



The Long View

The Future of Perpetuity: Conservation Easement Concerns in the 21st Century



By James L. Olmsted

Background

In the United States, one of the most popular legal tools for the protection of private land is the perpetual conservation easement. While exact figures are difficult to come by, it is likely that at least 12 million acres of private land are currently protected by conservation easements held by nonprofit land trusts and that many more millions of acres of private land are protected by conservation easements held by governmental entities.

The popularity of conservation easements should not be surprising, given their relative ease of creation and the often substantial financial incentives they provide to landowners.

Conservation easements are unique among other forms of easements in that they can be held by a third party (i.e., they are technically easements "in gross") and typically impose a multitude of restrictions on the property they burden, the most important of which are restrictions on development. Moreover, conservation easements run with the land they burden in perpetuity. Because of these and other unique features of conservation easements, they were not favored at common law. Thus, virtually all conservation easements in the United States are authorized by state statutes, many of which are modeled on the Uniform Conservation Easement Act.¹

Many conservation easements are purchased by the holder, allowing the holder to protect land without having to pay for the full market value of the land in fee and allowing the landowner to continue to occupy the land while potentially pocketing a substantial profit. An even more widely used financial incentive is the federal income tax deduction provided under Section 170(h) of the Internal Revenue Code (IRC) for the donation of a qualified conservation easement to a qualified holder. The IRC §170(h) tax deduction thus provides landowners with desirable income tax advantages while allowing holders to acquire conservation easements with minimal financial expenditures.

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CLE Program on Oregon Land Trusts October 20, 12 to 1:30 at the U of O Turnbull Center (White Stag Block)

Sustainable Future Section Annual Celebration November 17, 2011 5:00 P.M. at Schwabe Williamson & Wyatt

Conservation Easements: An Overview

By Nancy Duhnkrack

A land trust is a nonprofit organization that, as all or part of its mission, actively works to conserve private lands by undertaking or assisting in land or easement acquisitions, or by engaging in the stewardship of such land or easements. These trusts may receive land and easements in donation, or can purchase them at fair market or lower value.

Of the tools for conserving private land, conservation easements are frequently best suited to the task. Easements are increasingly being used to shape and manage growth, protect working farms and forests, and help define community character. Conservation easements are the tool of choice for land protection purposes for a variety of reasons. Chief

among these is that, under an easement, the land stays in private ownership and on the tax rolls but the easement's restrictions ensure that the important conservation values are protected in perpetuity. Other reasons are the inherent flexibility to tailor an easement for a particular landscape and particular purposes, the relative cost of easement acquisition compared to outright purchase, and the possible tax benefits to the landowner. The remainder of this article provides a brief overview of conservation easements in general, the process of easement design and stewardship, and possible tax benefits to the landowner.

A conservation easement is a voluntary legal agreement between a landowner and an eligible organization created to protect certain natural and traditional values of the property in perpetuity. Land placed into a conservation easement still belongs to the

landowner, who may continue to live on and manage the land consistent with the values that the conservation easement seeks to protect. The eligible organization/easement holder's role is to ensure that the mutually agreed-upon terms and conditions of the easement are honored over time.

To repeat a familiar analogy, ownership of land includes a bundle of rights. The rights given, sold, or otherwise transferred by the landowner to the easement holder could include the right to construct buildings, subdivide the land, graze in riparian areas, or clear-cut timber. The landowner retains those rights that have not been deeded to the easement holder. Land protected by a conservation easement may be sold, bequeathed, or transferred like any



other property. The easement is permanently recorded with the deed and remains with the land regardless of future ownership.

Public agencies, Indian tribes, and nonprofit corporations, typically land trusts, can hold conservation easements. If an easement donor wishes to claim an income tax deduction for the value of the conservation easement donation, he or she must donate (or sell at a bargain price) the easement to a governmental unit or an IRC § 501(c)(3) organization. The monetary value of a conservation easement is the fair market value of those property rights and restrictions conveyed by a landowner to a land trust. An appraisal estimates the value of those rights by calculating the impact of the easement on the value of the protected property. The appraisal may have several

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The Future of Perpetuity: Conservation Easement Concerns

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In the course of deploying so many perpetual conservation easements, the land trust community has developed an impressive body of knowledge regarding their nature and use. Nevertheless, and to its credit, the land trust community is also increasingly aware of its lack of a full understanding of the future consequences of deploying current versions of conservation easements in a world that is rapidly changing in every imaginable aspect, including its climate. The following sections describe some of the concerns that this gap in understanding has engendered and suggest areas in which perpetual conservation easements might need retooling to better serve the needs of future generations.

