

COMMON QUESTIONS ON CONSERVATION EASEMENTS

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CENTER FOR COLLABORATIVE CONSERVATION
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about
the center for COLLABORATIVE CONSERVATION

The Center for Collaborative Conservation (CCC) is an initiative in the Warner College of Natural Resources at Colorado State University. The Center is a place where stakeholders can come together to collaboratively discuss, define, study and implement conservation and livelihood practices to sustain both the earth's ecosystems and the people who depend upon them. The CCC is active in collaborative conservation efforts across Colorado, the US West and around the world. The Center attempts to build bridges among the diverse actors who work to enhance both conservation and livelihoods in local landscapes around the world.

In 2009, The Center awarded seventeen fellowships and seven internships which form the first cohort of CCC Fellows and Interns. The Fellows include eleven graduate students, three faculty members and three conservation practitioners; the seven Interns are undergraduates who work with these fellows. The Fellows are from six nations around the globe (and working in three more) and represent six departments and three colleges at Colorado State University, and three non-governmental organizations doing conservation and liveli-

hoods work in Colorado, South Dakota and east Africa. They are working on problems as diverse as ecosystem service payments in Colorado, community marine conservation in the Philippines, pasture management in Mongolia, and elephant-people conflicts in Tanzania.

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Photo: Leah Burgess

Many landowners hesitate to consider donating conservation easements on their land, due to concerns regarding potential impacts on their private property rights. Many of these concerns are valid and conservation easements are not the ideal solution for everyone. The transactions are not easy or cheap to complete and they may or may not be a viable economic option for many landowners burdened with high debt loads and limited venture capital. Jay Fetcher, founder of Colorado Cattlemen's Agricultural Land Trust noted, "You shouldn't even be considering this unless two things have happened: 1) you've run the numbers and it makes sense for you and your family and 2) you feel in your heart it's the right thing to do." However, there are some concerns that are based on misconceptions and unnecessarily discourage some property owners from considering an option that could make sense for them and their heirs.

Our objective is to address these concerns, separating fact from fiction, and answer some common questions regarding conservation easements. We approach the subject from a legal and practical perspective, so that landowners can make a better informed choice regarding whether donation of a conservation easement is the right option for their particular situation.

This paper is divided into two sections: overview of property rights and common questions. In the "facts" section we begin with an overview of conservation easements and their impact on private property rights, as well as the benefits that justify the impact. Then we discuss some specific property rights affected by conservation easements, including the right to use water, minerals, oil and gas, and wind power. Finally, we answer some common questions that come up with regard to practical considerations. In the "common questions" section, we focus on questions and concerns that are based on widespread misconceptions.



Photo: Jeff Jones

overview: property rights and benefits

1.1 What is a conservation easement?

A conservation easement is a voluntary agreement that a landowner ("grantor") may enter into with a qualified conservation organization ("grantee"), restricting particular development and uses of the landowner's property in order to protect certain resources. For example, agricultural conservation easements are designed to keep land available for farming or ranching and often limit non-agricultural commercial development of lands designated for agricultural use. Qualified grantees include both public (government) and private (land trust) entities. Due to limited funding opportunities for purchasing conservation easements, landowners usually choose to donate all or a portion of their development rights to a qualified conservation organization, often receiving tax benefits as a form of compensation. Many potential grantees will not accept easements that do not meet the federal tax requirements. Easements are usually perpetual, meaning they last forever. "Term" easements, lasting a specified number of years, do not qualify for tax benefits and, thus, are not the most popular option. Indeed, just one state permits only term easements. Every conservation easement is unique and subject to conditions agreed upon by the parties.

1.2 How are my private property rights affected by a conservation easement?

With regard to land, or "real property," private property rights include the right to reasonably develop and use the property. By placing restrictions on usage and development, a landowner is voluntarily giving up a portion of their rights. These rights are considered extinguished and can never be used, sold or transferred. Other private property rights include the right to sell or lease the property, as well as the right to exclude others from accessing the property. Typical conservation easements do not significantly impact these other rights, and the landowner retains full title to the property and all other rights not transferred under the easement.

