

CONSERVATION EASEMENTS

Public Policy Considerations for Land
Management

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Conservation Easements – What are They?

□ A legally-binding agreement b/w a property owner and a “non-profit” organization, typically a land trust or a government agency.

□ Restricts development on the land covered by the easement, usually in exchange for tax “benefits” for the property owner.

Conservation Easements, cont.

- The property owner (the “grantor”) retains partial ownership rights over the land, but relinquishes the rights to use the property for development.
 - Often limits all development (housing, minerals, etc.)
- The organization to receive or buy the easement (the “grantee”) holds the interest in the property and enforces the restrictions.

Conservation Easements, cont.

- Conservation easements are a contract.
- Are usually fully transferrable by the grantee
 - can be sold to another organization or the federal government.
- Typically “run with the land” – are binding on all subsequent purchasers and heirs.

Conservation Easements, cont.

- Tax benefits – landowners must agree to allow the land to be used for one of the following:
 - Outdoor recreation for the general public;
 - Protection of animals, plants or ecosystems;
 - Preservation of open spaces (farming, forestry, or ranching);
 - Scenic enjoyment for the general public; or
 - Preservation of historic land or structures.



Conservation Easements, cont.

- Landowner must donate the easement to a government agency or a “qualified” “non-profit” organization
 - Definition: a “charitable” organization “that receives a substantial portion of [its] support from the public and government entities.”

Conservation Easements, cont.

- Landowner must agree that the easement be held in perpetuity, meaning that all future landowners of the easement are bound by the terms of the deed.
- The intended purpose of the easement is to preserve the land for the benefit of the general public.
 - Conservation easements may involve public access to your property

Tax “Incentives”

- Conservation easements are considered a charitable “donation”
- Tax incentive: The “value” of the easement is deducted from the “value” of the property
 - What does that mean?
 - It is the difference b/w the value of the land just before the easement is granted as compared to the value of the land immediately after the donation
 - Conservation easements are thus intentionally designed to devalue your property (more on this later)



LAND OWNERSHIP IN THE U.S.

- Total Land base of the United States:
 - 2.27 Billion Acres

- Federal ownership of land in the U.S.
 - 653,299,090 Acres
 - 29% of all land
 - Approx. 605,000,000 acres are managed by BLM, USFS, NPS, NWR (National Wildlife Refuge)

Federal Ownership of Land by Region

- West: 54.1%
- Alaska and Hawaii: 38.8%
- North Central: 2.8%
- South Central: 2.4%
- South Atlantic & D.C. 1.7%
 - (D.C., established by the Constitution as the federal city has only 24.7% of its total acreage owned by the federal government)
- Northeast: 0.24%

Federal (and State) Ownership of Real Property - What Does it Mean?

- Limited use and development
- Decisions made from Washington, D.C., rather than at the local level
- A one-size-fits-all approach to land management
- Outside interests dictate land management decisions
- Bureaucracy – Rules and Regulations
- The feds rarely sell – Limits expansion of private operations



A Limited Resource

- Real property is a finite resource
- Federal ownership of real property limits land use decisions
- Federal mismanagement
 - Pine Beetle outbreak
 - Catastrophic forest fires

Private Property – Competing Demands

- Private property is limited
 - Farming
 - Ranching
 - Industrial
 - Commercial
 - Development
 - Housing
 - Mineral extraction
 - Oil and Gas
 - Wind, etc.

Increase in “Land Trusts” and Conservation Easements

- 1950 – 53 Land Trusts
- 2000 – 1,263 Land Trusts
- 2005 – 1667 Land Trusts
- Collectively, land trust control 37 million acres of land throughout the United States.
- At least 9 million acres are held in conservation easements (as of 2008)



Growth in Easements – Consolidating Power Over Real Property

- Most of the controlled land is managed by large, national “environmental” organization
 - The Nature Conservancy (TNC)
 - The Trust for Public Lands
 - Ducks Unlimited
 - American Farmland Trust
 - The Conservation Fund

Land Trust Control – the Numbers (2008)