Amendment

One of the greatest concerns of the land trust community is improper use of the amendment process. While there is arguably an implied ability to amend any conservation easement, most conservation easements contain language expressly permitting amendment upon agreement of the landowner and the holder. On a practical level, current landowners and holders are often concerned that future landowners and holders—remember that conservation easements last forever—may lack the motivation or resources to protect the land and thus may collude to amend the conservation easement to relax or even remove certain restrictions. It is also easy to envision any number of scenarios in which less-than-scrupulous landowners or holders may be tempted to amend away easement restrictions for economic gain. Another concern is that amendments may so greatly reduce or eliminate the protection of the conservation values of a donat-

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Schwabe, Williamson & Wyatt Awarded for Sustainable Law Office Leadership

Congratulations to Schwabe, Williamson & Wyatt, winner of the Sustainable Future Section's 2011 Sustainable Law Office Leadership Award. Not only was Schwabe an early adopter of sustainable practices, but the firm continues to pioneer innovative sustainability measures.

Schwabe commissioned its first sustainability audit in 2005. In 2008, Schwabe established sustainability as a core value of the firm. To implement the firm's commitment to sustainability, Schwabe set goals to decrease paper usage by 10 percent, increase by 25 percent purchases of office supplies manufactured from recycled materials, establish employee commuting initiatives, reduce energy use, and encourage vendors to adopt more sustainable practices. In 2009 and again in 2010, Schwabe was named one of the 100 Best Green Companies to Work for in Oregon by *Oregon Business* magazine.

Over the past several years, Schwabe has taken steps to significantly reduce the firm's impact on the environment by reducing its waste and consumption of resources. In total, Schwabe supports 15 different types of recycling programs. In addition to ongoing paper, plastic, and metal recycling programs, Schwabe reduced waste by initiating programs to recycle batteries, cell phones, corks, Tyvek envelopes, DVDs, CDs, and VHS tapes. Schwabe collects pens, markers, and mechanical pencils for recycling and encourages employees to bring plastic bags, printer cartridges, and compact fluorescent bulbs from home for collection and transport to the recycler. Schwabe also installed compost bins in the lunchroom kitchen and at all coffee stations.

Schwabe has also significantly reduced its resource consumption. The firm set up a program with the local Starbucks to provide durable coffee mugs rather than paper cups for Schwabe employees. Schwabe replaced disposable dishware and utensils in its lunchroom and conference center with durable products. To reduce paper use, Schwabe provides online payroll information rather than paper paystubs, prints marketing materials on recycled paper with soy-based ink, and uses 100 percent post-consumer-content bond paper and 100 percent post-consumer-content copy paper. The switch to post-consumer-content paper saves an average of 420 trees each year. Schwabe also worked with vendors to convert from corrugated packaging to reusable totes for all supply shipments. To reduce energy, Schwabe installed low-energy lighting and motion sensors in its offices, copy rooms, file rooms, and library. Schwabe also uses virtual servers to reduce heat and HVAC requirements in its

server rooms. To conserve water, Schwabe installed low-flow faucets and showerheads in all its sinks and showers.

Schwabe encourages employees to reduce their own carbon emissions by facilitating alternative commuter transportation. Schwabe offers a carpool matching resource on the firm's intranet, subsidizes up to 50 percent of a monthly pass for public transportation, provides shower facilities and lockers for bicyclers, provides a Toyota Prius on site, and maintains a Zipcar membership for workday transportation. A firmwide survey revealed that 66 percent of Schwabe employees in Oregon and Washington commute to work by taking public transportation, carpooling, bicycling, or walking. Schwabe also restricts deliveries of office supplies to twice weekly.



In addition to increasing sustainable practices within the firm, Schwabe encourages sustainability in the community. Schwabe and Portland State University partnered in 2008

to create the annual Youth Leaders for Sustainability Camp (YLS). YLS is a one-week summer camp for middle-school youth, teaching sustainability concepts, introducing campers to industry and community leaders in sustainability, and identifying ways in which campers can personally take steps to increase sustainability in their own communities.

Schwabe also provides pro bono services to Wallowa Resources, a not-for-profit organization that develops, promotes, and implements innovative ways to increase sustainability in Wallowa County and the Intermountain West. For example, Schwabe has advised Wallowa Resources regarding community forest bonds and conservation easements. Over the past year, Schwabe helped Wallowa Resources Community Solutions, Inc., to create a revolving fund for small-scale renewable energy projects in Wallowa County and the surrounding area. Schwabe also provided pro bono counsel to the Enterprise School District relating to the District's conversion to a biomass boiler.