The easement is specifically catered to the property owner's wishes. Thus, current use and management of the land is usually maintained, with minimal to no impact on day-to-day activities. Indeed, in a well-planned document, the only rights transferred are often rights that the property owner had no intention on exercising, such as the right to build a subdivision or shopping mall. In addition, conservation easements often do not limit development altogether and the property owner is free to designate areas that can be used for buildings, such as barns or other agricultural structures or home sites. An easement does give the grantee certain rights, such as the ability to enter the land during "monitoring visits," to

ensure the terms of the easement are being upheld and the right to enforce restrictions on the use of the land in accordance with the terms of the easement.

Monitoring visits are discussed further in Section 2.6. These rights are carefully negotiated and, consequently, reflect a compromise between maintaining current uses and the conservation values.

The first farmer was the first man, and all historic nobility rests on possession and use of land .

~ Ralph Waldo Emerson

1.3 Why would I want to give up any of my property rights?

One of the most cited reasons for pursuing a conservation easement is the landowner's desire to protect the condition and uses of his or her land long into the future. For instance, by granting a conservation easement the owner of a family farm and ranch ensures that the property remains available for agriculture. In addition, there are a variety of tax benefits available for grantors of conservation easements.

1.4 What tax benefits can I expect from granting a conservation easement?

A donated easement may be treated as a charitable gift, making the value of the easement tax deductible. In order to qualify for the federal tax deduction, the easement must be: (1) perpetual; (2) held by a "qualified conservation organization"; and (3) serve a valid "conservation purpose," which includes (a) the preservation of land areas for outdoor recreation by, or education of, the general public; (b) the protection of a relatively natural habitat of fish, wildlife, plants, or similar ecosystem; (c) the preservation of open space (including farmland or forest land); and/or (d) the preservation of a historically important land area or certified historic structure. In addition, the value of the conservation easement must be determined by a "qualified appraisal," as discussed further in Section 2.1

Currently the federal tax incentive rewards agricultural easement donors at a higher rate. Eligible farmers or ranchers are defined as taxpayers who earn more than 50 percent of their gross income from the business of farming during the taxable year in which the contribution is made. In this case they may deduct the easement's value up to 100 percent of their adjusted gross income, with a 15 year carry-forward period. (Non-eligible landowners are able to deduct up to 50% of their AGI.) If this incentive doesn't attain a permanent status by the end of 2009, the deduction reverts back to 30% of a landowner's AGI for everyone in the year of donation with a 5 year carry-forward. Many states also offer income tax benefits for the donation of conservation easements.¹

Another important tax benefit is the reduction of estate taxes. Because estate taxes are based on the highest economic use of the parcel, these taxes can be substantial even if the land is being used as a farm or ranch. This can put considerable financial strain on heirs and in many circumstances may force them to sell all or part of the land in order to pay estate taxes. Conservation easements can help prevent this and aid in the intergenerational transfers of intact properties.

By granting away development rights the value of the land is decreased, which lowers the value of the land for estate tax purposes, and can provide a significant reduction in the estate tax burden on family members. This is particularly helpful in situations where the cultural, sentimental and historical uses of the land are much more important to the heirs than its economic value.

In addition to this decrease, under the 1997 Taxpayer Relief Act a conservation easement may reduce estate taxes by 40%, up to a maximum of \$500,000, if it meets the requirements for a qualified conservation easement. It would be prudent to consult a tax professional to determine if a conservation easement qualifies as a qualified easement, but some of the key conditions are: (1) Ownership of land for more than 3 years prior to death, (2) Donation of the easement occurred by the decedent or a member of his family, (3) Easement must prohibit all but minimal commercial recreational use of the land, and (4) the easement must decrease the value of the land by at least 30% to qualify for maximum estate tax benefits.²

Great things are done
when men and mountains
meet. This is not done by
jostling in the street.

