

# ACEP-ALE

## MINIMUM DEED TERMS WITH COMMENTARY

The most important, lasting element of an ACEP-ALE transaction is the ALE deed. This is the legal document that ensures the program purposes are met and the property stays in agricultural use. What follows are the February 2020 ACEP-ALE Minimum Deed Terms (MDTs), which satisfy the program's regulatory deed requirements. Following each term is a box with commentary providing additional information and examples. This resource is meant to guide you through the MDTs. Be sure you understand the provisions before you enroll. The final ALE deed terms need to be considered in the appraisal.

U.S. Department of Agriculture  
Natural Resources Conservation Service

February 2020

AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP)  
AGRICULTURAL LAND EASEMENT (ALE)  
MINIMUM DEED TERMS FOR THE PROTECTION OF AGRICULTURAL USE

### INSTRUCTIONS OVERVIEW

Participating entities (Grantees) can use their own deed terms for ALE but must ensure minimum requirements are included in the deed for it to be legally sufficient and conform to the statutory requirements and NRCS policy. The section below provides instructions for appending the Minimum Deed Terms (MDTs) as an exhibit to a conservation easement (CE) or incorporating them into an existing easement. Refer to the [Options for Integrating Minimum Deed Terms](#) resource to learn about the differences of each approach.

**INSTRUCTIONS FOR APPENDING:** *When these terms are appended as an exhibit to the Agricultural Land Easement deed, as opposed to being incorporated directly into an Agricultural Land Easement deed, the following requirements must be met: (1) The Agricultural Land Easement deed must be an enforceable real property easement interest that runs with the land in perpetuity or for the maximum term allowed under State law and protects the agricultural use and future viability, and related conservation values, of eligible land by limiting nonagricultural uses of that land that negatively affect the agricultural uses and conservation values or protects grazing uses and related conservation values by restoring or conserving eligible land. (2) A complete copy of the exhibit below must be attached to the Agricultural Land Easement deed at the time of closing and recordation. (3) The following paragraph must be inserted at the end of the body of the Agricultural Land Easement deed.*

### INSTRUCTIONS NOTE

For easements that append the MDTs as an exhibit, terms in the entity's conservation easement containing more restrictive language should be noted for NRCS review, approved, and the approved deed should be considered in the appraisal.

☐ = OVERVIEW

☐ = NOTE

This [INSERT DEFINED TERM FOR AGRICULTURAL LAND EASEMENT] is acquired with funds provided, in part, under the Agricultural Conservation Easement Program (ACEP). The EXHIBIT \_\_\_\_ is attached hereto and incorporated herein by reference and will run with the land [SELECT ONE: *in perpetuity* OR *for the maximum duration allowed under applicable State laws*]. As required by 16 U.S.C. Section 3865 et seq. and 7 CFR Part 1468, and as a condition of receiving ACEP funds, all present and future use of the Protected Property identified in EXHIBIT \_\_\_\_ (legal description or survey) is and will remain subject to the terms and conditions described in EXHIBIT \_\_\_\_ entitled “Minimum Deed Terms For The Protection Of Agricultural Use” that is appended to and made a part of this easement deed.

**INSTRUCTIONS FOR INCORPORATION:** *When these terms are incorporated directly into an Agricultural Land Easement deed the following three paragraphs must be included in the Agricultural Land Easement deed’s granting clause and recitals. The terms in Section I and Section II must be incorporated into the body of the Eligible Entity’s Agricultural Land Easement deed unmodified except for appropriate formatting changes, selecting options, removing instructional provisions, and substituting, as needed, the defined terms for the Agricultural Land Easement Deed, Baseline Documentation Report, Protected Property, and the Parties. Please note, the language contained below between “Exhibit \_\_\_\_” and “Section I” is not for use with this method.*

#### INSTRUCTIONS NOTE

For entities that incorporate the MDTs into their conservation easement, the MDTs must be verbatim. It is recommended the entity provide citations for each MDT in their draft ALE and note where the entity’s terms are more restrictive. This will make it easier and more efficient for NRCS to review. The approved deed should be considered in the appraisal.

#### [Include in Granting Clause after Grantor and Grantee:]

and with a right of enforcement to the United States of America (the United States), acting by and through the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) on behalf of the Commodity Credit Corporation (CCC).

#### [Include in Recitals:]

This [INSERT DEFINED TERM FOR AGRICULTURAL LAND EASEMENT] is acquired with funds provided, in part, under the Agricultural Conservation Easement Program (ACEP) 16 U.S.C. Section 3865 et seq. and 7 CFR Part 1468 for the purpose of [SELECT BASED ON ENROLLMENT TYPE:

(FARMLAND) *protecting the agricultural use and future viability, and related conservation values, by limiting nonagricultural uses that negatively affect the agricultural uses and conservation values of the Protected Property (the “Purpose of the ALE”).*

(GRASSLAND, NON-GRASSLAND OF SPECIAL ENVIRONMENTAL SIGNIFICANCE (GSS) *protecting grazing uses and related conservation values by restoring or conserving the Protected Property (the “Purpose of the ALE”).*

(GRASSLAND, GSS) *protecting grazing uses, [(SELECT ONE OR MORE) protecting and providing habitat for threatened, endangered, or at-risk species; protecting sensitive or declining native grasslands; protecting highly sensitive natural resources identified by the Grantee], and related conservation values by restoring or conserving the Protected Property (the “Purpose of the ALE”).]*

Baseline conditions of the Protected Property are set forth in a Baseline Documentation Report, a copy of which is [SELECT ONE: *appended to this easement deed* OR *maintained in the files of the Grantee*].

## MINIMUM TERMS FOR AGRICULTURAL LAND EASEMENTS

**SECTION OVERVIEW**

This section provides the statutory authority for the ALE program. It also identifies the protected property, the parties, and the enrollment type based on the purpose of the ALE. The entity chooses how the Baseline Documentation Report will be provided. For deeds that attach the MDTs as an exhibit, include the statement that addresses any inconsistencies between the exhibit and other provisions of the ALE deed.

The Agricultural Conservation Easement Program, 16 U.S.C. Section 3865 et seq., facilitated and provided funding for the purchase of an Agricultural Land Easement (“ALE”), as described in this Agricultural Land Easement Deed (“ALE Deed”), on real property described in Exhibit \_\_\_\_\_, hereafter referred to as “the Protected Property.” As used herein, references to the “ALE Deed” include this Exhibit, except where explicitly stated otherwise.

[LANDOWNER NAMES] (collectively “Grantor”), the [ELIGIBLE ENTITY NAMES] (collectively “Grantee”), and the **United States of America** (the “United States”), acting by and through the United States Department of Agriculture Natural Resources Conservation Service (NRCS) on behalf of the Commodity Credit Corporation (jointly referred to as the “Parties”) acknowledge that the ALE is acquired by the Grantee for the purpose of **[SELECT BASED ON ENROLLMENT TYPE]**:

**SECTION NOTE**

Types of agricultural operations that can occur on the Protected Property are limited to those that promote the Purpose of the ALE. Farmland enrollment provides the most flexibility in terms of types of agricultural operations that can occur, and Grasslands of Special Significance the least flexibility. ALE deeds must include provisions that protect the attributes for which a parcel was ranked and selected for funding.

