of the due diligence exercised in evaluating a parcel for acquisition.

Recommendation: The Legislature should require holders of state-funded easements to submit a biennial report documenting how the easements have produced outcomes that are consistent with statewide conservation plans and goals. (p. 54)

Agree. It should be noted, though, that some state funding, such as Outdoor Heritage funding, already requires annual reports from recipients of the funds. Additional reporting requirements add to the costs for administration of the easements and the administrative costs for reviewing and responding to annual reports.

Recommendation: The Legislature should amend Minnesota Statutes 2012, 273.117, to require tax assessors to consider the effect of a conservation easement on the property value of the real property when the presence of an easement is known. (p. 55)

Not a DNR issue.

Recommendation: The Legislature should require easement holders to submit a copy of the conservation easement agreement to the county assessor's office when a conservation easement is filed with the county. (p. 55)

Not a DNR issue.

Recommendation: The Legislature should amend Minnesota Statutes, Chapter 84C, to require all state-funded conservation easement agreements to contain certain standard provisions. (p. 56)

Partially agree. We would suggest the establishment of a task force to discuss the need for and to establish standards.

Recommendation: The Legislature should require the state fiscal agent – typically the Board of Water and Soil Resources or Department of Natural Resources – to review and approve easement agreements entered into by nonprofit organizations with a state investment of \$500,000 or more. (p. 56)

Agree. However, the legislature should be clear about standards and criteria for such reviews, and how results of reviews should be considered by the nonprofit entities. Also, this would require additional funding to the state agencies to undertake this work.

Recommendation: The Legislature should amend Minnesota Statutes 2012, Chapter 84C, to require all holders of state-funded conservation easements to have long-term stewardship plans and funding identified for monitoring. (p. 87)

Partially agree. All holders of conservation easements should have stewardship plans, but there needs to be an open discussion as to whether state agencies should have dedicated funding for monitoring conservation easements held by the state.

Recommendation: The Legislature should amend Minnesota Statutes 2012, Chapter 84C, to require easement holders to monitor state-funded conservation easements at least once every three years. (p. 88)

Agree.

Recommendation: The Legislature should amend Minnesota Statutes 2012, Chapter 84C, to require holders of state-funded conservation easements to regularly report to the Legislature on their monitoring activities. (p. 88)

Agree. It should note, though, that some state funding, such as the Outdoor Heritage Funding, already requires annual reports from recipients of the funds. Additional reporting requirements adds to the costs for administration of the easements and the administrative costs for reviewing and responding to annual reports.

Recommendation: The Legislature should amend Minnesota Statutes 2012, 541.023, to provide an exception to the Marketable Title Act for conservation easements. (p. 89)

Neither agree nor disagree. The DNR's position is that the Marketable Title Act does not apply to conservation easements issued in conformance with Minnesota Statutes, chapter 84C.

Recommendation: The Legislature should consider different options for ongoing funding of conservation easement stewardship. (p. 90)

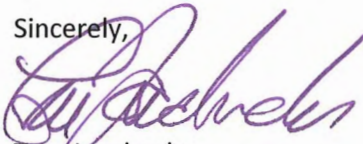
Agree. There are also other options, in addition to those identified in the report, which could also be considered.

Recommendation: The Legislature should amend Minnesota Statutes 2012, 84C.01, to require all nonprofit organizations that hold state-funded conservation easements to be accredited by the Land Trust Accreditation Commission or a comparable national organization. (p. 94)

Neither agree nor disagree. It is suggested that this type of requirement be included with the appropriation for a specific grant rather than codified in law, as private organizations often change.

Thank you for the opportunity to respond to the report. The issues you have raised will aid in providing a more balanced direction for both the department and the Legislature as funding and policy changes are considered.

