

AGENDA

North Carolina Land and Water Fund

Acquisition Committee Meeting

April 13, 2021, 1:30 – 3:30 p.m.

Due to the COVID19 pandemic, this meeting will only be available to the public by teleconference.

Please contact Sydney McDaniel at sydney.mcdaniel@ncdcr.gov or 919-707-9121 to request a teleconference meeting invitation/call-in or instructions to attend the meeting in person.

Committee Members:

Jason Walser (Chair), Ann Browning, Greer Cawood, Amy Grissom, John Wilson, David Womack

1) Call to Order (Chair – Jason Walser)

- a) Welcome
- b) Compliance with General Statute § 138A-15
General Statute § 138A-15 mandates that the Chair inquire as to whether any Trustee knows of any conflict of interest or the appearance of a conflict of interest with respect to matters on the agenda. If any Trustee knows of a conflict of interest or the appearance of a conflict of interest, please state so at this time.
- c) Revisions, Additions, and Adoption of the Agenda

2) Public Comments (Chair – Jason Walser)

The Public Is Invited to Make Comments to the Committee – (Three Minutes per Person)

3) Executive Director's Update (Walter Clark)

4) Enforcement of Conservation Agreements (Marissa Hartzler)

Staff will present a draft enforcement policy as directed at the March meeting.

5) Commercial Use Update (Will Summer)

Staff will present draft easement language as requested when the Commercial Use Policy was amended in December.

6) Adjourn

Action Item

Staff member(s): Marissa Hartzler

Agenda Item 4) Enforcement of Conservation Agreements

At its March 2, 2021 meeting, the Board directed staff to draft a policy for the enforcement of State-held conservation easements.

The policy is intended to define roles and responsibilities, set violation classifications, identify appropriate corrective actions, and establish reporting and notification requirements.

The attached draft will be reviewed with the acquisition committee during the meeting, with examples of enforcement scenarios provided in presentation.

Committee action needed

Review the draft policy and direct staff on how to continue.

Conservation Agreement Enforcement Policy (STW-007)

Background: On behalf of the State, the North Carolina Land and Water Fund (“NCLWF”) makes substantial grants of State funds and acquires conservation agreements from landowners to protect the conservation values of lands and waters. These conservation agreements include conservation easements and other agreements. NCLWF has the perpetual duty to enforce these conservation agreements to protect the conservation values of the lands and waters covered by these agreements and to protect the investment of State funds. When the terms of a conservation agreement are violated, NCLWF has the objective to address the violations in an effective, timely, prudent, and consistent manner.

The purpose of this policy is to define roles and responsibilities, classify violations, establish priorities, identify appropriate corrective actions, and establish reporting and notification requirements.

Policy:

1. Roles and Responsibilities

Contracted conservation agreement monitors, NCLWF Staff, the Board of Trustees, Department legal counsel, the State Property Office, and the Attorney General’s Office all have roles in the enforcement of conservation agreements acquired by the State:

- a. In accordance with this Enforcement Policy, Staff will develop more detailed procedures for the documentation, evaluation, and resolution of potential and confirmed violations of conservation agreements.
- b. Upon identification of a potential violation, Staff will, in cooperation with the contracted monitor, document the facts of the potential violation including aggravating and mitigating factors. Based upon its research and documentation, Staff will determine whether a violation has in fact occurred, and if so, the level of the violation.
- c. When a violation is confirmed, Staff will develop strategies for remedying the violation and, with assistance from the contracted monitor and/or Department legal counsel, seek resolution with the landowner as the first line of response to the violation.
- d. For ongoing, repeated, major, or high-profile violations, including those that may require litigation, Staff will notify the Chair of the Board of the violation and the corrective action proposed by Staff. The Chair may authorize staff to continue handling the violation or refer consideration of the violation to the Board through a regular or special meeting to determine if litigation is required.
- e. If the Chair refers a violation to the Board as provided above, the Board may engage the State Property Office and the Attorney General’s Office to review the violation and to proceed with litigation or other legal remedies.
- f. If a violation rises to the level of an emergency, Staff will consult with the Chair of the Board, Department legal counsel, the State Property Office, and the Attorney General’s Office, and with the Chair’s authorization, take immediate action up to and including seeking a temporary restraining order and a preliminary injunction to prevent the damage that would otherwise occur from the emergency.