**(FARMLAND)** *protecting the agricultural use and future viability, and related conservation values, by limiting nonagricultural uses that negatively affect the agricultural uses and conservation values of the Protected Property (the “Purpose of the ALE”).*

**SECTION NOTE**

Under Farmland enrollment, converting farmland to grazing land is allowed and vice versa if it is compatible with any ALE or HEL plans, as applicable.

**(GRASSLAND, NON-GSS)** *protecting grazing uses and related conservation values by restoring or conserving the Protected Property (the “Purpose of the ALE”).*

**SECTION NOTE**

Under Grassland Non-GSS enrollment, converting grazing land to farmland is not allowed unless located within an area approved for more intensive agriculture, not to exceed 10 percent of the easement area as shown in an exhibit to the ALE deed. In general, grassland enrollments contain more restrictive language.

(GRASSLAND, GSS) protecting grazing uses, [(SELECT ONE OR MORE) protecting and providing habitat for threatened, endangered, or at-risk species; protecting sensitive or declining native grasslands; protecting highly sensitive natural resources identified by the Grantee], and related conservation values by restoring or conserving the Protected Property (the “Purpose of the ALE”).]

#### SECTION NOTE

Under Grassland GSS enrollment, converting grazing land to farmland is not allowed. Further, whatever GSS selections are made, for example, protection of special wildlife habitat, the deed terms will enforce that commitment. In general, grassland enrollments contain more restrictive language.

Baseline conditions of the Protected Property are set forth in a Baseline Documentation Report, a copy of which is [SELECT ONE: appended to this easement deed OR maintained in the files of the Grantee].

#### SECTION NOTE

This report becomes the baseline for measuring changes to the protected property through annual monitoring. Trash, debris, encroachments, and other issues should be adequately addressed prior to the easement so as not to be part of the baseline condition. It is typically maintained in the files of the Grantee.

In order to ensure compliance with the Agricultural Conservation Easement Program, 16 U.S.C. Section 3865 et seq. and 7 CFR Part 1468, the following rule of interpretation will govern any and all inconsistencies between this Exhibit and other provisions of the ALE Deed. Notwithstanding any other provision of the ALE Deed, the Parties agree that all present and future use of the Protected Property is and will remain subject to all of the terms and conditions identified in the following Sections I and II. If the terms and conditions in Sections I and II are inconsistent with terms and conditions in other portions of the ALE Deed, Sections I and II will control; provided, however, that if other portions of the ALE Deed have terms and conditions that are more restrictive to the rights of the Grantor and are consistent with the provision or intent of the terms and conditions in Section I, Paragraphs 1, 2, and 4, those more restrictive terms and conditions will control. If other portions of the ALE Deed are more restrictive to the rights of the Grantor than Section I, Paragraphs 3 and 5, and Section II, then Section I, Paragraphs 3 and 5, and Section II will control.

#### SECTION NOTE

This paragraph is only included where the minimum deed terms are attached as an exhibit. It outlines how to handle inconsistencies between terms in the exhibit and terms in the remainder of the deed. When the minimum deed terms are incorporated into the body of the deed itself, this paragraph is not included; however, the principles contained in this paragraph, regarding instances where the terms can be more restrictive and when they cannot be more restrictive will be used by NRCS when reviewing and approving draft deeds.

## SECTION I - MINIMUM CONSERVATION DEED RESTRICTIONS

### SECTION I OVERVIEW

This section identifies restrictions of the ALE, including limits on impervious surfaces, non-agricultural uses, and the preservation of agricultural uses consistent with the “Purpose of the ALE”. As applicable to the Protected Property, the eligible entity will include provisions for addressing Highly Erodible Cropland, an Agricultural Land Easement Plan, and historical or archaeological resources. There are several restrictions that require the Eligible Entity to identify specific limits or options including but not limited to impervious surfaces, subdivisions, commercial enterprises related to agriculture or forestry, building envelopes, surface alteration, subsurface mineral development, mining activities for agricultural purposes, and Designated Crop Cultivation Areas.

Even if the Protected Property consists of more than one parcel for real estate tax or any other purpose or if it was acquired previously as separate parcels, it will be considered one parcel for purposes of this ALE, and the restrictions and covenants of this ALE Deed will apply to the Protected Property as a whole.

The terms and conditions of the ALE Deed run with the land and are binding upon the Grantor and Grantee and their respective heirs, successors, agents, assigns, lessees, and any other person claiming under them, any and all of whom must comply with all terms and conditions of this ALE Deed, including the following:

**1. Limitation on Impervious Surfaces.** Impervious surfaces will not exceed \_\_\_\_\_ percent [**Insert approved impervious surface percentage. Note: if greater than 2 percent, a written waiver from the Chief of NRCS or the Chief’s authorized designee is required.**] of the Protected Property, excluding NRCS-approved conservation practices. Impervious surfaces are defined as material that does not allow water to percolate into the soil on the Protected Property, including, but not limited to, buildings with or without flooring, paved areas, and any other surfaces that are covered by asphalt, concrete, or roofs. This limitation does not include public roads or other roads owned and controlled by parties with rights superior to those rights conveyed to Grantee by this ALE Deed.

*[Include the following if limited subdivision is allowed below: In the event the Protected Property is subdivided as provided for in Section I, Paragraph (2)(A), the total cumulative impervious surface of the subdivided parcels must not exceed the impervious surface limitation referenced above. The Grantor, with Grantee approval, will allocate the impervious surface limit among the subdivided parcels and ensure said impervious surface limitation is clearly defined in each subdivided parcel’s recorded instrument.]*

### SECTION I, PARAGRAPH 1 NOTE

Impervious surfaces are limited to 2% of the of the protected property, but you can request a waiver for up to 10%. See Conservation Program Manual Subpart G - 528.60 F(3) “*Before waiving the 2-percent limitation, NRCS will consider, at a minimum, population density; the ratio of open, prime, and other important farmland versus impervious surfaces on the easement area; the impact to water quality concerns in the area; the type of agricultural operation; parcel size; and the purposes for which the easement was acquired. All approved impervious surface waivers will be documented and the evidence retained in the individual easement case file. (See subpart U of this part for the “ACEP-ALE Worksheet for 2-Percent Impervious Surface Waiver Determinations” provided as an example.)*”

Gravel roads and parking lots and temporary greenhouses are not considered impervious surfaces. Other uses and structures that restrict water percolation into the ground count toward the overall limit. Entities can further restrict impervious surfaces, but because the easement is in perpetuity, they should consider how this might limit options for future agricultural operations.