Sincerely,



Tom Landwehr
Commissioner



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January 28, 2013

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James Nobles, Legislative Auditor
Office of the Legislative Auditor, State of Minnesota
Room 140 Centennial Building
658 Cedar Street
St. Paul, Minnesota 55155-1603

Dear Mr. Nobles:

Thank you for including Ducks Unlimited in your thorough review of conservation easements in Minnesota, and for the opportunity to review the final report. We appreciate the level of depth and detail of the report and the time and effort your staff put into their assignment. The report accurately documents Ducks Unlimited's sound, problem-free conservation easement work in Minnesota to date, and our rigorous easement procedures and protocols that conform to Land Trust Alliance standards. We are thankful for your positive assessment of Ducks Unlimited's conservation easement program in Minnesota.

We are pleased the report documents a lack of serious problems among the many conservation easements held by non-profit non-governmental organization (NGO) conservation partners in Minnesota, especially those held by Ducks Unlimited. It is important that the report notes only 2% of State funding spent for conservation easements between 2001 and 2011 was spent by NGOs, of which only a small fraction was spent by Ducks Unlimited on our nine relatively small easements secured with State funds.

We are especially pleased the report acknowledges Ducks Unlimited's proper conservation easement procedures and responsible use of State funds, including our strategic focus on shallow lakes consistent with several State conservation plans, our use of qualified appraisals procured through a competitive process, our timely completion of thorough baseline documentation reports, our annual easement monitoring by trained staff that has revealed no violations to date, and lack of amendments to our easements. Ducks Unlimited has worked very hard to develop policies and procedures to ensure proper use and management of both public and private funds to secure conservation easements in accordance with Land Trust Alliance standards. As the report notes, this has earned Ducks Unlimited accreditation by the Land Trust Accreditation Commission, which we take very seriously.

We greatly appreciate the opportunity to partner with the State to effectively address shared shallow lake conservation concerns and achieve our mutual wildlife habitat objectives by securing easements on private lands, and look forward to many more years of strong partnerships with the State. Conservation easements are a proven cost-effective approach to conservation of important natural resources. Not only are public needs effectively addressed, but the land remains in private ownership and the ongoing maintenance and care is provided by those private landowners, including payment of local and State taxes.

We believe that most of the report's concerns about older conservation easements are being adequately addressed by the stringent criteria currently in place to guide the delivery of conservation easement work by NGOs here. This assertion is supported by the lack of significant findings about the NGO partners evaluated in the report, especially Ducks Unlimited. The report reveals these NGO groups can be trusted to perform with efficiency

and effectiveness, and we believe that adding additional rules and complexity to an already highly regulated and scrutinized program is unnecessary. If recommendations in the report are adopted and implemented, they should focus on the future, as application of the majority of these recommendations retroactively to past and current grant agreements and conservation easements will require excessive work and result in unanticipated fiscal strain on NGO partners that will unnecessarily interfere with the delivery of conservation work in the future.

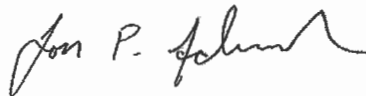
Regarding the report's concern that NGOs are given wide latitude and significant discretion to select property to protect and negotiate terms of State-funded easements, and purchase easements without approval of the State, we believe this is an essential part of our programmatic NGO conservation easement process and partnership with the State to protect shallow lake shoreland with willing private landowners. Since Ducks Unlimited and the other NGOs securing easements accept the legal responsibility (and cost) to hold, monitor, and enforce the legal easement terms in perpetuity, we believe it reasonable for NGOs to select the parcels and negotiate the terms for which we are agreeing to be responsible for monitoring and enforcing forever (in contrast to fee-title land acquisitions that are transferred to the State which may justify more State involvement). Extensive State oversight and pre-approval of our conservation easements will cause NGOs to essentially function as an agent of the State at the pace of State agencies and not as efficient, private entities. Alternatively, only funding State agency conservation easements would exclude private NGOs from assisting the State in meeting the goals and objectives of State conservation plans. Moving in this direction is not an efficient way to deliver conservation and achieve wildlife habitat objectives, and is not consistent with the partnership theme of conservation plans such as the North American Waterfowl Management Plan which was developed to foster and encourage strong State, Federal, and private conservation partnerships and trust. One of the many benefits to the State of working collaboratively with NGO partners is the efficiencies gained in effectively converting State funding into actual projects on the ground. Adding too much complexity or excessive oversight to the process jeopardizes the ability of NGO partners to work effectively to assist the State in meeting conservation goals.