- Together these large organizations hold 25 million acres of land
- TNC alone controls over 15 million acres
- TNC holds over 3 million acres in conservation easements – a five-fold increase since 1997 (at which time it held 645,000 acres)
- 1,663 Land Trusts control 12 million acres of private lands – approximately ½ (6.2 million acres) in conservation easements (2.5 million in yr. 2000)

2011 Figures

- More than 10 million acres placed in land trusts between 2005 and 2010
- 731% increase in acres in Wyoming between 2005 and 2010
- Size of Massachusetts – 5 million acres
- Size of Maryland – 6.3 million acres
- Size of Vermont – 5.9 million acres
- Size of New Hampshire – 5.7 million acres



Reasons for Increase in Land Trusts and Conservation Easements

- In response to exorbitant costs of government regulations on land use and zoning laws
- Tax “relief”
- Rising cost for government agencies to purchase land for “conservation”
 - Why should a government agency or Land Trust buy when they can control the land for pennies on the dollar?

Conservation Easements – Are We “Federalizing” Our Private Property

- Concerns: we are “federalizing” our private property rights – allowing government agencies or “non-profits” to make decisions re: land use
- We are slowly but surely allowing the federal government to take our private property rights by tolerating perpetual conservation easements
- This “federalization” is largely under the radar



National Center for Public Policy Research (May, 2008)

- Land Trusts and the government – how the relationship affects the landowner
- As gov't acquisition and regulatory restrictions on land use have become prohibitively costly and ineffective, governments have looked to conservation easements as a potentially effective and less expensive method for controlling lands without having outright government ownership

NCCPPR Analysis, cont.

- Land trusts have grown in size, and so has their association and influence with the government.
- This has been the case particularly for the large, national organizations that obtain enormous federal funding (Ducks Unlimited, Trout Unlimited, TNC)
- The close working relationship with the private landowners has now been replaced by a closer relationship with government agencies.

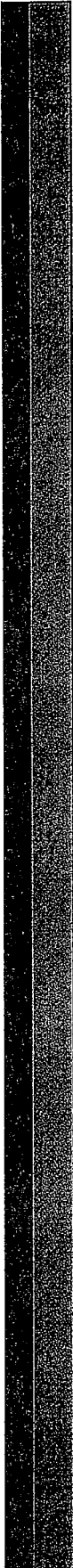
NCPPR Analysis cont.

- Perhaps even more importantly, their mission has also evolved from protecting open lands through private stewardship, to aiding government agencies in acquiring private lands.
- In these troubling arrangements, land trusts have operated more like government agents, acquiring easements from private landowners, only to turn around and quietly sell them – sometimes at an enormous profit – to state or federal governments.
- Not all land trust act this way – but enough of them do that we should all be concerned about the unholy alliance that has been created.




Pre-arranged “Flip”

- Increasingly, the Land Trust does not hold on to the easement
- Sell it to federal or state agencies
- Known as a “prearranged flip,” or “preacquisition”
- Most easements are purchased by Land Trusts at below market value (w/ the landowner “donating” the difference to the “non-profit” Land Trust)
- Land Trusts sell the easement to the government at market value, pocketing the difference



Pre-arranged “Flip,” cont.

- TNC purchased an easement for \$1.26 million; sold directly to the BLM for \$ 1.4 million
- Land Trusts earn a profit off of the taxpayer-funded arrangement
- Government agencies can obtain private property via methods shielded from public scrutiny



Pre-arranged ‘Flip,’ cont.

- ‘Preacquisitions’ enable the government to obtain private land when public funds not yet available.
- U.S. Department of Ag: “voluntary acquisitions’ provide ‘opportunities for public agencies to influence resource use without incurring the political costs of regulation or the full financial costs of outright land acquisition.”