William Blake



Photo: Lynne Sherrod

The grant of a conservation easement can in some cases also lead to a reduction in property taxes. Because states vary widely in how they assess property taxes the effect of a conservation easement on such taxes is equally variant. In some states landowners may see a reduction of property taxes, but it is not guaranteed. Because the tax benefits vary between states, those considering the grant of a conservation easement should consult a tax professional that has a solid foundation in this complex topic to determine the benefits they can reasonably expect and the specific requirements they must meet to be eligible for those tax benefits.

It is important to note that granting a conservation easement by private landowners WILL NOT completely eliminate tax burdens on the owners. The property will remain on the tax rolls but the restrictions placed on the property can often lead a reduction in the taxes assessed. Please remember that the landowner retains responsibility for any property tax liabilities.

1.5 What is the relationship between my water rights and a conservation easement?

Most western states follow the prior appropriation doctrine and view water rights as separate from land; however, this does not preclude water rights from being included in conservation easements. When considering a conservation easement one important concern is whether water rights are necessary to support the conservation purposes of the easement. If the conservation purposes are related to preservation of habitat or agricultural productivity, water rights will need to be included in the easement. In situations where water rights are necessary their value must be appraised in addition to the land's value to determine the total value of the easement.

One of the biggest water right issues related to conservation easements is abandonment. Under the prior appropriation system, a water rights holder is only entitled to the amount of water that has historically been put towards a beneficial use, regardless of size of the decreed right. Consequently, if a landowner reduces his or her water use for an extended period of time, they run the risk of losing a portion of their water rights. Thus, when water rights are included in a conservation easement, it is particularly important to ensure that the rights are being used "beneficially" so that the owner does not risk abandoning them.

Maintaining a beneficial use is fairly clear-cut when the conservation purposes served by the water are related to maintaining the agricultural character of land. For example, an easement on irrigated farmland for the purposes of maintaining the agricultural character will likely require water rights, especially in the West. In this situation, because the water is being put to a beneficial use by the farmer for irrigation purposes, the farmer runs little risk of abandonment.

Preventing abandonment can be trickier when the water is used for ecological purposes. Water used to support ecological purposes often results in the water being left instream or allowed to flow naturally to support plants and animals. States have recently begun to recognize instream flow as a "beneficial use," but private individuals are nevertheless not allowed to hold instream flow rights. A state water trust or other state entity may be required to hold instream flow rights in trust for the benefit of the public.

Water rights vary from state to state, so before pursuing something of a perpetual nature landowners may wish to ensure that they have appropriate professional advice in helping them to understand potential long term consequences of related easement language.

1.6 What is the relationship between my mineral development rights and a conservation easement?

The nature of the relationship between mineral rights and conservation easements depends on who owns the mineral rights and the type of mining involved. Due to the incompatibility of surface mining and conservation purposes, the tax code prohibits surface mining. However, a tax deduction for a conservation easement will not be denied where “certain methods of mining that may have limited, localized impact on the real property but that are not irretrievably destructive of significant conservation interests” are utilized. For example, where “production facilities are concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state.”³

If the estate is “split” and the rights are owned by different parties, the owner of the mineral estate will usually have the right to reasonably use the surface to extract the minerals underneath. Thus, in a “split estate,” the surface owner may not be eligible for the tax deduction unless they can show that the probability of surface mining on their land is “so remote as to be negligible.” This determination requires that a landowner have a mineral remoteness assessment (commonly called a mineral report) performed by a certified geologist to determine either that there are no commercially important minerals on the property, or that it is commercially impractical to mine any minerals that are present.

If the landowner owns the mineral rights, for federal tax credit eligibility it is usually adequate that the conservation easement contain a provision explicitly prohibiting surface mining. If a landowner wishes to retain rights to certain mineral extraction such as sand, gravel, rock, or soil for personal use, it is important that the amount and location of the activity is confined in a manner that does not interfere with the purposes of the conservation easement. If the easement drafter is not careful in limiting the scope of mining it may not be eligible for these federal tax benefits. In fact, a 1997 case denied the tax deductions stemming from two conservation easements where the landowner retained the rights to extract sand and gravel.⁴ Please keep in mind, retaining the mineral rights could reduce the overall value of the easement.