2. Violation Classification

Violations vary in scope, impact, and permanence. The following categories are a general guide to the levels of severity of violations, although in practice, the specifics of each situation will determine the classification of the violation:

- a. Procedural violations – violations in which the landowner fails to comply with a procedural requirement of a conservation agreement, including but not limited to failures to give notice to or seek approval from NCLWF or the State and failures to refer to the conservation agreement in subsequent deeds or instruments conveying an interest in the property subject to the conservation agreement.
- b. Minor violations – violations that, because of limited scope, impact, and/or duration, have a negligible impact on a conservation agreement's purposes and conservation values.
- c. Moderate violations – violations that have a measurable impact on a conservation agreement's purposes or conservation values, but restoration to prior condition may still be possible.
- d. Major violations – violations that have or may have serious, potentially irreversible impacts on a conservation agreement's purposes or conservation values.

3. Corrective Actions

When determining the necessary corrective actions for confirmed violations, NCLWF will consider resolutions and remedies tailored to the classification of the violation, the violation's impact to the relevant conservation purposes and values, the intent of the original grant award, and aggravating and mitigating factors. NCLWF may seek one or more corrective actions to address violations, including but not limited to the following:

- a. Negotiated Cooperative Resolution - If an activity has impacted the conservation values and must be stopped, NCLWF may negotiate a cooperative resolution with the landowner, such as restoration of prior condition, recordation of corrective instruments, or prevention of third-party trespass.
- b. Update of Plan - If the activity does not impact the conservation values, and the conservation agreement references a Memorandum of Understanding, Recreational Plan, or other Management Plan, NCLWF and the landowner may update the plan following any requirements put forth in the conservation agreement.
- c. Letter of Interpretation - If a landowner asserts that it is unclear that the relevant conservation agreement restricts an activity in question, NCLWF may issue a letter of interpretation for clarification.
- d. Amendment - Subject to all applicable law, including but not limited to the Conservation and Historic Preservation Agreements Act, and NCLWF's STW-001 Conservation Agreement Amendment Policy, a landowner may seek amendment of a conservation agreement for an activity that does not have a significant impact on conservation values or for which impacts will be mitigated and does not result in impermissible private benefit.

- e. Litigation - For violations that cannot be resolved by other non-litigation means after such means have been attempted by Staff, NCLWF may seek litigation or other legal remedy via the State Property Office and Attorney General's Office.

4. Enforcement Priorities

NCLWF recognizes that it does not have unlimited resources to address violations of conservation agreements, and consequently, violations must be prioritized to maximize protection of the purposes and conservation values covered by conservation agreements, the funds invested in them, and the program's integrity and goodwill. If the violation is ongoing, repeated, or results in impermissible private benefit, these circumstances will be considered in prioritizing the violation for enforcement action. Non-enforcement with respect to a violation shall not constitute a waiver of the State's right to enforce against the violation or any other violation in the future.

5. Reporting and Notification

NCLWF staff will keep the Board apprised of violations:

- a. Staff will notify the Chair of the Board of any major violation promptly after the violation is confirmed and of any high-profile or ongoing or repeated violations that may require legal remedy.
- b. If an emergency action was taken, such action will be brought to the attention of the Board of Trustees as soon as practicable.
- c. Staff will report to Board annually on the numbers, classification, and status of all violations.

Information Item

Staff member(s): Will Summer

Agenda Item 5) Commercial Use Update

At its December 1, 2020 meeting, the Board approved an update to the policy directing commercial use with the understanding that staff would work with legal counsel to amend language in the NCLWF conservation agreement templates. The Board requested to see the new template language in order to see how the policy will affect the practice.

Staff will review the draft language and will discuss the implications for the “reserved rights” section of the easement template. An excerpt of the language is attached with a redline markup showing changes, which are primarily in the first section under “Access.” There are comments in the margin adjacent to areas that have been edited.

No committee action needed.

(excerpt from the NCLWF Conservation Easement Template)

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ARTICLE II. RIGHTS RESERVED TO GRANTOR

Grantor reserves the right accruing from the fee simple ownership of the Property to engage in or permit others to engage in the uses of the Easement Area that are specifically reserved by this **Article II**. All other uses of and activities on the Easement Area are prohibited. All rights specifically reserved by Grantor are reserved for Grantor and its successors and assigns and are considered to be consistent with this Conservation Easement and the Conservation Values. The Parties acknowledge and agree that they have no right to agree to any activity that would result in the termination of this Conservation Easement.