Show Me the Money

- American Farmland Trust - \$ 1 million annually from the federal government
- The Conservation Fund - \$ 3 million annually from the federal government
- TNC – federal funds exceed \$ 100 million annually.
- TNC revenues from sale of conservation easements to governments “and others” amounts to another \$262 million annually (20% of TNC’s support and revenues)

TNC Idaho Purchase

- Purchased a ranch for \$480,000 and 2 months later sold it to U.S. Gov't for \$460,000
- Then traded the land to the government in exchange for federal and state land in the foothills of Boise,
 - Some of the most highly valued land in Southern Idaho
 - Later sold that land for millions of dollars

The Feds and Your Money are Soon Parted

- Forest Legacy Program (USDA)
 - 1997 – \$ 2.6 million
 - 2007 – over \$ 80 million
- Farm and Ranch Lands Protection Program (USDA)
 - 1996-2001 -- \$ 62 million
 - 2002-2007 -- \$ 597 million




A Government Land Grab

- “Easements become not a means of protecting lands through a private sector partnership between landowner and land trust, but a non-transparent tool for government to obtain private property without public knowledge or approval.” NCPPR (May, 2008)



Who Makes the Land Management and Use Decisions?

- Conservation Easements –
 - Contract – enforceable by the Courts
 - Deeds – an encumbrance (cloud) on your title
 - Recorded in County Land Records
 - Conflicts b/w landowner (grantor) and holder of easement (grantee)
- The “poison pill” effect
 - Sheep rancher in Colorado
 - Example language from Conservation Easements



Conservation Easements Devalue Landowners' Most Important Asset

- Decreased borrowing power, increases risk of default
- Risks for existing loans (fluctuating livestock/commodity prices) or obtaining operating loans
- Conservation easements are being used to devalue and limit use on the approx. 50% of private property in the West



Additional Implications

- Perpetuity requirement – Forever is a long long time
- Conservation easements typically prohibit subdividing (or any other type of “development”)
 - Limiting landowner’s flexibility (to sell lots on parameters of the property)
- Reduces pool of potential purchasers
 - Merging of conservation easement w/ ownership of property
 - Real estate brokers – conservation-easement-burdened property is hard to sell

Perpetuity – is this the best way to manage our real property?

- Conservation easements that bind landowners and their descendants in perpetuity ultimately become antiquated, useless or harmful
- Scientific advances cannot be accounted for
- Nature affects changes that aren't predictable
- Impact on housing costs
 - Prevent construction of homes far into the future
 - Already a critical issue in California, where 427,000 acres are encumbered by conservation easements; housing costs have skyrocketed

Perpetual Easements – Local Impacts and Flawed Decision-making

- Perpetual conservation easements impact the economic prosperity of a community, both in the short term and the long term.
 - Property taxes
 - School funding
- Public policy counsels against allowing the current generation to dictate how the next generation uses, manages, operates, sells and develops our real property resources.
- Our standard of living is tied to our private property rights.

Perpetual Easements = Bad Economic Policy

- Payments are in current value
- Private Property - The “bundle of sticks” includes the right to make decisions re: use.
 - Perpetual easements operate to transfer that (perhaps most important) right to a third party
 - Future lost value – hundreds of millions of dollars
- If citizens in 2075 choose to preserve open space and habitat through the concept of conservation easements, they should pay for it
 - Pay the then-going-rate for such a privilege in the future.
 - We should not be taking the entire value of this ownership right in present dollars, leaving nothing for our descendants

Additional Public Policy Considerations

- Perpetual conservation easements will impact our food supply and our food independence as it will be too costly to raise food using 2010 technology when other advances have been made (which the landowner may not be allowed to take advantage of as a result of the conservation easement restrictions)
- The price of lands without conservation easements will skyrocket (restricting the next generation's options)
- Housing costs – where to build?
- Industrial and commercial activities – where can they operate?




Recommendations

- Government should not be allowed to obtain conservation easements through pre-arranged flips/acquisitions;
- No federal funding for non-profit conservation groups
 - They already benefit by tax-exempt status



Recommendations, cont.

- Tax deductions should not require perpetuity
- The government should not use tax dollars to effect perpetual conservation easements
- Future generations should not be burdened with inflexible, irreversible policies based on today's land use decisions
- Conservation easements should be time-limited providing charitable income tax deductions to those who restrict land use on their property (10-20 year increments)



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