Thanks again for the opportunity to comment on the report. We appreciate the opportunity to provide input, and the work that your staff have put into this important evaluation of conservation easements in Minnesota.

Very truly yours,



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cc: David Brakhage, Russ Terry, & Ben Van Gundy – Ducks Unlimited
Judy Randall and Julie Trupke-Bastidas – Minnesota Office of the Legislative Auditor



January 29, 2013

Mr. James Nobles, Legislative Auditor
Office of the Legislative Auditor
Room 140 Centennial Building
658 Cedar St.
St. Paul, MN 55155

Dear Mr. Nobles:

Thank you for the opportunity to respond to your report titled *Conservation Easements*. The Minnesota Land Trust appreciates the OLA's thoughtful evaluation of this important and effective conservation strategy. The OLA has done a thorough job of highlighting desirable standards associated with conservation easements, such as maximizing public benefit through careful project selection, recognizing the importance of clearly written easements, and understanding the necessity of adequately funding easement monitoring and enforcement. I am pleased to note the many instances in which the report highlights the rigorous "gold standards" of operation under which accredited land trusts such as the Minnesota Land Trust (MLT) and Ducks Unlimited operate.

I'd like to underscore the importance and value of non profits in protecting Minnesota's essential wildlife habitats and water quality through conservation easements. Minnesota Land Trust was founded with a mission that is deliberately aligned with the state's efforts to protect our natural and scenic heritage, resulting in the protection of miles of sensitive shoreline and thousands of acres of Minnesota's most unique natural areas. Moreover, MLT has devoted significant time and resources to working closely with other easement holders to improve conservation easement practices and is recognized as a respected resource for conservation easement expertise in Minnesota and around the country.

Therefore, I respectfully disagree with the report's assumption that non-profits are "private entities with missions and priorities separate from the state". On the contrary, the report further notes that MLT's conservation easement projects and documents consistently reflect state conservation goals.

Finally, I'd like to highlight the overall success of conservation easements and their unparalleled cost effectiveness, illustrated with two important statistics contained in the report. The known combined violation rate of state funded easements is a mere 0.24%, a fraction of the national average, cited at approximately 6%.

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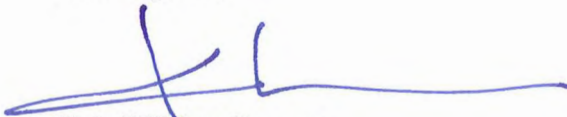
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Further, the report cites that the state spent approximately \$186 million to acquire 3,569 conservation easements over the past decade. This works out to an unarguably cost effective average of \$367 per acre protected, based on the report's cited average of 142 acres per easement. In addition, the report does not account for the incredible leverage of easement programs such as MLT's, which brings in millions of dollars in private easement donations to further stretch the state's funding.

I strongly endorse the report's recommendations that would serve to reinforce the integrity of conservation easements. As the report notes, however, there are potential unintended consequences of implementing the recommendations which could slow conservation efforts, erode easement enforcement or result in a conflict with national accreditation standards. I trust that careful consideration of these potential consequences and the goal of ensuring that the integrity and pace of conservation easement implementation will remain at the forefront of any legislative discussions on improvements.

As Minnesota's most significant conservation strategies (such as the *Minnesota Statewide Conservation and Preservation Plan* and the *Minnesota Prairie Conservation Plan*) recognize, we simply cannot meet our state conservation goals of habitat conservation and clean water without protecting private lands. I offer the Minnesota Land Trust's assistance—as well as the perspective of the “gold standards” established through the Land Trust Accreditation Commission—in the ensuing exploration of the report's recommendations to ensure that we have most effective conservation easement programs possible.

Best regards,



Kris William Larson
Executive Director

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