The Easement Area shall be restricted from any development or usage that would impair or interfere with the Conservation Values including the purposes of this Conservation Easement. The following uses are reserved as indicated:

THE FOLLOWING LANGUAGE MAY NEED TO BE TAILORED FOR SPECIFIC MANAGEMENT SCENARIOS AND FEATURES FOUND ON THE PROPERTY. IF YOUR GRANT CONTRACT ALLOWS FOR SPECIAL RESERVED RIGHTS, PLEASE DRAFT AND CONSULT WITH NCLWF STAFF

A. Public Access and Use. Grantor reserves the right to allow ~~public~~ access and use of the Easement Area for the purposes of the ~~public~~ activities permitted herein. ~~Grantor reserves the right to collect fees or donations generate income from individuals and groups related to for the activities public activities permitted under the rights reserved permitted herein, so long as the activities are incidental to and not inconsistent detrimental to with the Conservation Values.~~

Commented [SW1]: This section was changed to allow income to be generated from activities that are permitted in the reserved rights

B. Passive Recreational Use. Grantor reserves the right to engage in and to permit others to engage in passive recreational uses of the Easement Area that do not require surface alteration of the land and pose no threat to the Conservation Values. By way of illustration, such passive recreational uses may include hiking, walking, scientific study, animal/plant observation, nature and environmental education, historic tours, photography, so long as such uses are consistent with the maintenance of the Conservation Values, and such uses are subject to all applicable federal, state, and local laws and regulations.

INSERT PARAGRAPHS FOR ANY ACTIVE RECREATIONAL RESERVED RIGHTS APPROVED BY THE BOARD AT TIME OF FUNDING

C. Existing Roads and Trails. Grantor reserves the right to maintain existing unpaved roads and trails in the Easement Area. These roads and trails shall not be paved without prior written approval of Fund. The existing roads and trails may be stabilized with gravel and permanent vegetation. Associated ditches, culverts, stream crossings, and bridges may be maintained and replaced as necessary as maintenance of the road or trail. All necessary care shall be taken to maintain existing roads and trails in a manner so as not to impair any Conservation

Values. Existing roads and trails shall not be realigned without the prior written approval of Fund.

INSERT PARAGRAPH FOR ANY NEW ROAD AND/OR PARKING RESERVED RIGHTS APPROVED BY THE BOARD AT TIME OF FUNDING

D. Motorized Vehicles. Grantor reserves the right to use motorized vehicles on allowed roads and trails for management, maintenance, or stewardship purposes.

E. New Trails. Grantor reserves the right to construct and maintain new natural surface trails for the purpose of hiking [and non-motorized biking]. [Grantor further reserves the right to pave trails for non-motorized recreational purposes.] All trails must be located a minimum distance of fifty (50) feet from the top of the bank of all surface water, unless such locations are physically impracticable, and must be located so as not to impair the Conservation Values. All trail construction involving soil disturbance must follow best practices for sustainable trail design and construction and must have prior written approval by Fund. [Private trails for personal use by the landowner and a small number of guests that will not have more than a de minimis impact on the land, water quality, or environment are excepted from the requirements of the immediately preceding sentence.] When required by the terrain, trails may include boardwalks, ramps, and handrails to the extent necessary. Trails may include stream crossings up to [] feet wide, provided they are permitted by all applicable regulatory authorities. All necessary care shall be taken to construct and maintain trails in a manner so as not to impair any Conservation Values either during or after construction. Fund shall have the authority to require the closure of any trail that is detrimental to any Conservation Values. All realignments of trails are subject to the requirements of this Paragraph.

IF INCLUDED AS SPECIAL CONDITION IN CONTRACT, INCLUDE NUMBER AND TYPE OF PLATFORMS IN THE BELOW

F. Trail and Recreational Accessories. Grantor may construct and maintain park benches, litter receptacles, and directional, educational, and informational signs along existing trails and approved new trails. Grantor further reserves the right to construct and maintain [] observation platforms/camping platforms/fishing platforms/boat docks along existing and approved new trails or on the banks of surface water if allowed and approved by all applicable regulatory authorities. All necessary care shall be taken to construct and maintain trail and recreational accessories in a manner so as not to impair any Conservation Values either during or after construction. Fund shall have the authority to require the removal of any trail or recreational accessory that is detrimental to any Conservation Values.