Through early adoption of sustainability as a core value, continuing innovation of sustainable office practices, and encouraging sustainability outside the office, Schwabe has become a leader in sustainability for the legal community. The Sustainable Future Section applauds Schwabe for the firm's contributions to increasing sustainability.

Robin B. Seifried is an attorney at Cable Huston Benedict Haagenes & Lloyd LLP.

Oregon's Public Trust Doctrine in the 21st Century: Public Rights in Waters, Wildlife, and Beaches

By Michael C. Blumm & Erika A. Doot

Oregon's public-trust doctrine has been misunderstood. The doctrine has not been judicially interpreted in over 30 years, but was the subject of a recent opinion of the Oregon Attorney General (AG). In 2005, the AG interpreted the scope of the doctrine to be limited to the beds of tidelands and navigable-for-title water and erected a separate "public use" doctrine protecting public rights in other waters, including recreational waters. But because Oregon courts have never limited public rights in the state's waters to those with publicly owned bedlands, the opinion should have recognized that the public-trust doctrine provides broad public recreational rights in all waters of the state.

Indeed, since early statehood, Oregon courts and the legislature have recognized that water is a publicly owned resource, a resource that present and future generations have the right to use. Since the 1860s, the Oregon Supreme Court has consistently ruled in favor of public rights in waterways, based on language in the Oregon Statehood Act declaring navigable waters to be public highways that would remain "forever free," not monopolized by private owners.

Moreover, in the early 20th century, the court explicitly ruled that the scope of public rights in publicly owned waters could and should evolve over time. The court explained that public rights in state waters include not only navigation, fishing, hunting, and recreation, but also sailing, rowing, bathing, skating, taking water for various purposes, cutting ice, and other public use that could not then be anticipated.

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"Oregon's public-trust doctrine is not of mere academic interest. The doctrine imposes duties on the state as sovereign owner of water, wildlife, and ancillary uplands to manage these resources for the common good."

Trickle Down Sustainability at the Oregon State Bar Center

By Rod Wegener

With the start-up of the Sustainability Future Section and sustainability-related actions by the Board of Governors in 2010, the efforts to be a more sustainable organization trickled down to actions and efforts of staff at the bar center. A Sustainability Team of interested staff from various departments met and continue to meet to identify sustainability matters at the bar center and offer educational opportunities in sustainability for all staff. The Team members gained valuable education from presentations by local leaders in sustainable office practices. Max Miller and Elizabeth Goodman from Tonkon Torp LLP explained what that firm does to raise awareness of sustainability. Jeanne Roy of the Center for Earth Leadership wowed the Team with her personal sustainable and recycling practices. Pride Disposal Company and Far West Fibers,

Inc.—two companies that collect or recycle the items placed in the recycle bins—explained their roles in product lifecycles.

The number of pages copied on the copiers decreased 40 percent in the two years from January 1, 2009, through December 31, 2010. That is a significant savings in paper, energy, and dollars.

The Team also held a number of sessions to identify practices that should be in place at the bar center to add to or increase recycling and sustainability. Here are some of the ideas that surfaced and the results of those efforts:

- Plastic silverware and paper cups

and plates were removed from the staff kitchen and replaced with durable products.

- Recycle bins are located in common areas for dead batteries, plastic bags, and lids and tops. The kitchens have had containers for the most commonly recyclable products since the building opened.
- Containers for recyclable products are in place for all CLE and similar events at the conference center.
- All PCs are set to a standby mode after 20 minutes, and staff are instructed to turn off their PCs at the end of the workday.
- Double-sided printing is the default at all workstations.
- All copy machines move into a "sleep" mode if not in use for 20 minutes.
- Off-site document storage has been

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Conservation Easements: An Overview

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uses. For charitable contribution purposes, the appraised value of the easement is used to determine the amount of the income tax deduction. In this case, the appraisal procedure and report must conform to specific IRS standards. See Treasury Regulations §§ 1.170A-13(c) and 1.170A-14(h) for more detail. The value of the property for purposes of calculating the contribution is its fair market value, not the landowner's basis in the property.