**2. Limitations on Nonagricultural Uses.** Any activities inconsistent with the Purpose of the ALE are prohibited. [Note: The term “ALE grassland enrollments” refers to both general ALE grazing uses enrollments or ACEP-ALE-GSS enrollments. **Also include the following sentence for ALE grassland enrollments:** *The provisions of this ALE Deed limit the types of agricultural operations that can occur on the Protected Property to those that promote the Purpose of the ALE.*] The following activities are inconsistent with the Purpose of the ALE and are specifically prohibited, subject to the qualifications stated below:

### SECTION I, PARAGRAPH 2 NOTE

Non-agricultural uses of the protected parcel must be vetted and approved by the entity. The entity and landowner should discuss potential uses before the easement is placed on the property.

(A) *Subdivision* – [Select Option 1, 2, or 3.] [Additionally, where required by State law the following may be inserted at the end of the selected option: *Notwithstanding the foregoing, subdivision of the Protected Property is permissible when necessary to comply with State or local regulations that explicitly require subdivision to construct residences for employees working on the Protected Property. Grantor must provide written notice and evidence of such requirements to Grantee and the Chief of NRCS, or the Chief’s authorized designee (Chief of NRCS), prior to division of the Protected Property in accordance with such State or local regulations.*]

### SECTION I, PARAGRAPH 2(A) NOTE

This provision will restrict the ability to divide the parcel and convey each portion separately. If subdivision is allowed, the maximum number of separate parcels and divisions are identified in the ALE deed with required approval procedures. Think about how restricting or allowing subdivisions could affect the viability of current and future operations.

If the entity allows subdivision, each resulting parcel must meet ACEP-ALE land eligibility requirements in place when the original parcel was enrolled. Resulting parcels are subject to the impervious surface limit as allocated among the parcels when subdivision occurs. Parcels cannot be divided, subdivided, or separately conveyed unless Option 2 or 3 is chosen.

It may make sense to subdivide a large parcel before applying to ACEP-ALE. Subdivided parcels could then enroll as standalone ALE parcels. This could provide more flexibility for current and future agricultural enterprises, especially when there are multiple heirs managing the parcels.

[Option 1] Separate conveyance of a portion of the Protected Property or division or subdivision of the Protected Property is prohibited.



[Option 2] The Protected Property must not be divided or subdivided into, or separately conveyed as, more than \_\_\_\_\_ separate parcels (\_\_\_\_\_ divisions allowed), the boundaries and the allocation of the impervious surface limitation of which have been identified in EXHIBIT \_\_\_\_\_, which is appended to and made a part of this ALE Deed. To protect the Purpose of the ALE, the boundaries of such divisions have been preapproved in writing by Grantee and the Chief of NRCS, or the Chief's authorized designee (Chief of NRCS). Deviations from the identified boundaries will not be allowed. Grantor must give Grantee and the Chief of NRCS written notice prior to subdividing, dividing, or separately conveying a parcel of the Protected Property.

#### SECTION I, PARAGRAPH 2(A) NOTE

Option 2 allows subdivision into pre-approved parcels that are not subject to the additional requirement of matching or exceeding the median size of farms in the county or parish as determined by the most recent survey conducted by USDA National Agricultural Statistical Service (NASS).

Prior to closing, the entity must provide a map of the proposed subdivision and impervious surface allocation for each resulting parcel. The resulting parcels must meet the ACEP-ALE land eligibility requirements, be approved by NRCS prior to closing, and must be identified in the ALE deed as an exhibit. No further NRCS review is required at the time of future conveyance of the parcels as identified in the deed.

[Option 3] The Protected Property must not be divided or subdivided into, or separately conveyed as, more than \_\_\_\_\_ separate parcels (\_\_\_\_\_ divisions allowed). To protect the Purpose of the ALE, the boundaries of such divisions must be approved in writing by Grantee and the Chief of NRCS, or the Chief's authorized designee (Chief of NRCS), before any such division, subdivision, or separate conveyance occurs. The Chief of NRCS may only approve the division, subdivision, or separate conveyance of the Protected Property into separately conveyable farm or ranch parcels when—

1. The Grantee requests the Chief of NRCS approval to subdivide the Protected Property into separate farm or ranch parcels, after receiving a request from the Grantor;
2. The Grantor certifies to the Chief of NRCS that the requested subdivision is required to keep all farm or ranch parcels in production and viable for agricultural use and that any new owners of the subdivided Protected Property farm or ranch parcels intend to use such parcels for agricultural operations; and
3. The Chief of NRCS determines that the—
  - a. Parcels resulting from the subdivision of the Protected Property will meet ACEP land eligibility requirements of 16 U.S.C. Section 3865 et seq. as enacted on the date the original parcel was enrolled in ACEP, including the allocation of the impervious surface limitation between the subdivided parcels, and
  - b. The resulting parcel will not be below the median size of farms in the county or parish as determined by the most recent United States Department of Agriculture's National Agricultural Statistical Survey (NASS).

#### SECTION I, PARAGRAPH 2(A) NOTE

Option 3 enables the entity to submit a request to NRCS *after* closing for subdivision authorization. The resulting parcels must meet the ACEP-ALE land eligibility requirements and meet or exceed the median size of farms in the county or parish. In addition, the resulting parcels cannot exceed the impervious surface limits allocated to them. These requirements may effectively rule out subdivisions on some ALE parcels.

(B) *Industrial or Commercial Uses* –

Industrial or commercial activities on the Protected Property are prohibited except for the following:

- (i) Agricultural production and related uses in accordance with the terms and conditions of this ALE Deed;
- (ii) The sale of excess power generated in the operation of renewable energy structures and associated equipment or other energy structures that Grantee approves in writing as being consistent with the Purpose of the ALE and in accordance with the terms and conditions of this ALE Deed;

**SECTION I, PARAGRAPH 2(B) NOTE**

Renewable energy structures are only permitted for the purpose of generating power for on-farm use. Excess power may be sold. However, renewable energy development for the purpose of commercial sale is not allowed. Impervious surface limitations apply. Renewable energy structures are not required to be sited within building envelopes.

- (iii) Temporary or seasonal outdoor activities or events that do not harm the Purpose of the ALE; and

**SECTION I, PARAGRAPH 2(B) NOTE**

These activities may contribute to farm's viability and may be unrelated to the farm operation. They could include events, camps, and overnight stays. Landowners would be expected to provide evidence that the proposed activities will not degrade the resources protected by the ALE or interfere with the purpose of the ALE.

- (iv) Commercial enterprises related to agriculture or forestry including but not limited to [**Select those consistent with the Purpose of the ALE and that may occur on the Protected Property:** *agritourism; processing, packaging, and marketing of farm or forest products; farm machinery repair; farm wineries; and small-scale retail enterprises compatible with agriculture or forestry, including but not limited to cafés, shops, and studios for arts or crafts.*] [**For properties that contain historical or archaeological resources the following may be inserted:** *Commercial enterprise activities related to interpretation of the Protected Property's historic or archaeological resources.*]

**SECTION I, PARAGRAPH 2(B) NOTE**

These activities may contribute to farm's viability. Consider and list current and potential future commercial enterprises to avoid needing additional approval.