G. Vegetation Management. Grantor reserves the right to manage vegetation for boundary marking, fencing, signage, fire containment, disease control, invasive exotic plant control, and removal of conditions that threaten life or property. Methods of vegetation management may include, but are not limited to, selective cutting, prescribed burning, application of herbicides or pesticides.

H. Early Successional Habitat Areas. Grantor reserves the right to maintain the existing early successional habitat areas identified in the Baseline Documentation Report for the

purpose of providing habitat diversity for wildlife species and may include the planting of various native grasses, forbs, and herbaceous vegetation. This activity must be conducted a minimum distance of 100 feet from surface waters as measured from top of bank. **EARLY SUCCESSIONAL HABITAT AREAS MUST BE IDENTIFIED AND APPROVED AT THE NCLWF BOARD MEETING AT THE TIME OF FUNDING.**

I. Native Community Restoration, Management, and Maintenance. Grantor reserves the right to perform all activities necessary to restore, manage, or maintain the native plant and animal communities in the Easement Area, provided, however, that the conversion of one habitat type to a native habitat type requires prior written approval of Fund. All necessary care shall be taken to protect all Conservation Values, and restoration, management, and maintenance activities shall be carried out in a manner so as not to impair any Conservation Values either during or after the activities.

J. Stream/Wetland Restoration. Grantor reserves the right to perform all activities necessary to restore and stabilize streams and wetlands to enhance water quality on the Easement Area. Such activities shall be based upon prevailing design and permitting standards. Restoration and stabilization activities shall be based on a design using as many natural materials as possible, shall require prior written approval of Fund, and shall be subject to all applicable regulatory authorities.

K. Hunting and Fishing. Grantor reserves the rights to recreational hunting and recreational fishing and to permit others to hunt and fish on the Easement Area in compliance with all federal, state, and local rules and regulations.; ~~including Grantor may the right to lease or license the Easement Area for recreational hunting and fishing as permitted by in accordance with Article VI, Paragraph B, but is such leases and licenses are exempt from the 60-day notification requirement.~~; ~~in compliance with all federal, state, and local rules and regulations.~~ ~~Grantor may charge a fee for a lease or license permitted by this Paragraph. Recreational hunting leases and fishing leases and licenses permitted by this Paragraph shall be in writing and shall reference this Conservation Easement and shall require tenants and licensees to abide by its terms.~~

L. Signs. Grantor reserves the right to post the following signs: no trespassing signs, local, state, or federal traffic or similar information signs, for sale or lease signs, signs identifying the Conservation Values of the Easement, signs identifying Grantor as owner of the Property, signs identifying the funders or the holders of Conservation Easements, educational signs, directional signs, and interpretative signs.

USE THE FOLLOWING LANGUAGE IF SPECIFIC MANAGEMENT AREAS WERE APPROVED AT THE NCLWF BOARD MEETING AT THE TIME OF FUNDING. USE A SEPARATE PARAGRAPH AS NEEDED FOR EACH MANAGEMENT AREA OR MANAGEMENT GOAL

M. The following specific activities are allowed in Management Area(s) as depicted on **Exhibit C**, with the goals and objectives of .

Commented [SW2]: Hunted leases were already permitted, but this update is tied to a clarification in Article IV on noticing requirements.

INCLUDE THE FOLLOWING PARAGRAPHS AS NEEDED FOR PROJECTS WITH SPECIAL CONDITIONS IN CONTRACT ONLY

N. Agricultural and Horticultural Uses. Fund recognizes that the Easement Area has significant historic value and that the Easement Area has historically been used for agricultural activities; therefore, the following agricultural and horticultural uses are allowed in Management Area [REDACTED] as depicted on **Exhibit C**:

LIST PERMITTED AGRICULTURAL AND HORTICULTURAL USES HERE

O. Military Buffer Uses. Fund recognizes that the Easement Area is a military buffer and that the Easement Area has historically been used for agricultural activities; therefore, the following agricultural and horticultural uses are allowed in Management Area [REDACTED] as depicted on **Exhibit C**.