Properties protected by an easement are primarily those with significant conservation values. Lands under easement range in size from a half-acre community garden to thousand-acre ranches, and include tracts with forests, wetlands, farms and ranches, wildlife habitat, scenic areas, and historic and cultural lands. Most land trusts have guidelines for targeting lands to protect and will evaluate proposed easement projects under those guidelines to determine which properties best mesh with organizational goals. A first step in evaluating a project and in developing an appropriate easement is an assessment of the property's conservation or preservation values. An inventory of the property's important resources will help the easement drafter to tailor restrictions to properly protect these resources. When the easement holder accepts an easement, it accepts responsibility for enforcing the restrictions set forth in the easement document in perpetuity. It also accepts responsibility to partner with the landowner to provide stewardship, responsible resource management, of the land. Typically landowners provide a cash donation to a "stewardship fund" for ongoing management of the easement. In other instances, stewardship dollars come from outside sources.

There are possible tax benefits associated with easement donations, and potential easement donors should seek the advice of legal and tax counsel to determine the possible income, estate, and property tax benefits of an easement donation. The donation of a conservation easement, or the bargain sale of an easement, may be a tax-deductible charitable gift, as long as it meets IRC requirements. The value of an estate is reduced by the value of the easement, such that estate taxes are imposed only on the restricted value of land passed to heirs. Because property taxes are based on the assessed value of the property, an easement, by restricting allowable uses, usually reduces the assessed value, and may reduce property taxes as well.



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Oregon's Public Trust Doctrine



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We maintain that the Oregon public-trust doctrine is grounded on public ownership of natural resources held in trust by the state in a sovereign capacity, not solely on ownership of the beds of navigable-for-title waters, as the AG suggested. Indeed, in earlier opinions, the AG consistently recognized public rights in resources managed in a sovereign capacity. Oregon has always claimed sovereign ownership of water and wildlife within the state, so the courts should recognize both as public-trust resources. Although the state can authorize private rights in those resources, all private rights are subject to the state's sovereign ownership, which is properly characterized as a public easement that requires the state, as trustee, to maintain these resources for the public. Thus, trust resources simultaneously have public and private "owners." The AG was mistaken in thinking that the public-trust doctrine applied only to lands the public owned in fee and failed to appreciate the broad nature of the state's public-trust doctrine.

Just as in the Statehood Act's declaration of public ownership of waterways, courts should interpret the public-trust doctrine to be implicit in other statutory declarations of public ownership of natural resources. Thus, although its origins may lie in common law, the public-trust doctrine's future likely is in statutory interpretation because many statutes recognize public ownership of natural resources and impose trust obligations on the government. For example, in 2011, interpreting Oregon statutes, the Oregon Court of Appeals rejected assertions that game farm animals were not subject to wildlife statutes, reaffirmed that the state owns all wildlife within its borders in a sovereign capacity, and concluded that the state must manage these resources for the public benefit.

Similarly, ocean beaches are public-trust resources because the public possesses usufructuary rights in beaches that are necessary to enable use of the adjacent ocean waters. Over 40 years ago, the Oregon Supreme Court upheld public rights to use these resources under the doctrine of custom, but the courts should also acknowledge that ocean beaches have long been public highways, and therefore the subject of a public easement in these trust resources.

In 1869, in its first decision on public rights in the state's waterways, the Oregon Supreme Court explained that the public had rights in adjacent uplands to facilitate log drives. We maintain that similar public ancillary rights exist in other uplands where necessary to provide public access to, or preservation of, public-trust water and wildlife resources.

Oregon's public-trust doctrine is not of mere academic interest. The doctrine imposes duties on the state as sovereign owner of

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Mission and Work of the Deschutes Land Trust

By Brad Nye

The Deschutes Land Trust was founded in 1995 to provide community-based land conservation within the Deschutes Basin. The Land Trust's mission is to "cooperate with landowners to conserve land for wildlife, scenic views and local communities." While the Land Trust founders had specific conservation needs they wished to address, our main focus in the early years was building awareness of the organization. Few people in our service area were familiar with land trusts or conservation easements, and good project opportunities were relatively few. As a result, the criteria we used to screen and pursue projects were fairly general in nature.

Over the years, awareness of the Land Trust has increased, conservation opportunities have grown in number, and our work has become increasingly strategic. Now, instead of simply responding to opportunities, the Land Trust proactively identifies and cultivates conservation projects that address the region's greatest conservation needs. Like many other land trusts of our size, we employ a variety of tools that extend beyond the standard land trust approach of accepting tax-driven conservation easements or donated properties. Because the ultimate measure of success in conserving vital natural resources includes objectives outside our specific niche, we also devote greater energy to collaborating with other conservation groups.