(C) *Construction on the Protected Property* – Except as otherwise permitted in this **Section I, Paragraph 2(C)**, all structures and improvements must be located within the Building Envelope(s), [**Select One (FIXED OPTION)**: containing approximately \_\_\_\_\_ total acres and described or shown in EXHIBIT \_\_\_\_\_, which is appended to and made a part of the ALE deed. **OR (FLOATING OPTION)**: of which there shall be no more than \_\_\_\_\_, containing no more than \_\_\_\_\_ total acres. The Grantor must receive prior written approval of the location and boundaries of the future building envelopes from the Grantee and the Chief of NRCS, following which, the Grantor and Grantee shall amend this ALE Deed to add an exhibit that describes the approved boundaries and locations of the Building Envelope(s).]

#### **SECTION I, PARAGRAPH 2(C) NOTE**

This provision will restrict the ability to build structures and make improvements. Construction counts toward the impervious surface limit and must be located within the building envelope(s). All existing structures must be located within a building envelope. Consider future agricultural activities to determine the number, location, and size of the envelopes. To the extent possible, building envelopes should be sited to minimize impacts on agricultural resources. For example, building envelopes could be located within existing farmstead areas and/or on less productive soils.

Refer to the deed restrictions section in the Program Manual (528.60) for a description of fixed and floating options for building envelopes. The location and boundaries of fixed envelopes are identified prior to closing as an exhibit to the deed. Floating envelopes are sited after the easement has closed by amending the deed exhibit and must be approved by NRCS. The 2018 Farm Bill permitted floating building envelopes under the conditions described above.

[Alternately, if the Protected Property will have no building envelopes, replace the preceding sentences with the following: *Except as otherwise permitted in this Section I, Paragraph 2(C), no structures or improvements, whether existing or in the future, may be constructed, replaced, or enlarged on the Protected Property.*]

#### **SECTION I, PARAGRAPH 2(C) NOTE**

Before choosing this option, consider impacts on future viability and the needs of producers in the area of the protected property.

[Include the following subparagraph if future adjustments to approved building envelopes may be considered: *The identified boundaries and locations of the approved Building Envelope(s) may be adjusted only with prior written approval from the Grantee and the Chief of NRCS. The adjusted Building Envelope(s) may not be larger than the approved Building Envelope(s) and must provide equal or greater protection of the Purpose of the ALE. Following receipt of written approval to adjust identified Building Envelope(s), the Grantor and Grantee shall amend this ALE Deed to add an exhibit that describes the subsequently approved boundaries and locations of the Building Envelope(s).*]

#### **SECTION I, PARAGRAPH 2(C) NOTE**

Future adjustments and future building envelopes (if allowed) may take significant time for approval and amendment. If approved, the grantee and/or grantor would be responsible for the legal and recording fees associated with an amendment to the ALE Deed.

Agricultural structures and utilities to serve approved buildings or structures, including on-farm energy structures allowed under **Section I, Paragraph 2(B)(ii)** and in this **Section I, Paragraph 3(C)** that neither individually nor collectively have an adverse impact on the Purpose of the ALE, may be located outside of the Building Envelopes with prior written approval of the Grantee.

#### **SECTION I, PARAGRAPH 2(C) NOTE**

Construction outside the building envelope must be approved by the entity and is limited to agricultural structures and utilities to serve on-farm needs. To the extent possible, improvements should be located where there is minimal impact on the protected resource. Examples might include wells, utility lines, and on-farm energy structures.

New roads may be constructed if they are approved in advance by Grantee, within impervious surface limits, and are necessary to carry out the agricultural operations or other allowed uses on the Protected Property. **[Add the following sentence for ALE-GSS enrollments:** *Any new roads must be constructed in a location and manner that is consistent with the Purpose of the ALE and will not negatively impact the habitat, species, or sensitive natural resources identified for protection in the Baseline Documentation Report.*]

#### **SECTION I, PARAGRAPH 2(C) NOTE**

The 2018 Farm Bill allows for grasslands enrollments to have new roads, under the same conditions as other enrollments.

Maintenance of existing roads documented on the Baseline Documentation Report is allowed; however, existing roads may not be widened or improved unless widening and improving is within impervious surface limits, approved in advance by Grantee, and necessary to carry out the agricultural operations or other allowed uses on the Protected Property.

Fences may be maintained and replaced, and new fences installed if they are necessary for agricultural operations or other allowed uses on the Protected Property or to mark boundaries of the Protected Property. Maintenance, replacement, and installation of fences must be conducted in a manner consistent with the Purpose of the ALE **[Add the following sentence for ALE-GSS enrollments:** *and will not negatively impact the habitat, species, or sensitive natural resources identified for protection in the Baseline Documentation Report.*]

(D) *Granting of Easements for Utilities and Roads* – The granting or modification of easements for utilities and roads is prohibited when the utility or road will adversely impact the Purpose of the ALE as determined by the Grantee in consultation with the Chief of NRCS.

#### **SECTION I, PARAGRAPH 2(D) NOTE**

To the extent possible, easements for utilities and roads should be located where there is minimal impact on the protected resource. This action may require significant time for approval and amendment. If approved, NRCS is not responsible for the legal and recording fees associated with an amendment to the ALE deed. Examples include, but are not limited to, utilities and roads for on-farm improvements, access and utilities for abutting properties, and renewable energy and telecommunications structures.

(E) *Surface Alteration* – Grading, blasting, filling, sod farming, earth removal, or any other activity that will disturb the soil surface or materially alter the topography, surface or subsurface water systems, or wetlands of the Protected Property is prohibited, except for the following:

- (i) Dam construction pursuant to a plan approved by the Grantee to create ponds for agricultural use, fire protection, or wildlife enhancement, including enhancement through wetland restoration, enhancement, or creation;
- (ii) Erosion and sediment control pursuant to a plan approved by the Grantee;
- (iii) Soil disturbance activities required in the construction of approved buildings, structures, roads, and utilities provided that the required alteration has been approved in writing by Grantee as being consistent with the Purpose of the ALE; and
- (iv) **[Select One: *Agricultural activities* OR *Grazing uses or grassland restoration*]** and related conservation activities conducted in accordance with the terms and conditions of this ALE Deed **[Insert if the agricultural land easement plan paragraph is included: and the agricultural land easement plan as described in Section I, paragraph 4]**.

#### SECTION I, PARAGRAPH 2(E) NOTE

Surface alteration can have detrimental effects on the soil. Therefore, to the extent possible, these activities should be located where there is minimal impact.

(F) *Surface and Subsurface Mineral Exploration and Extraction* – Mining or extraction of soil, sand, gravel, oil, natural gas, fuel, coal, or any other mineral substance owned by Grantor as of the date of this ALE Deed or later acquired by Grantor, using any surface mining, subsurface mining, or dredging method, from the Protected Property is prohibited **[Include the following if either of the optional mineral extraction options below are used: except as otherwise provided in this Paragraph (F)]**.