Photo: Mesa Land Trust

1.7 What is the relationship between conservation easements and my oil and gas development rights?

As with surface mineral rights, a landowner can retain limited oil and gas development rights and still remain eligible for the federal tax deduction. The tax regulations give two examples of situations where the retention of oil and gas development rights do not affect the tax status of a conservation easement; one addresses a situation where the landowner retains the mineral rights and the other where the landowner has conveyed the mineral rights to a third party. If a landowner controls the mineral rights and retains oil and gas development rights he or she will still be eligible for a tax deduction as long as the owner ensures that "the drilling will have no more than a temporary, localized impact that will not interfere with the overall conservation purpose of the donation."

A landowner can also still benefit from the tax deduction where he or she conveys the rights to mineral development to a third party (as in a lease), but where the easement language prevents all surface mining and the removal of any minerals that could affect the purposes of the conservation easement. The IRS has also suggested that it is permissible for a landowner to employ slant drilling where the mining is based on an adjacent parcel but targets minerals under the parcel placed under a conservation easement.⁵ Additionally, as with mineral development, retaining oil and gas rights will reduce the overall value of the easement.

1.8 What is the relationship between conservation easements and my wind power development rights?

Given increased public and commercial interest in renewable energy, landowners may want to consider the impact that a conservation easement will have on the ability to develop renewable energy on protected land. Some land trusts support the development of renewable energy so long as it does not frustrate the purposes of the easement. The Pennsylvania Land Trust Association, for example, has provisions in its model conservation easement that allow certain development related to renewable energy that would otherwise be prohibited under a traditional conservation easement.⁶

Other land trusts are less receptive to the idea of allowing wind farm development and some might only allow it for personal use. Landowners who wish to have the option to develop renewable wind energy on their property should be familiar with their potential land trust's wind policies prior to entering into any final agreement. Section 2.7 will discuss other issues a landowner should consider when deciding which land trust to work with. Because this is such a new area of law, an expert should be consulted regarding how the retention of alternative energy development rights could affect the tax status of the easement.

The only progress that counts is that on the actual landscape of the back forty.

~ Wallace Stegner

2.1 How do I know whether my appraisal qualifies for the purposes of a conservation easement?

The Internal Revenue Service requires that the appraisal of the property and the conservation easement be done by a “qualified appraiser” in order to be eligible for tax benefits. Generally, a qualified appraiser must be state certified and cannot be compensated based on the value of the land. In addition, the appraiser cannot be any person whose relationship to the taxpayer would cause a “reasonable person” to question the appraiser’s independence and includes parties involved in the transaction, as well as employees of such parties. Land trusts can provide a list of qualified appraisers in your area.

2.2 How do I know whether I am dealing with a “qualified organization?”

Ensuring that the entity you are working with is a qualified organization is essential to be eligible for tax benefits. There are two types of entities that are considered qualified organizations: (1) governmental entities, including cities, counties, states, or the United States⁷ and (2) conservation or historic preservation organizations that qualify for tax exempt status under §§ 501(c)(3) of the Internal Revenue Code. A landowner should ask a potential easement holder whether they meet such criteria and may also consider hiring a tax lawyer to confirm that they are in fact a qualified organization.

A helpful guide to evaluating if the qualified organization is following the best management practices in conducting conservation transactions is through the Land Trust Alliance. The Alliance has developed Standards and Practices for land conservation organizations and has a list of organizations that are using their Standards and Practices. This information can be found at landtrustalliance.org

2.3 What are the costs associated with granting a conservation easement?

There are various transaction costs associated with putting a conservation easement on a property. For instance, a conservation easement requires a baseline report documenting the existing natural resources and human activity on the property. Furthermore, if the landowner does not own all of the mineral rights, a minerals remoteness assessment (“mineral report”) is necessary. In addition, fees are incurred for title work and recording costs. Land trusts will also suggest donating to a stewardship endowment that will help offset future monitoring expenses, and landowners are responsible for costs to conduct an appraisal as well as attorney or accountant fees. Together these



Photo: Wendy Ninteman

donations and fees typically range from \$25,000 to \$40,000. In some cases land trusts may be prepared to help fundraise for these associated expenses. While it might seem tempting to avoid incurring these associated fees, it is imperative that anyone considering a conservation easement work with informed professional advisors that can help wade through the complexities of related legal and financial decisions.