One example of this type of collaboration is the Deschutes Collaborative (the "Collaborative"). This collaboration, which includes the Land Trust, the Upper Deschutes Watershed Council, the Crooked River Watershed Council, and the Deschutes River Conservancy, supports the once-in-a-lifetime effort to reintroduce salmon and steelhead to the upper Deschutes River. Salmon and steelhead have been absent from the upper river since 1968, when efforts to pass juvenile fish downstream through the newly constructed Pelton-Round Butte hydroelectric project, having met with little success, were abandoned.

In the late 1990s, Portland General Electric (PGE) and the Warm Springs Tribes filed applications for a new federal license to operate the dams. The two entities began the relicensing process as competitors, but eventually joined forces as partners in the ownership of the project. As a condition of the new license, PGE and the Tribes committed more than \$100 million to restoring fish passage through the project.

This commitment to restore fish passage at the dams brought heightened focus on the condition of fish habitat within the proposed reintroduction area. Habitat was already in poor condition by the time Round Butte Dam was completed in 1964, but the Christmas flood that occurred later that year set the stage for a new level of degradation. In response to the flood, the U.S. Army Corps of

Engineers straightened many project-area streams. From a fisheries perspective, these streams now looked more like ditches, with few of the pools and slow-water areas that our native fish depend on for survival and reproduction.

"The Land Trust proactively identifies and cultivates conservation projects that address the region's greatest conservation needs."

Habitat studies completed during the relicensing process had confirmed that many of the stream reaches proposed for reintroduction were in poor condition. Although the Tribes and PGE had committed a certain amount of funding for habitat restoration, no entity had stepped up to lead the restoration effort. Recognizing this, the Land Trust launched its Back to Home Waters program and hired a project manager to conserve land along project-area and to rally other local groups around the cause of restoring habitat to support the reintroduction effort. Our acquisition of the Camp Polk Meadow Preserve—widely regarded as providing some of the best historic habitat on Whychus Creek—was our first land conservation project completed under this new program.

Ten years and dozens of projects later, the Land Trust, the Deschutes River Conservancy, the Upper Deschutes Watershed Council, and the Crooked

River Watershed Council are engaged in a formal collaboration focused on protecting and restoring habitat throughout the reintroduction area. These four groups began work on a formal collaboration because of natural ties between their areas of expertise and service areas. It took more than two years of regular, and many times heated, discussions to agree on how the group would function, and we wouldn't have reached agreement without the gracious help of staff from two outside entities, the Bonneville Environmental Foundation and the National Forest Foundation.

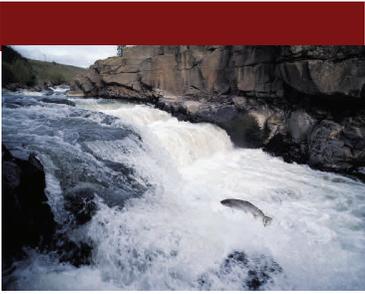
As part of these partnership discussions, each participant was required to confirm its organizational priorities and clarify its role within the reintroduction effort. A natural result of this clarification was the identification of restoration needs (e.g., screening irrigation diversions to prevent entrainment of juvenile salmon) that fell within the natural purview of one of the groups, even though the group lacked the capacity necessary to address the need. One of the Collaborative's first priorities was to jointly help develop resources to meet these individual needs.

The organizations within the Collaborative operate primarily in four basic areas: land conservation, water conservation,

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Mission and Work of the Deschutes Land Trust



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stream restoration, and fish passage. The Land Trust permanently conserves and manages important properties, the Deschutes River Conservancy works with irrigators and irrigation districts to improve efficiencies and keep more water in streams, and the Watershed Councils restore stream habitat and remove fish-passage barriers. The four organizations meet regularly to identify, prioritize, fund, and implement the highest priority conservation and restoration projects in the reintroduction area.

The Collaborative has become a model for collaborative ecosystem restoration and drawn great interest from public and private restoration funders. For example, the Oregon Watershed Enhancement Board, Oregon's largest restoration funder, has contributed more than \$8 million to the Collaborative's work over the past four years. We are currently working to expand our funding base to a national level so that we can better meet the funding requirements of the sustained effort it will take to provide sufficient high-quality habitat for the reintroduction effort. While the Collaborative took significant energy, sacrifices, and trust to develop, and continues to require those investments today, the ecological returns to date have more than justified the effort. We invite you to visit us and our project sites to learn first-hand about the Deschutes Land Trust, its partners, and our collaborative approach to watershed restoration.