#### SECTION I, PARAGRAPH 2(F) NOTE

In general, the ALE deed prohibits surface and subsurface mineral exploration and extraction. However, the entity is provided the option of allowing limited mining activities for agricultural purposes or subsurface mineral development with several requirements, including approval by the entity and NRCS. The 2018 Farm Bill permitted subsurface mineral development with certain limitations.

If a third party owns or leases the oil, natural gas, or any other mineral rights associated with the Protected Property at the time this ALE Deed is executed, and their interests have not been subordinated to this ALE, the Grantor must require, to the greatest extent possible, that any oil, natural gas, and mineral exploration and extraction conducted by such third party is conducted in accordance with this Paragraph (F). Any mineral leases or other conveyances of minerals entered into or renewed after the date of this ALE Deed are subordinate to the terms of this ALE Deed and must incorporate by reference this ALE Deed.

### SECTION I, PARAGRAPH 2(F) NOTE

This is a remedy if a third-party oil, natural gas, or mineral rights interest is not identified and/or subordinated prior to the ALE. In this situation, the landowner should ensure any mineral development is limited to the subsurface and adheres to requirements listed in the optional additional subsurface mineral development language section below.

**[Include the following subparagraph if a limited allowance for agricultural purposes may be authorized:** *Limited mining activities for materials (e.g., sand, gravel, or shale) used to facilitate the agricultural operations on the Protected Property are allowed where the extraction of such materials is limited, localized, and small with a defined area and acreage [SELECT ONE: identified in EXHIBIT \_\_\_\_ OR approved prior to extraction by the Grantee, not to exceed \_\_\_\_ acres,] and does not harm the Purpose of the ALE.*

### SECTION I, PARAGRAPH 2(F) NOTE

This provision allows for the limited mining of sand and gravel for agricultural purposes and is not related to commercial mineral development. For example, a landowner may extract material to maintain farm roads. The area could be identified in an exhibit to the deed or approved prior to extraction by the entity.

**[The following may be inserted to qualify the above if Grantee chooses to allow subsurface mineral development as an alternative to a complete prohibition on mineral exploration and extraction on the Protected Property – Beginning of Optional Additional Subsurface Mineral Development Language:** *Subsurface mineral development on the Protected Property is allowed in accordance with this Paragraph (F), if approved by Grantee and Chief of NRCS. Grantee and Grantor must demonstrate prior to the initiation of mineral development activity that such subsurface mineral development shall—*

- (i) *Be conducted in accordance with applicable State law;*
- (ii) *Have a limited and localized impact;*
- (iii) *Not harm the Purpose of the ALE;*
- (iv) *Not materially alter or affect the existing topography, as determined by Grantee and the Chief of NRCS;*
- (v) *Comply with a subsurface mineral development plan that includes a plan for the remediation of impacts to the Purpose of the ALE, which includes reclaiming and restoring all areas of the Protected Property that are impacted by the subsurface mineral development and such plan is approved by Grantee and the Chief of NRCS prior to the initiation of mineral development activity.*
- (vi) *Not be accomplished by any surface-mining method;*
- (vii) *Be within the impervious surface limits described in Section I, Paragraph 1; and*
- (viii) *Use practices and technologies that minimize the duration and intensity of impacts to the Purpose of the ALE.*

*All areas of the Protected Property that are impacted by subsurface mineral development pursuant to this section must be reclaimed and restored within a reasonable time, as determined by the Grantee and Chief of NRCS, at cessation of subsurface mineral development activities.*

*Impervious surfaces, as defined in Section I, Paragraph 1, include any surface disturbance or impervious surfaces associated with subsurface mineral development allowed by this paragraph. End of Optional Additional Subsurface Mineral Development Language]*

#### SECTION I, PARAGRAPH 2(F) NOTE

This provision allows subsurface mineral development. If it interferes with the percolation of water into the ground, it will count toward the impervious surface limit. There is no requirement that the subsurface mining occur within a building envelope as long as the other requirements are satisfied.

**[Include the following paragraph for all ALE Grassland Enrollments: (G) Crop Cultivation. Except for grazing uses and grassland restoration and conservation, the cultivation or production of crops, nonperennial forages for human or domestic animal consumption, crop seed production, or planting of orchards, vineyards, berries, tree farms, or other perennial nongrassland agricultural product is prohibited [Include the following if agricultural intensification may be permitted on ALE Grassland Enrollments that are non-GSS (not allowed on ALE-GSS enrollments): outside of the Designated Crop Cultivation Areas on the Protected Property, identified in Exhibit \_\_\_\_\_, the extent of such areas may not exceed [Insert Percent Not to Exceed 10 Percent] \_\_\_\_\_ percent of the Protected Property, the agricultural uses, location, and boundaries of which must be compatible with the purpose of the ALE and be approved in advance, in writing by the Grantee.]**

#### SECTION I, PARAGRAPH 2(G) NOTE

For ALE Grassland enrollments that are non-GSS (grasslands of special environmental significance), more intensive agriculture may be permitted on up to 10% of the easement area, identified as a Designated Crop Cultivation area in exhibit to the deed. If 10% of the property is already being cultivated, no additional cultivation would be permitted. To allow for maximum flexibility in future operations, Designated Crop Cultivation Areas should be identified even if there is currently no plan for non-grassland uses. Future agricultural uses, location, and boundaries must still be approved in advance.

For GSS enrollments, no cultivation is permitted on the property except for grazing uses and grassland restoration and conservation. This restriction also applies to areas under cultivation at the time of enrollment.

**3. Preserving Agricultural Uses.** The provisions of this ALE Deed and associated exhibits will not be interpreted to restrict the types of agricultural operations that can function on the Protected Property, so long as the agricultural operations are consistent with the long-term viability of the Protected Property and the Purpose of the ALE. **[The preceding sentence must be struck for ALE grassland enrollments.]** No uses will be allowed that violate Federal laws, including Federal drug laws, or that decrease the ALE's protection for the Purpose of the ALE. Allowed uses of the Protected Property include the specific uses allowed in Section I, Paragraph (2)(B)(i)–(v) and the following activities, subject to the qualifications stated below:

#### SECTION I, PARAGRAPH 3 NOTE

It is important to understand the state's definition of agricultural use and confer with NRCS to determine whether the agency will restrict the types of agricultural operations that can occur on the protected property. According to NRCS regulations, "agricultural uses" means activities defined by a state's farm or ranch land protection program or, where no program exists, by the state's agricultural use tax assessment program. NRCS will restrict the types of agriculture otherwise included in a state's definition that would constitute a violation of federal law, limit future agricultural viability, degrade soils or the agricultural nature of the land or the related natural resources. Sod farming and concentrated animal feeding operations are examples of agricultural uses that are inconsistent with ALE.