LIST PERMITTED AGRICULTURAL AND HORTICULTURAL USES HERE

ARTICLE III. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on or use of the Easement Area that is inconsistent with this Conservation Easement or the Conservation Values is prohibited. All activities on or uses of the Easement Area other than those specifically reserved in **Article II** are prohibited. Except for the activities and uses specifically reserved in **Article II**, the Easement Area shall be maintained in its natural, scenic, wooded, and open condition. Any activity on or use of the Easement Area that is not specifically reserved in **Article II** is considered to impair or interfere with this Conservation Easement or the Conservation Values.

Without limiting the generality of the immediately foregoing Paragraph, the following activities and uses are expressly prohibited or restricted in the Easement Area as stated, except to the extent of rights specifically reserved to Grantor in **Article II**. When an activity or use is prohibited or restricted in, within, on, or of the Easement Area, the activity or use is prohibited or restricted in, on, over, under, through, above, and across the Easement Area.

A. Industrial and Commercial Use. Industrial and commercial activities and any rights of passage for such purposes are prohibited in the Easement Area.

B. Agricultural, Grazing and Horticultural Use. Agriculture, grazing, horticultural and animal husbandry operations and any rights of passage for such purposes are prohibited in the Easement Area.

C. Disturbance of Natural Features, Plants, and Animals. There shall be no cutting or removal of trees and no disturbance of other natural features within the Easement Area.

D. Construction of Structures or Improvements. There shall be no constructing or placing of any temporary or permanent structure, improvement, building, fixture, mobile home, asphalt, concrete, or other pavement, billboard or other advertising display, antenna, utility pole, tower, conduit, line, or facility in the Easement Area.

E. Motorized Vehicles. Use of motorized vehicles in the Easement Area is prohibited.

F. Signs. Signs are not permitted in the Easement Area.

G. Mineral Use, Excavation, Dredging. There shall be no filling, excavation, dredging, mining, or drilling in the Easement Area. There shall be no removal of topsoil, sand, gravel, rock, peat, minerals, hydrocarbons, or other materials from the Easement Area. There shall be no change in the topography of the land in the Easement Area in any manner.

H. Wetlands and Water Quality. There shall be no pollution or alteration of surface waters in the Easement Area. There shall be no construction or other activities that would be detrimental to water quality or that would alter the natural water levels, drainage, sedimentation, or water flow in, on, or over the Easement Area or into any surface waters. There shall be no construction or other activities that would cause soil degradation or erosion. There shall be no diking, dredging, alteration, draining, filling, or removal of wetlands.

I. Dumping. Dumping of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery, or other materials in the Easement Area is prohibited.

USE FIRST PARAGRAPH J IF EASEMENT AREA IS ONE PARCEL:

J. Conveyance and Subdivision. The Easement Area shall not be divided, subdivided, or partitioned. No property interest in the Easement Area, including but not limited to the fee simple interest, shall be divided, subdivided, or partitioned. Without limiting the foregoing, the Easement Area shall not be conveyed except in its current configuration as a single parcel of property.

USE SECOND PARAGRAPH J IF EASEMENT AREA IS MULTIPLE PARCELS AND UPDATE INFO IN YELLOW:

J. Conveyance and Subdivision. The Easement Area consists of **non-contiguous/contiguous** areas of the Property. The Easement Area shall not be further divided, subdivided, or partitioned. No property interest in the Easement Area, including, but not limited to the fee simple interest, shall be further divided, subdivided, or partitioned. Without limiting the foregoing, the individual areas included in the Easement Area shall not be conveyed except all together in undivided ownership and in their current configuration.

K. Open Space and Development Rights. The Easement Area shall not be used to satisfy open space or density requirements of any cluster or other development scheme or plan.

The development rights encumbered by this Conservation Easement shall not be transferred to any other land pursuant to a transfer of development rights scheme, a cluster development arrangement, or otherwise.

L. Mitigation. There shall be no use of the Easement Area or any portion thereof to satisfy compensatory mitigation requirements under 33 USC Section 1344, N.C.G.S. §143-214.11 or any successor or replacement provision of the foregoing.