Brad Nye is Conservation Director of the Deschutes Land Trust.

<http://www.deschuteslandtrust.org>

<http://www.deschutesriver.org>

<http://www.restorethedeschutes.org>

<http://crookedriver.deschutesriver.org>

Oregon's Public Trust Doctrine

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water, wildlife, and ancillary uplands to manage these resources for the common good.

Throughout the state's history, the courts have relied on public-trust principles to resolve disputes among competing natural resource users. In the late 19th century, the courts generally recognized superior public rights in waterways for commercial purposes such as logging and fishing. By 1920, the Oregon Supreme Court had recognized recreation as commerce protected under the public-navigation easement. In the 21st century, the doctrine is fully capable of evolving to meet contemporary pressing needs, such as climate change, as the court recognized nearly a century ago.

When called upon to resolve disputes between competing uses of natural resources, Oregon courts should rely on the public-trust doctrine to sustain these public resources for present and future generations. In an era of widespread skepticism of government management, this venerable doctrine seems to be an especially appropriate mechanism to ensure access to publicly owned resources as well as to provide citizens with an opportunity to gain review of government action and inaction threatening unsustainable development of natural resources that are central to the state's identity, culture, and economy.

Michael Blumm is Jeffrey Bain Faculty Scholar & Professor of Law at Lewis & Clark Law School; Erika Doot graduated magna cum laude from Lewis & Clark Law School in May 2011. Their article, complete with citations, is available at <http://ssrn.com/abstract=1925112>.

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ed conservation easement that the eased land may be deemed by the IRS to no longer be "protected in perpetuity," an express requirement under the Treasury regulations, resulting in the disallowance of the tax deduction taken by the landowner. While there is a continuum of conservation easement provisions to remove these concerns, a conservative and often-used approach is to expressly require that all amendments be "neutral to or enhance the conservation values."² Even greater protection from inappropriate amendment can be had by adding further provisions requiring judicial oversight when substantive amendments are not neutral or enhancing to the conservation values.

Termination

Concerns regarding improper conservation easement termination mirror those regarding improper amendment. Like the ability to amend a conservation easement, the ability to terminate a conservation easement usually derives from provisions in the easement itself. While the Treasury regulations are silent regarding amendment of donated easements, they allow termination of donated easements when the stated conservation purposes become impossible or impractical to implement. As with amendments, one commonly used drafting strategy to avoid improper termination is to include preventive language within the easement document itself.

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For example, the termination provision might require that any proposed termination requires judicial approval. Further protection may be provided by expressly characterizing the conservation easement as a charitable trust, thus requiring that a state's attorney general's office participate in the termination proceeding on behalf of the public interest in continuing the easement's existence. Additional protections would involve granting standing to contest termination proceedings to such parties as former landowners, heirs of the current or former landowners, or former holders.³

Databases

In view of the enormous popularity of conservation easements as a land protection tool, to date there has been remarkably little progress in gathering, organizing, and disseminating to the public information about individual conservation easements. There are a number of reasons for this, including the collective ambivalence of the land trust community regarding whether conservation easement information should be made public in the first instance. Of the arguments against making conservation easement information public, the most prominent include protecting land not open to the public from public use and protecting the privacy of landowners granting conservation easements. Compelling as such arguments may be, on balance this author finds arguments in favor of compiling and making public conservation easement data far more persuasive. For example, making conservation easement data public greatly enhances collaborative efforts to protect not only land but also species and their habitat. Publicly available conservation easement data also enhances the ability of scientists to evaluate various land-protection methodologies, gather information critical to species and habitat protection, and track on the ground effects of climate change. Finally, and perhaps most importantly, conservation easement registries may provide the only reliable means for tracking conservation easements that might otherwise be lost because of the dissolution or other failure of the easement holder in the distant future. Despite the many obstacles to making conservation easement data public, one critical milestone was recently achieved after years of collaborative effort with the online publication of the National Conservation Easement Database.⁴