(A) *Agricultural Production* – The production, processing, and marketing of [**Select One:** *agricultural crops and livestock* **OR** *livestock and agricultural products compatible with the Purpose of the ALE*] are allowed provided these activities are conducted in a manner consistent with the terms of the ALE deed [**Insert if the agricultural land easement plan Section I, Paragraph 4 is included:** *and the agricultural land easement plan described in Section I, Paragraph 4*].

#### SECTION I, PARAGRAPH 3(A) NOTE

Grassland enrollments must select “livestock and agricultural products compatible with the purpose of the ALE” as the permissible type of agricultural production.

(B) *Forest Management and Timber Harvest* – Forest management and timber harvesting are allowed, provided these activities are carried out, to the extent practicable, in accordance with current, generally accepted best management practices for the sites, soils, and terrain of the Protected Property [**Insert if a forest management plan is included in Section I, Paragraph 4:** *and in accordance with a written forest management plan as described in Section I, Paragraph 4*].

#### SECTION I, PARAGRAPH 3(B) NOTE

If the entity does not include a reference to a forest management plan in the ALE, they may still require management plans for future activities to comply with state laws and best practices. Some entities have their own guidelines for forest management and timber harvest that should be provided to the landowner.

(C) *On-Farm Energy Production* – Renewable energy production is allowed for the purpose of generating energy for the agricultural and residential needs of the Protected Property. Renewable energy sources must be built and maintained within impervious surface limits and consistent with the Purpose of the ALE.

#### SECTION I, PARAGRAPH 3(C) NOTE

The provision restricts on-farm energy production to on-farm use and clarifies that these structures count toward impervious surface limits. Some entities have their own guidelines for on-farm energy production that should be provided to the landowner. On-farm energy structures are not required to be located within the building envelope, but some entities may consider this a best practice. If siting in the building envelope is not practical, siting on nonprime soils and land that provides marginal production is preferred.



**[Include the following paragraph any time the property is in grassland use that is considered during ranking and selection, is an ALE grassland enrollment, or funded for conservation purposes that include conserving or restoring grassland uses or grassland dependent species: (D) Grassland Uses of the Protected Property –** Grantors are allowed to graze, hay, harvest for hay and noncrop seed production, mow, construct fire breaks, conduct fire presuppression and rehabilitation activities, and conduct common grazing practices, including cultural practices, consistent with the provisions of this ALE Deed and the Purpose of the ALE. The term “common grazing practices” means those practices customary to the region where the Protected Property is located related to livestock grazing, forage management, and maintenance of infrastructure required to conduct livestock grazing on the Protected Property. Grantors must not hay, mow, or harvest for seed during certain nesting seasons for birds whose populations are in significant decline. Determinations of birds whose populations are in significant decline, nesting seasons for such birds, and the areas of the Protected Property affected by this restriction will be set forth within **[Select all that apply: the Baseline Documentation Report, the ALE Plan, and the grassland management plan described in Section I, Paragraph 4]**.

### SECTION I, PARAGRAPH 3(D) NOTE

ALE enrollments awarded ranking points for grassland uses must comply with these provisions. Landowners should understand and agree to these nesting season prohibitions before enrolling in ALE.

**[Include the following paragraph and each applicable clause if the Protected Property contains highly erodible cropland or is an ACEP-ALE-GSS parcel on an FY 2019 ALE-agreement, and for each agricultural land easement plan the entity has otherwise agreed to:**

**4. Agricultural Land Easement Plan.** *The Grantee shall prepare an agricultural land easement plan (the “ALE Plan”) in consultation with the Grantor and as needed NRCS. The Grantee agrees to update the ALE Plan, in consultation with the Grantor and as needed, NRCS, in the event the agricultural uses or ownership of the Protected Property change. A copy of the current ALE Plan is kept on file with the Grantee.*

**[INCLUDE THE FOLLOWING ONLY IF ENTITY AGREED TO HAVE A GENERAL ALE PLAN:** *The ALE Plan shall describe the farm or ranch management system, describe the natural resource concerns on the Protected Property, describe the conservation measures and practices that may be implemented to address the identified resource concerns, and promote the long-term viability of the land to meet the Purpose of the ALE.]*

### SECTION I, PARAGRAPH 4 NOTE

In general, landowners are not required to have land management plans to participate in ACEP-ALE. This is a change from the 2014 Farm Bill which required the development of an ALE Plan for all projects. Now, there are only some circumstances that require plan development and implementation.

ALE enrollments awarded ranking points for an ALE Plan and associated management plans must include this provision in the deed. If the entity does not include this provision, that does not prevent them from requiring management plans for future activities to comply with state laws and best practices. For example, the entity may require landowners to adhere to a forest management plan should they decide to do a timber harvest.

**[INCLUDE THE FOLLOWING IF PARCEL CONTAINS HIGHLY ERODIBLE CROPLAND:** *The ALE Plan shall include a conservation plan that complies with 7 CFR Part 12 pertaining to all highly erodible cropland on the Protected Property. If the NRCS standards and specifications for highly erodible cropland are revised after the date of this ALE Deed based on an Act of Congress, NRCS will work cooperatively with the Grantor and Grantee to develop and implement a revised conservation plan.]*

#### **SECTION I, PARAGRAPH 4 NOTE**

NRCS will prepare a conservation plan for highly erodible cropland (HEL plan) in consultation with the landowner prior to closing, if applicable. The HEL plan can be a stand-alone Conservation Plan or be incorporated into an optional ALE Plan. Landowners must maintain the HEL plan and update it prior to changing agricultural uses. New landowners are required to update the HEL plan with NRCS to reflect their agricultural uses.

**[INCLUDE THE FOLLOWING FOR ALL ACEP-ALE-GSS PARCELS ON FY 2019 ALE-AGREEMENTS OR IF THE ENTITY HAS AGREED TO HAVE A GRASSLAND MANAGEMENT PLAN:** *The ALE Plan shall include a grassland management plan that describes the grassland resource; the management system and practices that conserve, protect, or enhance the viability of the grassland; and as applicable any habitat, species, or sensitive natural resources requirements, permissible and prohibited activities, and any associated restoration plans.]*

**[INCLUDE THE FOLLOWING IF THE ENTITY HAS AGREED TO HAVE A FOREST MANAGEMENT PLAN:** *The ALE Plan shall include a forest management plan that describes the management system and practices that conserve, protect, or enhance the viability of the forest land and as applicable, any significant conservation benefits. The forest management plan must be prepared by a professional resource manager, in consultation with the Grantee.]*

**[Include the following paragraph if eligibility of the land for ACEP-ALE is based on the presence of historical or archaeological resources or the project received ranking points for the multifunctional benefits of agricultural land protection for historical and archaeological resources (Note: Number as paragraph 4 if the preceding ALE plan paragraph is not included):**

5. **Historic or Archaeological Resources.** *Existing archaeologically, culturally, or historically significant features on the Protected Property including, but not limited to, such features as documented in the Baseline Documentation Report, must be maintained consistent with the guidelines provided in The Secretary of Department of the Interior's Standards for the Treatment of Historic Properties pursuant to 36 CFR Part 68, as amended. The up-to-date version of such guidelines must be maintained by Grantee in the Baseline Documentation Report and made available to Grantor upon request. The archaeologically, culturally, or historically significant features may not be altered or removed without Grantee's prior written approval, which approval will not be given except where the proposed activity is accomplished in accordance with the guidelines provided in the Secretary of the Department of the Interior's Standards for the Treatment of Historic Properties.]*

#### **SECTION I, PARAGRAPH 5 NOTE**

ALE enrollments awarded ranking points for historic or archaeological resources must include this provision. Landowners should understand and agree to maintain these features according to the Department of the Interior's Standards for the Treatment of Historic Properties.