2.4 Do I have to grant a conservation easement over all of my land?

A conservation easement does not have to encompass an entire parcel of land and can include provisions allowing landowners to reserve portions as future building sites free from development restrictions. It is important that the landowner reveal any future development intentions to both their appraiser and the potential grantee to ensure that the easement can be appropriately valued and crafted to take these goals into consideration. Additionally, if a landowner does wish to encumber only a portion of his or her property, he or she should consider what impact future building might have on the appraised value of their adjacent property. This is important to discuss with the appraiser because there is a possibility that it might change the valuation of the remainder of the property and possibly raise the property taxes.

2.5 What is the difference between a donated easement and a purchased easement? What is a bargain sale easement?

As previously discussed, donated easements occur when landowners donate the full appraised value of the easement to the holding entity and in return receive all applicable benefits. Whereas purchased easements occur when an entity pays for the value of the development rights, leaving fee title with the landowner. Entities that might consider purchasing easements include land trusts, national conservation organizations, county or state open space programs, purchase of development rights (PDR) programs, and state or national wildlife or natural resources agencies. Again, due to limited resources, purchased easements are less common than donated easements and may be subject to more restrictions.

Bargain sale easements are a combination of purchase and donation. A land trust agrees to raise part of the purchase price if the landowner also agrees to donate an agreed upon percentage. In many areas of the country funding sources will only agree to pay a portion of the value of the appraised easement, necessitating a partial landowner donation.

That partial donation still generates income and estate tax benefits based on the landowner donation amount. Like purchased easements, bargain sale agreements are often restrictive, based on the particular requirements of a funding source.

2.6 How do monitoring visits work?

The purpose of monitoring visits is twofold: 1) to ensure that the terms of the easement are being adhered to by the landowner; and 2) to continue building relationships with landowners. Typically, monitoring visits occur once a year but may occur more frequently when the easement is vulnerable to frequent violations (e.g. sensitive natural areas). Monitoring procedures are established during easement negotiations, and should not result in surprise or intrusive site visits. Grantees contact landowners far in advance to determine a mutually agreeable date, often encouraging them to participate in inspections so that they are familiar with monitoring procedures. Monitoring visits can occur in several ways including aerial monitoring, ground monitoring, and monitoring by boat.

While monitoring is an important tool for evaluating that a landowner is complying with the

Land is a man's soul.

~ Daniel McCarty

terms and conditions of the deed of conservation easement, it is important to note the landowner violations of the terms of conservation easement are rare. In a survey of 7,000 conservation easements nationwide, less than 7 % had experienced major violation. Most of the cases of involving major violations occurred against subsequent landowners and not the original grantors of the conservations easement. ⁸

2.7 As a landowner, how do I choose which land trust to work with?

Because conservation easements lead to a long-term relationship between the landowner and the easement holder, it is important that the landowner finds a land trust with conservation goals similar to their own. For example, some trusts specialize in particular land types, such as rangeland, agriculture, natural or historical areas. Landowners may wish to research and meet with several land trusts to determine their options and find the best fit for them and their family prior to making any legal commitments. ⁹



Photo: Rio de la Vista

3.1 Will a conservation easement unreasonably reduce the value of my land?
It is true that a conservation easement will reduce the resale value of real property by granting certain rights, such as the ability to subdivide and develop the land, to an organization such as a land trust. In exchange for that reduction, the landowner has received income tax and estate tax benefits. Value may also be gained in the sense that the owner has the reassurance of knowing that the land will remain intact for years to come. In addition, placing land under a conservation easement may actually increase the value of the surrounding landscape due to the increased significance the public now places on open space.

