

CONSERVATION EASEMENTS

Public Policy Considerations for PRIVATE
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.
- 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 (minerals, etc.)

Conservation Easements, cont.

- Conservation easements are a contract.
 - How they are interpreted and enforced will be dictated by the language used.
- 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.
 - Held in perpetuity
 - All future landowners of the easement are bound by the terms of the deed

Tax “Incentives”

- 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)
- March 31, 2015 Wyoming Tribune Eagle Article:
NPS alone suffers from an \$ 11 billion backlog of unfunded maintenance

Government Ownership of Land in Wyoming

- ❑ Wyoming has a total of 62,147,200 acres
- ❑ Federal and State ownership combined:
33,964,230 acres
- ❑ Right at 50%
- ❑ Does not include easements, water rights, and other types of property interests (minerals)
- ❑ That is enough – the remainder should be managed for multiple use

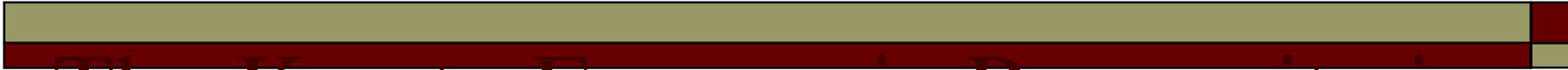
Private Property – Competing Demands

- Private property is limited
 - Farming
 - Ranching
 - Industrial
 - Commercial
 - Housing development
 - Mineral extraction
 - Oil and Gas
 - Recreation
 - Schools



The Growth of Land Trusts and Conservation Easements

- 1950 – 53 Land Trusts
- 2000 – 1,263 Land Trusts
- 2005 – 1667 Land Trusts
- 2010 National Land Trust Census: there are currently 47 million acres of land controlled by approximately 1700 land trusts and similar entities.



The Key to Economic Prosperity in this Country

- The ability to protect our environment is dependent upon our economic prosperity
- Private property ownership is the key to economic prosperity of the U.S.
- Economic Prosperity is dependent upon the following:
 - Affordable Housing
 - Affordable Food
 - Affordable Energy
- Perpetual conservation easements negatively impact every one of these factors



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
- ❑ Total size of Massachusetts – 5 million acres
- ❑ Total size of Maryland – 6.3 million acres
- ❑ Total size of Vermont – 5.9 million acres
- ❑ Total size of New Hampshire – 5.7 million acres

Conservation Easements – We are “Federalizing” Our Private Property

- “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
- The manner in which this “federalization” is taking place is largely (but not entirely) under the radar
 - Wyoming Stock Grower’s Land Trust – USDA/NRCS has enforcement authority – Stated right in the contract
 - Colorado ag land trust – similar language



Show Me the FEDERAL 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.



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 Once a Conservation Easement is in Place?

- The “poison pill” effect
 - Example language from Conservation Easements

Conservation Easement Language

□ Ducks Unlimited

- Places “voluntary restrictions” upon the use of the property
- Provides for the “transfer from the Grantor to the Grantee” the “affirmative rights for the protection” of the property
- baseline study – establishes condition of property at time of grant; used to monitor compliance; used to prohibit future development, improvements, fencing, use, etc.

Language cont.

□ Ducks Unlimited

- To protect wetlands and waterfowl;
- To protect wildlife habitat and ecological value;
- To protect open space;
- To protect natural communities and biological diversity;
- To protect scientific and natural features;
- To protect water quality and riparian values;

Language cont.

□ Ducks Unlimited

- To allow compatible outdoor recreation and educational uses;
- To assure the sustained, natural capacity to support healthy, vigorous grass growth and agricultural uses;
- To ALLOW agricultural, livestock, silvicultural, and farming uses;
- To protect any other characteristic, resource and/or use of the protected property that constitutes conservation values

Language cont. – Ducks Unlimited

- “The Purpose is **to ensure** that the Protected Property will be retained **in perpetuity** predominantly in its natural and scenic condition for conservation purposes to benefit the public and **to prevent** any use of the Protected Property that would significantly impair or interfere with the Conservation Values of the Protected Property, as defined in the Report, while allowing for traditional uses on the Protected Property that are compatible with and not destructive of those Conservation Values.”

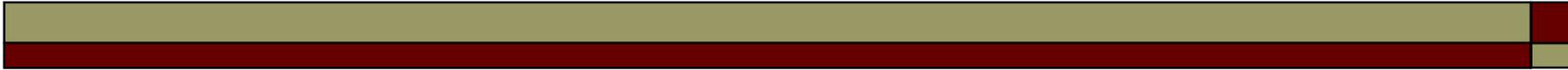
Language cont.

□ WSGLT

- USDA/NRCS has right of enforcement
- “The Grantor **binds itself** to monitor the use of the Property, and to enforce the restrictions on the future use of the Property imposed by this Easement, **in perpetuity.**”
- “Grantor **shall ensure** that all such surface use agreements comply with the terms of this Easement and protect the Conservation Purposes and Conservation Values.”

Language cont.

- WSGLT
- “Grantor intends that the Conservation Values of the Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those related to ranching and associated agricultural operations existing at the time of this grant that do not significantly impair or interfere with those values, and the Parties agree that the present ranching and associated agricultural operations do not impair or interfere with the Conservation Values of the Property at the time of this grant.”
- This is dangerous language.



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

- The right to make decisions re: the “use” of property is perhaps the most valuable (and most powerful).
 - USFS experience (we own it, we decide how it is used)
- Conservation easements typically prohibit subdividing (or any other type of “development”)
 - Limiting landowner’s flexibility (to sell lots on parameters of the property to improve cash flow)
- 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 a long, long time – is this the best way to manage 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

- Would we be happy to live by the rules set by our ancestors in the year 1642?
 - Why not?

- Should public policy allow us to dictate how property is managed in 2442?
 - Public policy counsels against allowing the current generation to dictate how the next generation uses, manages, operates, sells and develops our real property resources.

Perpetual Easements = Bad Economic Policy = Bad Public Policy = Bad Land Use 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 are fully entitled to do so.
 - Pay the then-going-rate for such a privilege at that time.
 - We should not be withdrawing the entire “use” value of the ownership right in present dollars, leaving little for our descendants (and government to tax at that time)

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)
- ❑ Industrial and commercial activities – where can they operate?



Recommendations

- States should amend statutes to do away with perpetual easements.
 - Limit to 25 to 50 years (one generation)
- 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
- States should not use public funds to effect perpetual conservation easements

Recommendations, cont.

- Tax deductions should not require perpetuity
 - Do not allow the IRS to dictate land use policy
- 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)



Our Ranchers and Farmers are Our Past, Our Present and Our Future

- “Great cities rest upon our broad and fertile prairies. Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms, and the grass will grow in the streets of every city in the country.”
 - William Jennings Bryan 1896



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