## SECTION II - PROTECTION OF THE UNITED STATES' INTERESTS

### SECTION II OVERVIEW

ACEP-ALE easements represent a significant public investment in agricultural land. Therefore, statutory clauses are inserted into the ALE Deed to protect the interests of the United States. This section describes such protections including the U.S. right of enforcement, general disclaimer and grantor warranty, environmental warranty, administrative actions, and amendments.

**1. United States Right of Enforcement.** Pursuant to 16 U.S.C. Section 3865 et seq., the United States is granted the right of enforcement that it may exercise only if the terms of the ALE Deed are not enforced by the Grantee. The Secretary of the United States Department of Agriculture (the “Secretary”) or the Secretary’s assigns, on behalf of the United States, may exercise this right of enforcement under any authority available under State or Federal law if the Grantee, or its successors or assigns, fails to enforce any of the terms of this ALE Deed, as determined in the sole discretion of the Secretary.

In the event the United States exercises this right of enforcement, it is entitled to recover any and all administrative and legal costs associated with any enforcement or remedial action related to the enforcement of this ALE Deed from the Grantor, including, but not limited to, attorney’s fees and expenses related to Grantor’s violations. In the event the United States exercises this right of enforcement, it is entitled to recover any and all administrative and legal costs associated with any enforcement of this ALE Deed from the Grantee, including, but not limited to, attorney’s fees and expenses related to Grantee’s violations or failure to enforce the ALE Deed against the Grantor, up to the amount of the United States’ contribution to the purchase of the ALE.

The Grantee will annually monitor compliance and provide the United States with an annual monitoring report that documents that the Grantee and Grantor are in compliance with the ALE Deed. If the annual monitoring report is insufficient or is not provided annually, or if the United States has a reasonable and articulable belief of an unaddressed violation, as determined by the Secretary, the United States may exercise its right of inspection. For purposes of inspection and enforcement of the ALE Deed and the United States ALE-Agreement with the Grantee, the United States will have reasonable access to the Protected Property. Prior to its inspection of the Protected Property, the United States shall provide advance notice to Grantee and Grantor and provide Grantee and Grantor a reasonable opportunity to participate in the inspection.

In the event of an emergency, the United States may enter the Protected Property to prevent, terminate, or mitigate a potential or unaddressed violation of the ALE Deed and will give notice to Grantee and Grantor at the earliest practicable time.

### SECTION II, PARAGRAPH 1 NOTE

Failing to provide an annual monitoring report can trigger an on-site inspection by NRCS with advance notice to the landowner and entity. If the U.S. exercises this right of enforcement, it is entitled to recover administrative and legal costs related to the enforcement of this ALE Deed from the landowner and entity, up to the amount of the U.S. contribution. The 2018 Farm Bill limited the U.S. right of inspection, specifying conditions that enable the U.S. to exercise its right, incorporated above.

**2. General Disclaimer and Grantor Warranty.** The United States, its employees, agents, and assigns disclaim and will not be held responsible for Grantee's or Grantor's negligent acts or omissions or Grantee's or Grantor's breach of any representation, warranty, covenant, or agreements contained in this ALE Deed, or violations of any Federal, State, or local laws, including all Environmental Laws (defined below) including, without limitation, those that give rise to liabilities, claims, demands, losses, expenses, damages, fines, fees, penalties, suits, proceedings, actions, costs of actions, or sanctions asserted by or on behalf of any person or governmental authority, and other liabilities (whether legal or equitable in nature and including, without limitation, court costs, and reasonable attorneys' fees and attorneys' fees on appeal) to which the United States may be subject or incur relating to the Protected Property.

Grantor must indemnify and hold harmless the United States, its employees, agents, and assigns for any and all liabilities, claims, demands, losses, expenses, damages, fines, fees, penalties, suits, proceedings, actions and costs of actions, sanctions asserted by or on behalf of any person or governmental authority, and other liabilities (whether legal or equitable in nature and including, without limitation, court costs, and reasonable attorneys' fees and attorneys' fees on appeal) to which United States may be subject or incur relating to the Protected Property, which may arise from, but are not limited to, Grantor's negligent acts, omissions, or breach of any representation, warranty, covenant, agreements contained in this ALE Deed or violations of any Federal, State, or local laws, including all Environmental Laws (defined below).

### SECTION II, PARAGRAPH 2 NOTE

This is a standard disclaimer to hold harmless the U.S. against entity or landowner errors, negligence, or omissions.

### 3. Environmental Warranty.

As used herein, "Environmental Law" or "Environmental Laws" means any and all Federal, State, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies, or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, hazardous materials, worker and community right-to-know, hazard communication, noise, radioactive material, resource protection, subdivision, inland wetlands and watercourses, health protection, and similar environmental health, safety, building, and land use as may now or at any time hereafter be in effect.

As used herein, "Hazardous Materials" means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infectious materials, and any other element, compound, mixture, solution, or substance that may pose a present or potential hazard to human health or the environment.

Grantor warrants that it is in compliance with, and will remain in compliance with, all applicable Environmental Laws. Grantor warrants that there are no notices by any governmental authority of any violation or alleged violation of, noncompliance or alleged noncompliance with, or any liability under, any Environmental Law relating to the operations or conditions of the Protected Property. Grantor further warrants that it has no actual knowledge of an undisclosed release or threatened release of Hazardous Materials, as such substances and wastes are defined by applicable Federal and State law.

Furthermore, Grantor warrants the information disclosed to Grantee and United States regarding any past violations or noncompliance with Environmental Laws and associated remedial actions, or any past releases of Hazardous Materials and any associated remedial actions is complete and accurate.

Moreover, Grantor hereby promises to hold harmless and indemnify Grantee and the United States against all litigation, claims, demands, penalties and damages, including reasonable attorneys' fees, arising from or connected with the release or

threatened release of any hazardous materials on, at, beneath or from the Protected Property, or arising from or connected with a violation of any Environmental Laws by Grantor or any other prior owner of the Protected Property. Grantor's indemnification obligation will not be affected by any authorizations provided by Grantee or the United States to Grantor with respect to the Protected Property or any restoration activities carried out by Grantee on the Protected Property; provided, however, that Grantee will be responsible for any Hazardous Materials contributed after this date to the Protected Property by Grantee.