The existence of privately created open space can also take the pressure off local government to invest in land conservation, thus helping to keep property taxes low. In this way a conservation easement reduces the cost of owning the land. This is particularly important in situations where the landowner is considering developing part of his or her land simply to afford continuing to live there. In situations where conservation easements are used to ensure that farm or ranchland is reserved for farming and ranching, the existence of the easement will actually make it more affordable for subsequent landowners to use the land for production agriculture.

Because the rights to subdivide and develop the land have been severed, the cost to purchase the land is often reduced and the subsequent purchaser is simply paying for the current use of the land which is now farming or ranching and not development. While this means less money for the seller, it also offers the peace of mind that that land will only be used for farming or ranching in the future. Even though the resale value of land encumbered with a conservation easement is reduced, the significant tax benefits that flow from such a restriction can help offset the reduction in value.

3.2 Will a conservation easement tie the hands of my heirs?
Conservation easements are often referred to as “perpetual” easements because they are intended to last forever. A great deal of careful thought should go into any easement language because of its long term implications. Although placing restrictions on land “forever” may seem like an enormous burden, it is really no different than if the landowner were to exercise certain development rights. For example, a decision to pave roads or sell land for the construction of a shopping center is essentially making a permanent decision.

While land that has been paved or sold over isn’t technically encumbered in perpetuity, in a practical sense it will never be the same. Thus, many choices that a landowner can make will have a lasting impact, regardless of whether or not that is an upfront consideration.

Although conservation easements are designed to be perpetual, there are situations that can lead to an easement’s termination or modification. For example, if the purpose of the

easement has become “impossible or impractical” the holder of the easement can ask the court, in what is called a *cy pres* proceeding, to allow for the modification or termination of the easement. Where such change is granted, the holder of the easement must use the compensation from the termination of the easement to accomplish conservation measures in a different manner or a different location.

Additionally, many conservation easements contain an “amendment provision” which allows the easement to be amended if the amendments are consistent with the purpose of the easement and both the landowner and easement holder agree on the change. Such a provision allows for making changes to the easement without going through the *cy pres* proceeding. The IRS is beginning to scrutinize amendments, and both *cy pres* proceedings and amending easements should be viewed as a last resort and not considered a potential future option for changing undesirable language.

3.3 Will a term easement adequately protect my land without tying the hands of my heirs?

For many people the primary factor involved in their decision to pursue a conservation easement is the long-term protection it offers, as well as the tax benefits associated with donating an easement. Under current tax laws, only perpetual easements qualify for federal income tax deductions and reductions in estate taxes. Initially, a term easement may be less expensive than a perpetual easement.

However, landowners may incur significant follow-up costs if they choose to renew a term easement. Additionally, due to the potential high cost of easement transactions and lack of tax benefits and permanency, many land trusts will not accept term easements. Thus, a term easement may place an increased burden on heirs, tying their hands without giving them any of the estate tax benefits of reduced value.

If perpetuity is not an option, landowners may want to consider management agreements that fund specific management practices for an agreed upon duration of time. Funding for these are often available through various state and federal wildlife and conservation agencies, and they can be layered on top of easements.

3.4 Can conservation easements prevent me from using my land as I like?

Conservation easements are voluntary deed restrictions that are meant to protect either current or mutually acceptable uses of the land. In some situations, this may require the use of commonly accepted conservation management practices to ensure current and future uses, but it is not a categorical restriction of past activities. Landowners should exercise their right to walk away from any negotiations they feel are not in their best interests or the interest of their heirs. It should be noted that if funding is involved, as in a purchased easement, potential funding sources may require additional restrictions.

3.5 Do conservation easements subject property owners to increased environmental regulation?

Conservation easements create a relationship strictly between the landowner and the easement holder. Unless a government entity is holding or funding the easement, the government is not involved in easement negotiations and has no role in the determination or enforcement of any environmental restrictions.

3.6 Will a conservation easement open my land to the public and increase my liability risk?

Conservation easements allow representatives of the grantee to enter the property on limited occasions to inspect the land to ensure that the terms of the easement

are being followed, usually on a yearly basis and always with scheduled permission from the landowner. While easements can be created which allow public access, this is not a necessary condition of a conservation easement and certainly not one upon which many landowners agree.