Land Use and Zoning

Conservation easements prohibiting development in perpetuity inevitably interact, for better or worse, with land use and zoning

processes. For example, placing a large conservation easement on land in the path of development not only will be unlikely to stop such development permanently, but may even make matters worse by altering its trajectory, perhaps even causing it to leapfrog to other locations, including locations poorly suited for development. For reasons explained in the previous section, land use planners may not even be aware of the existence and locations of conservation easements in their jurisdictions, thus leading them to act on incomplete information and thereby decreasing the effectiveness of their planning efforts. Despite the negative social and economic consequences that might occur when

conservation easement creation and land use and zoning processes are allowed to operate independently, only one state, Massachusetts, requires the integration of conservation easement creation and land use and zoning hearing and approval processes. Significantly, the lack of governmental oversight of conservation easement creation by local governments may be a contributor to the popularity of conservation easements. In particular, those who mistrust the motivation of local governments and planning departments when it comes to protecting natural lands find this lack of governmental oversight helpful in staving off unwanted development.⁵

Climate Change

Of all the challenges facing the land trust community, anthropogenic climate change tops the list in complexity and severity of threat. Climate change forces the land trust community to confront the incongruity between its use of a legal tool created and designed to maintain the status quo in a static world and the scientific perspective that the world exists in a constant state of almost infinitely complex change. Climate change has simultaneously multiplied the speed and complexity of all forms of biotic and abiotic change thereby increasing the severity of the potential harms that the land trust community hoped conservation easements would prevent. Important issues to be considered include how to address climate-change-caused migrations of species that become invasive in their new domains, whether to attempt restoration of ecosystems transformed by climate change, and whether to dispense with or reduce the use of perpetual conservation easements in the first instance. After what may be described as a long denial phase, the land trust community has begun to more fully acknowledge the immensity of the challenges posed by climate change. Nevertheless, actual solutions in terms of how conservation easements should be drafted and deployed in a climate-changed world are often little more than cosmetic.

Management Plans

Thus far, the primary means by which the land trust community

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has attempted to inject flexibility into conservation easement practice is by use of management plans. This relatively recent trend has typically been limited to management plans for so-called working forests, but grazing-management plans for rangelands are becoming more common and the use of management plans for other types of working lands is to be expected. Another, more generalized, form of management plan is the increasingly common "adaptive management plan." Designed to allow flexibility in management of eased lands under a variety of change scenarios (e.g., climate change), adaptive management plans take advantage of multiple information inputs, including monitoring reports based on site visits and scientific data gathered over varying scales.

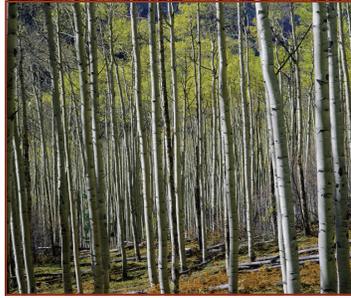
While much hope has been pinned on management plans, a number of pessimistic observations may be made. First, in terms of conservation easement drafting, provisions for management plans remain skeletal and aspirational. For example, the typical management-plan provision simply provides that at some future time the landowner and the easement holder will select an expert to create a management plan for some feature of the eased land, with such plans sometimes being subject to the approval of the landowner and sometimes not.

Second, as the number of conservation easements created by each individual land trust increases, the amount of resources that each land trust can devote to monitoring its easement portfolio may tend to decrease. Such decreases are likely to be particularly problematic on lands subject to management plans because such lands would be expected to require even higher than normal levels of monitoring.

"After what may be described as a long denial phase, the land trust community has begun to more fully acknowledge the challenges posed by climate change."

Indirect, but nonetheless compelling, evidence of the ineffectiveness of management plans in general comes from the dismal history of use of management plans by state and federal agencies.⁶ Among the causes cited for failed agency management plans are lack of mechanisms for gathering and preserving data from failed plans that would inform future plans, lack of resources for monitoring management-plan effectiveness, and lack of communication among various players and in particular among agencies themselves. Land trusts could easily be subject to the same deficits.

Finally, management plans are at odds with the predominant pur-



pose of traditional conservation easements, which is to maintain the status quo at the time of easement creation. Consequently, unless conservation easements containing management plans are extraordinarily well crafted, the typical conservation easement restrictions on alterations to the land and modifications to the operation of the easement itself may cripple future attempts to implement management plans, particularly adaptive management plans intended to react to changing conditions.

Conclusion

Conservation easements hold great promise for protecting private lands, the treasures such lands contain, and the services they provide. Indeed, of all land-protection tools in use today, conservation easements are often the most effective and efficient in terms of providing the greatest social benefits for the least economic investment. Nevertheless, conservation easement practice faces great challenges, and such challenges can only be expected to grow and become more complex as population increases, development advances, and climate-change effects multiply exponentially. Accordingly, the land trust community must exist in a mode of constant learning and adaptation and must utilize scientific data from both the physical and social sciences. Through ongoing learning and multidisciplinary collaborations, and with more than a little luck, the land trust community will ideally be well positioned to protect our natural lands in an ever more populated, complex and rapidly changing world.