## SECTION II, PARAGRAPH 3 NOTE

In this section, the landowner warrants compliance with environmental laws, accurate disclosure of any known environmental issues, and holds the entity and the U.S. harmless for any environmental claims.

**4. Extinguishment, Termination, and Condemnation.** The interests and rights under this ALE Deed may only be extinguished or terminated with written approval of the Grantee and the United States. Due to the Federal interest in this ALE, any proposed extinguishment, termination, or condemnation action that may affect the United States' interest in the Protected Property must be reviewed and approved by the United States.

With respect to a proposed extinguishment, termination, or condemnation action, the Grantee and the United States stipulate that the fair market value of the ALE is \_\_\_\_\_ percent, hereinafter the "Proportionate Share," of the fair market value of the land unencumbered by this ALE. The Proportionate Share will remain constant over time.

If this ALE is extinguished, terminated, or condemned, in whole or in part, then the Grantor must reimburse Grantee and the United States an amount equal to the Proportionate Share of the fair market value of the land unencumbered by this ALE. The fair market value will be determined at the time all or a part of this ALE is terminated, extinguished, or condemned by an appraisal that meets the Uniform Standards of Professional Appraisal Practice (USPAP) or Uniform Acquisition Standards or Federal Land Acquisition (UASFLA). The appraisal must be completed by a certified general appraiser and be approved by the Grantee and the United States.

The allocation of the Proportionate Share between the Grantee and the United States will be as follows: (a) to the Grantee or its designee [**Calculate and enter the percent of fair market value of the ALE provided based on the sum of the Grantee's contributions and Grantor donations toward the acquisition value of the easement**], \_\_\_\_\_ percent of the Proportionate Share; and (b) to the United States \_\_\_\_\_ percent of the Proportionate Share. Until such time as the Grantee and the United States receive the Proportionate Share from the Grantor or the Grantor's successor or assign, the Grantee and the United States each have a lien against the Protected Property for the amount of the Proportionate Share due each of them. If proceeds from termination, extinguishment, or condemnation are paid directly to Grantee, the Grantee must reimburse the United States for the amount of the Proportionate Share due to the United States.

## SECTION II, PARAGRAPH 4 NOTE

Easement administration actions are rarely approved. The actions must be unavoidable, have a public benefit, and could not have been anticipated when the easement was established. Easement administration actions are discretionary and therefore, not appealable. If NRCS determines termination is in the interest of the federal government, the U.S. and the entity will be fully compensated for the fair market value (FMV) of their interests in land. The U.S. is also entitled to any costs and damages related to the termination. The majority of NRCS-approved terminations are for a portion of the easement.

In the event an ALE, or a portion of an ALE, is terminated and the property is sold, exchanged, or taken, the Grantee (entity) and the U.S. are each entitled to a "Proportionate Share" of the proceeds from the sale of the property. The "Proportionate Share" is determined at the time the ALE is granted. It is specified as a percent and does not change. **The "Proportionate Share" is equal to the FMV of the ALE divided by the FMV of the unencumbered property.** These values are established by the appraisal report that supports the ALE purchase. Lastly, the Proportionate Share is allocated between the Grantee and the U.S.

For example, let's assume the appraisal determines the FMV of the property unencumbered to be \$500,000 and determines the FMV of the property encumbered by the ALE is \$100,000. That means the FMV of the ALE is \$400,000. The Proportionate Share would be set at 80%.

Next, assume the U.S. contributed \$200,000 toward the purchase of the ALE, the entity contributed \$40,000, and the landowner donated \$160,000. If an appraisal determines the FMV of the unencumbered property **at the time of termination** is \$2 million, the Proportionate Share is  $0.80 \times \$2 \text{ million} = \$1.6 \text{ million}$ . The U.S. and the entity would each be entitled to \$800,000.

Assumptions:

- ➔ FMV of the unencumbered property at ALE purchase = \$500,000
- ➔ FMV of the property protected by the ALE = \$100,000
- ➔ U.S. contribution = \$200,000
- ➔ Entity contribution = \$40,000
- ➔ Landowner donation = \$160,000
- ➔ FMV of the unencumbered property at ALE termination = \$2,000,000

### 1 Calculate the FMV of the ALE

$\$500,000 \text{ (FMV of the unencumbered property)} - \$100,000 \text{ (FMV of protected property)}$   
**= \$400,000 (FMV of the ALE)**

### 2 Calculate the Proportionate Share

$\$400,000 \text{ (FMV of the ALE)} \div \$500,000 \text{ (FMV of the unencumbered property)}$   
**= 0.80 (Proportionate Share)**

### 3 Calculate the Percent of the Proportionate Share for Grantee and U.S.

$\$200,000 \text{ (U.S. contribution)} \div \$400,000 \text{ (FMV of the ALE)}$   
**= 0.50 (U.S. share)**  
 $[\$40,000 \text{ (Entity contribution)} + \$160,000 \text{ (Landowner donation)}] \div \$400,000 \text{ (FMV of the ALE)}$   
**= 0.50 (Entity share)**

### 4 Determine the Value of the Proportionate Share

$\$2,000,000 \text{ (updated FMV of unencumbered property)} \times 0.80 \text{ (Proportionate Share)}$   
**= \$1,600,000 (Updated Proportionate Share)**

### 5 Allocate the Proportionate Share

$\$1,600,000 \text{ (Updated Proportionate Share)} \times 0.50 \text{ (Percent of Proportionate Share)}$   
**= \$800,000 due to entity and U.S. each**




**5. Amendment.** This ALE Deed may be amended only if, in the sole and exclusive judgment of the Grantee and United States, by and through the Chief of NRCS, such amendment is consistent with the Purpose of the ALE and complies with all applicable laws and regulations. The Grantee must provide timely written notice to the Chief of NRCS of any proposed amendments. Prior to the signing and recordation of the amended ALE Deed, such amendments must be mutually agreed upon by the Grantee, Grantor, and United States, by and through the Chief of NRCS. Any purported amendment that is recorded without the prior approval of the United States is null and void.

### SECTION II, PARAGRAPH 5 NOTE

NRCS routinely allows amendments to correct typographical errors, addresses, or inaccurate legal descriptions resulting from survey or mapping errors. Amendments are also used to make changes that will have a neutral or a positive easement benefit, such as the adjustment of a building envelope boundary. Proposed changes to the deed terms, including administrative actions, require greater scrutiny. Administrative actions are the subordination, modification, exchange, or termination of rights or interests of the United States in an ACEP easement. All amendments, including minor amendments, must be approved by NRCS.

AFT's Farmland Information Center houses a comprehensive collection of resources and tools to help landowners and entities participate in ACEP-ALE: <https://farmlandinfo.org/acep-ale-toolkit/>.

 = OVERVIEW

 = NOTE