A property owner is only required to permit public access if the primary purpose of the easement is for recreational or educational use. For properties that lack either historical or conservation value, this designation may be a requirement to obtain the federal tax benefits stemming from the grant of a conservation easement, but they are very situation specific. Easements designed to protect wildlife, open space, or agricultural lands, for example, should not require public access.



Photo: Lynne Sherrod

3.7 Do banks offer loans on land encumbered with a conservation easement?

Because conservation easements reduce the value of the property, the size of a loan available for mortgaging a property will be reduced, but categorical exclusion of lands with easements from being mortgaged is a fallacy. Indeed, in the case of purchased easements, landowners can use money from selling their development rights to pay down debts owed on the property.

Many banks eagerly support this aspect of easements. It is important to note, however, that placing a conservation easement on property that is currently mortgaged requires agreement by the lender in most states. This requires a legal document called a “subordination” and should be considered early in the process.

3.8 Can conservation easements lead to the mismanagement and depletion of the land?

Some critics are concerned that conservation easements offer landowners an incentive to quickly deplete their property of its resources, based on the fear that the easement’s restrictions will prevent them from capitalizing on the presence of the resources, such as timber, water, or wildlife.

The purpose of a conservation easement is to ensure the continued use of the land for particular purposes. Any restrictions placed on the land are not an effort to limit the use of a particular resource, but rather to conserve its use to long-term sustainable levels.

Additionally, restrictions on the use of the land are negotiated and established prior to the grant of the easement. It is this legally recorded document that governs the land trust’s future oversight – new conditions can not be added without amending the easement, which is neither quick nor easy, or accomplished without the permission of ALL parties.

3.9 Aren't land trusts really arms of the government aimed at taking private property and converting it to government ownership or control?

There is a fear being perpetuated that land trusts are in collusion with the government, with an ulterior motive of transferring land from private ownership to government control unbeknownst to the landowner. Legally, this is not possible, and there is no evidence to support it. Under the Constitution of the United States, the federal government can only take private property through its power of eminent domain.

When exercising this power the government must, in addition to proving that the taking is for a public purpose, pay just compensation to the landowner.¹⁰ Of course, if a landowner cannot afford to pay taxes on the property, the property may be subject to a tax lien.

However, tax liens are not directly related to conservation easements, and a potential grantor should engage competent and qualified professional advisors during the negotiation process to ensure the easement does not frustrate their ability to pay taxes.

3.10 Do I have to fear an IRS audit if I put an easement on my property?

Although there is no way to predict the actions of the Internal Revenue Service, the vast majority of conservation easement transactions completed over the last 30 years have not received undue scrutiny. As with any charitable donation, following the IRS regulations and the national Land Trust Alliance's Standards and Practices will help support a landowner in defense of any potential IRS audit. However, recently there have been a number of Colorado easements audited. We asked a conservation real estate attorney to address this issue. Lawrence Kueter of Isaacson, Rosenbaum P.C., who is a nationally recognized expert on conservation easement transactions, noted:

As to the impact of the audits on current conservation easement transactions in Colorado, it is not significant for valid, defensible, transactions. Prior to the IRS Colorado audit project, prudent advice to a landowner and a land trust was to be careful and thorough in satisfying all of the requirements of the Treasury Regulations and to be conservative in the appraisal for the donation. The best information we have is that the IRS project is not going to recur in Colorado so that there will not be a focus again on a large number of conservation easements.