To download this and other articles by James L. Olmsted, please visit this author's SSRN website at:
http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1488037.

To download conservation-easement examples, conservation-easement laws, and influential conservation-easement law review articles, please visit the Conservation & Preservation Counsel website at: www.landprotect.com.

James L. Olmsted is a conservation easement attorney representing clients nationwide. He is widely published and a frequent speaker on conservation easements and how they should be drafted and managed in the age of climate change. Mr. Olmsted also serves as an adjunct faculty member at the University of Oregon School of Law, where he is affiliated with the Environmental and Natural Resources Department. He is the founder of the law firm Conservation & Preservation Counsel, L.L.C.

Notes

- 1 The Uniform Conservation Easement Act was approved by the Uniform Law Commission in 1981 and has been adopted by 24 states and the District of Columbia. Oregon's conservation easement enabling statute, ORS 271.715 et seq., is among those that

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Sustainability at the Oregon State Bar Center

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reduced by almost half with the continuing conversion of paper documents into electronic format.

- A tip on green ideas is regularly listed on the bar's intranet.

The bar has been focusing on reducing its use of copy machines for some time, and this practice has shown dramatic results in the last two years. The number of pages copied on the copiers decreased 40 percent in the two years from January 1, 2009, through December 31, 2010. That is a significant savings in paper, energy, and dollars. And as is the case for most homes and businesses, there is a recycle bin right next to the copier for those goofs or copies that never should have been made in the first place.

As with copier usage, the bar's postage costs have also decreased

dramatically, largely because more communication is being made electronically. As for many other businesses, correspondence that once was sent through the post office is now sent by e-mail or is available on the bar's Web site. Furthering that trend, the bar's Board of Governors made three decisions that significantly reduced paper usage. First, the entire legal publications library is available online for all members. Second, the bar eliminated members' names and addresses in the Membership Directory. Third, the bar e-mails the membership fee statements. All those changes have led to paper, energy, time, and dollar savings.

Currently, the Team is evaluating commuting alternatives. Getting to and from Tigard on public transportation is not the easiest way to commute, but the Team is exploring options with Tri-Met, carpools, vanpools, and even benefits for bike riders.

Rod Wegener is Chief Financial Officer of the Oregon State Bar.

Announcements

CLE Program: Oregon Land Trusts

Date/Time:	Thurs., October 20, 2011, Noon to 1:30 PM
Location:	University of Oregon, Portland (White Stag Block) 70 NW Couch Street The Turnbull Center on Floor 3R
Cost:	Free to Sustainable Future Section members; \$10 for nonmembers (payable at door)
CLE:	1.5 hour CLE credit (application will be submitted)
Call-in:	Teleconference available for SFS Section members (to be provided after registration)
Lunch:	Brown bag (bring your own)
RSVP:	Amie Jamieson at amie@mcd-law.com or (503) 595-3922

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have not formally adopted the Uniform Conservation Easement Act.

- 2 See generally Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, July/August Prob. & Prop. 52 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461159.
- 3 *Id.*
- 4 See generally James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 Duke J.L. & Contemp. Probs. 51, (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690007.
- 5 See generally Jesse J. Richardson, Jr. & Amanda C. Bernard, *Zoning for Conservation Easements*, 74 Duke J.L. & Contemp. Probs. 83, (2011), <http://www.law.duke.edu/journals/lcp>. See also John D. Echeverria & Jeffrey Pidot, *Drawing the Line: Striking a Principled Balance between Regulating and Paying to Protect the Land*, 39 Envtl. L. Rep. 10868, (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925907.
- 6 See generally Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through A Learning Infrastructure*, 59 Emory L.J. 1, (2009).



The Long View

Photo by J. Michael Mattingly

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Editor's Note:

Thank you for reading *The Long View*. Your input and suggestions on content are welcome.
E-mail SFSeditor@millernash.com to comment.

Michelle Slater, Editor
Miller Nash LLP

Consider This...

“As individuals, people are inherently good. I have a somewhat more pessimistic view of people in groups. And I remain extremely concerned when I see what’s happening in our country, which is in many ways the luckiest place in the world. We don’t seem to be excited about making our country a better place for our kids.”

~ Steve Jobs