INCLUDE THE FOLLOWING PARAGRAPHS AS NEEDED

M. Military Buffer Restrictions. **IF THE EASEMENT AREA/PROPERTY IS ENCUMBERED BY AN EASEMENT FOR DEPARTMENT OF DEFENSE, THEN REFERENCE THE DOD EASEMENT IN ARTICLE V AND DO NOT INCLUDE THESE MILITARY BUFFER RESTRICTIONS PARAGRAPHS IN ARTICLE III.**

1. Lighting. The Easement Area is recognized by Fund as a military buffer; exterior light emissions that would interfere with pilot vision are prohibited. All lighting equipment, including but not limited to lasers, floodlights, searchlights, recreational lighting, and all protective lighting, such as streetlights, shall have positive optical control that shines downward so that no direct light is emitted above the horizontal plane.

2. Emissions. The Easement Area is recognized by Fund as a military buffer; land uses that produce electrical emissions that would interfere with aircraft communications, navigational equipment, or targeting equipment (air to air or air to ground) are prohibited.

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ARTICLE VI. MISCELLANEOUS

A. Stewardship of the Conservation Easement. Pursuant to the terms of the Grant Contract and any contract for stewardship of the Easement Area entered into pursuant to the Grant Contract, [NAME OF STEWARD/MONITOR] will monitor and observe the Easement Area in perpetuity to assure compliance with the purposes and provisions of this Conservation Easement and the provisions of the Grant Contract, and that it will report on the condition of the Easement Area, or provide for such reporting, to State and Fund no less frequently than once a year, and further will report immediately to State and Fund any observed and/or known violations of this Conservation Easement or the Grant Contract. The Parties acknowledge that the associated stewardship monies awarded under the Grant Contract are administered pursuant to N.C.G.S. §143B-135.236 which establishes the North Carolina Conservation Easement Endowment Fund, or any successor law, and Fund's internal policies and procedures, and that [NAME OF STEWARD/MONITOR]'s obligation to monitor the Easement Area at any given time is contingent on the availability of said stewardship funds. Further, the Parties acknowledge

that this obligation to monitor the Easement Area is assignable provided such assignment is made with the prior written approval of Fund and evidenced by a written instrument signed by the Parties thereto and recorded in the Office of the Register of Deeds of [COUNTY] County. Provided further, that any such assignment of [NAME OF STEWARD/MONITOR]'s obligation to monitor the Easement Area shall include a right of entry onto the Property and the Easement Area for the assignee of said monitoring obligation, and shall require the monitoring to be carried out in accordance with and subject to N.C.G.S. §143B-135.236 or any successor law, and Fund's internal stewardship policies and procedures. The Parties specifically acknowledge that neither [NAME OF STEWARD/MONITOR]'s obligation to monitor the Easement Area, nor its assignment of said obligation, shall have any effect on the rights and obligations of Grantee of this Conservation Easement. Further, the Parties covenant that the obligation to provide monitoring of the Easement Area will survive any transfer of Grantor's fee interest in the Property.

B. Subsequent Transfers of the Fee or Other Interests: Licenses. Grantor agrees for itself, its successors and assigns, that in the event it intends to transfer the Property, any interest in the Property, ~~or~~ any portion of the Property that includes the Easement Area, or any license to use the Easement Area, to notify Grantee and Fund in writing of the names and addresses of any party to whom the Property, any interest in the Property, any portion of the Property that includes the Easement Area, or any license to use the Easement Area, is to be transferred, the nature of the interest or license to be transferred, and the terms and conditions of the intended transfer, at least sixty (60) days before the transfer is intended to be consummated. Grantor, for itself, its successors and assigns, further agrees to make specific reference to this Conservation Easement in a separate paragraph of any subsequent lease, ~~license~~, deed, license or other legal instrument by which any interest or license in the Property is conveyed. The Property owner shall not convey the Property or any interest or license therein, and shall not incur, assume, or suffer to exist any lien, upon or with respect to the Property, without disclosing to the prospective transferee the Conservation Easement, the obligations of the Property owner, and the limitations on use of the Property. No interest or license in the Property shall be transferred except in writing in accordance with the above. Nothing in this Paragraph abrogates or limits **Paragraph J of Article III** hereof.

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Commented [SW3]: Update to clarify that licensed uses are captured here. The hunting and fishing section in Article II exempts those arrangements from the 60-day notice requirement here.