This leads to the present advice to a landowner and a land trust to be thorough in satisfying the requirements of the Treasury Regulations and to be conservative in the appraised value of the charitable donation. That is the manner in which business should have been conducted prior to this IRS project, and it is the manner in which business can still be reasonably conducted at this time. Any landowner and land trust should construct their transaction in a way where they believe it is capable of passing the tests as to conservation values and other requirements of the Treasury Regulations. They should also expect, as was true before the audit project, that any large gift may have the appraisal reviewed, and, therefore, the appraisal should be done conservatively as well. If those rules are followed, the use of the conservation easement as a charitable gift is still appropriate, notwithstanding the recent IRS focus on a large number of 2003 and 2004 Colorado transactions.

summary

In closing with this Bulletin, we hope we met our objective to separate fact from fiction, and answer some common questions regarding conservation easements. With the intention to offer our legal and practical perspective, we see this paper as an opportunity to help landowners to make a better informed choice in deciding if the donation of a conservation easement on their land is the right option for their particular situation. We also hope that our evaluation of some common misconceptions of conservation easement will help

guide land trusts in addressing concerns that the land owning community may have before pursuing a land protection option that could leave a lasting legacy for future generations.

The authors recognize that the subject of conservation easements is very complex and this publication could only provide a limited description. However, we hope this overview was informative and helped address the common questions about conservation easements.



Photo: Lynne Sherrod

¹For more information go to: <http://www.landtrustalliance.org/policy/taxincentives/state>.

²26 U.S.C. § 2031(c) (2007).

³26 C.F.R. § 1.170A-14(g)(4)(i) (2008).

⁴See *Great Northern Nekoosa Corporation & Subsidiaries v. United States*, 38 Fed. Cl. 645 (1997).

⁵Rev. Rul. 75-373, 1975-2 C.B. 77.

⁶See Pennsylvania Land Trust Association Model Conservation Easement, available at http://conserveland.org/model_documents/ModelCE08sep11b.pdf

⁷(26 U.S.C. § 170((b)(1)(A)(v))

⁸Source, Jason B. van Doren (2005) 2004 Conservation Easement Violation & Amendment Study. University of Vermont Law School.

⁹A nationwide list of land trusts can be found at: www.landtrustalliance.org.

¹⁰It is important for land conservation organizations to address to address the value of the extinguished development rights if a conservation easement is rescinded through the eminent domain process. Reaching an agreement in the deed of conservation easement of a pre-defined percentage based on the value of the extinguished development rights to be paid to the grantee helps to address any question about distribution of the just compensation process.

references

- Colorado Cattlemen's Agricultural Land Trust, <http://www.ccalt.org/CCALT%20FAQs.htm>
- Colorado Coalition of Land Trusts, *Mineral Development and Land Conservation: A Handbook for Conservation Professionals* (2009).
- Elizabeth Byers & Karin Marchetti Ponte, *The Conservation Easement Handbook*, 2nd Ed. (Land Trust Alliance 2005).
- Lawrence R. Kueter, *Law Update: Accounting for Mineral Rights in Conservation Easements*, Land Trust Alliance Exchange at 24 – 25 (Fall 2002).
- Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *Ecology L.Q.* 673, 681 (2007).
- Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 *Wy. L. R.* 1 (2009).
- New Mexico Conservation Easement Executive Committee, *A Guide to Conservation Easements for Agricultural Landowners*. New Mexico Department of Agriculture, 2009.
- Paul Mitchell, *Protecting the Future Forever: Why Perpetual Conservation Easements Outperform Term Easements* (University of Georgia Land Use Clinic 2006).
- Pennsylvania Land Trust Association Model Conservation Easement, available at http://conserveland.org/model_documents/ModelCE08sep11b.pdf.
- Peter D. Nichols *et al.*, *Water Rights Handbook for Colorado Conservation Professionals* (Bradford Publishing Co. 2005).
- Robert Trout et al., *Acquiring, Using, and Protecting Water in Colorado*, (Bradford Pub. 2004).
- Sheila McGrory-Klyza, *The Oilman Knocks*, 28 *Saving Land* 24, (Winter 2009).
- Vermont Land Trust, *Land Conservation: The Case for Perpetual Easements*, available at: http://www.vlt.org/perpetual_easements.html
- <http://www.landtrustalliance.org/policy/taxincentives/how-to-use>
- <http://www.landtrustalliance.org/conserve/faqs>
- <http://www.landtrustalliance.org/conserve/factsheets/conserve/why-land-conservation/farmers-ranchers/index>

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