

CONSERVATION EASEMENTS TO PROTECT WORKING FORESTS

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Introduction

Development pressures and rising taxes and land values are among the growing challenges facing forestland owners. Increasingly, it is financially difficult to keep large parcels of land intact.

According to the National Resources Inventory, the rate of development between 1997 and 2001 averaged 2.2 million acres per year. During that time period, 46% of the developed acres came from forestland and the rate of forest land development continued on an upward trend¹.

Under this development pressure, forested properties are being divided into smaller parcels, with some sold for development. Parcelization can lead to major change in how land is managed and can limit forestry activities as smaller properties become inefficient to manage economically. Additionally, this parcelization often leads to the fragmentation of forest cover and the resulting loss of wildlife habitats.

In recent years, one tool – the conservation easement – has come to the forefront of the race to protect land from development. A conservation easement is a tool that restricts land use conversion yet allows landowners to retain ownership and continue activities that fit their ownership objectives.

According to the National Land Trust Census,² there were more than 1,500 land trusts in the United States by mid-2003, many of which managed conservation easements. The total acreage protected by conservation easements in the United States increased 266% from 1998 to 2003, from 1.4 million to more than 5 million acres. The total number of conservation easements in 2003 was 17,847, up from 7,392 in 1998.

In many ways, conservation easements are considered a win-win for landowners, who are able to keep their land, and for public interests that want to see natural resources and resource assets that support industries such as farming and forestry protected for future generations. Nonetheless, even conservation easements have their critics. This report provides an introduction to easements and their potential benefits,

A present to the future
Love the land? Then help preserve it for the next generation

Sun, Dec. 18, 2005

As Will Rogers famously said, the trouble with land is they're not making any more of it.

In the north woods, land prices are rising as the population swells and people look for places to build vacation and retirement homes. Wall Street investment bankers are demanding that timber companies convert their vast land holdings into profit. And as cheap wood pulp from abroad depresses their revenues, it's hard for the companies to say no.

"It's the perfect storm," says Ron Nargang, director of the Nature Conservancy's Minnesota chapter.

Land previously used by the public for hunting and hiking and by birds and animals for habitat is disappearing fast.

<http://www.twincities.com/mld/twincities/sports/outdoors/13417028.htm>

¹ Natural Resources Inventory, 2001, <http://www.nrcs.usda.gov/technical/land/nri01/nri01dev.html>

² The National Land Trust Census, 2003, <http://www.lta.org/census/>

and examines some of the debate around the use of easements as a conservation tool for working forests.

Introduction to Conservation Easements

A conservation easement is a legal restriction that a landowner voluntarily places on his or her property to define and limit the type of development and activities that may take place there³. For a conservation easement to be eligible for federal tax benefits, an easement is required to address specific “conservation purposes”. The Internal Revenue Service (IRS Code Section 170(h)) recognizes five legitimate conservation purposes: public recreation and/or education, protection of significant natural habitat, scenic enjoyment, uses pursuant to local governmental policy, and historic preservation⁴.

Key Points of Conservation Easements

- Voluntary
- Individually negotiated
- Legally binding
- Carries over to future landowners
- Land stays in private ownership
- Most are permanent
- Land stays on local tax roles

The generic term “conservation easement” encompasses a wide variety of easement types and programs. Generally speaking, conservation easements are voluntary, individually negotiated, legally binding for current and future landowners, and permanent. Land enrolled in an easement remains in private ownership and on the local tax rolls. That being said, it is important to emphasize that these easements are *individually negotiated* resulting in specific restrictions on development or allowable practices that vary between different easements, different land trusts, and different easement programs.

Application of Protection to Agricultural Land

The conservation easement has a longer history as a farmland and open space protection tool than as a forestland protection tool. Similar to other voluntary conservation programs such as forest certification, conservation easements, and the associated land trusts that hold the easements, grew out of concerns that regulation, zoning, and government planning processes inadequately protect open space and natural resource values⁵.

Conservation easements for farmland or suburban areas can have very different objectives and needs compared to easements for forestlands. Often those conservation values of forests that warrant protection through an easement require the protection of large tracts of forestland. Forest easements may need to cover thousands of acres to be effective at providing adequate forest habitat for wildlife that either utilize interior forest habitat or have a large home range. Providing this scale of protection is very challenging.

³ The Pacific Forest Trust, An Overview of Conservation Easements: Questions & Answers

⁴ ATTRA, Conservation Easements Resource Series, www.attra.ncat.org

⁵ <http://www.stevesmall.com/art/articles/031223.html>

Not only is it financially difficult to fund conservation easements on this scale, but also it is increasingly difficult to find forest tracts of this size to protect.

Loss of Large Scale Forests

In the past decade large-scale tracts of forestland have grown increasingly costly for families and individuals to hold and increasingly lucrative to sell for development. These same economic pressures also apply to the forest industry which has historically been one of America's most stable ownerships of forestland. As a result, there has been a significant transfer in ownership of large-scale tracts of forestland during this period.

Several approaches have been pursued to mitigate the impacts of these economic pressures. The increase in Timber Investment Management Organizations (TIMOs) and Real Estate Investment Trusts (REITs) that own forestland are two examples of landownership changes that are taking place and impacting both forestlands and the forest industry. The acreage growth in TIMOs and REITs was 22% annually between 1987 and 2003. Consolidation has also been a significant trend. Between 1998 and 2003, 20 of the 40 publicly traded forest product companies merged, acquired, or divested land⁶.

As large landowners, including industrial landowners, explore the available options for their forestlands, conservation easements are increasingly viewed as a potential alternative to selling the land. Easements can offer economic gains through the sale or donation of the easement, resulting in income and/or tax deductions for qualifying easements.

Conservation Easement Programs

There are various existing conservation easement programs, but most are related to the protection of agricultural lands or perhaps wetlands rather than forestlands. Many of the working forest easements in the United States are negotiated and held by local land trusts and are not part of any larger national program. The exceptions are those linked to the Forest Legacy Program.

Forest Legacy Program

The most widely used and well-established program for protecting working forests with conservation easements is the Forest Legacy Program (FLP)⁷. Administered by the USDA Forest Service in cooperation with State Foresters, this program was established in the 1990 Farm Bill to “protect environmentally sensitive forest lands that are



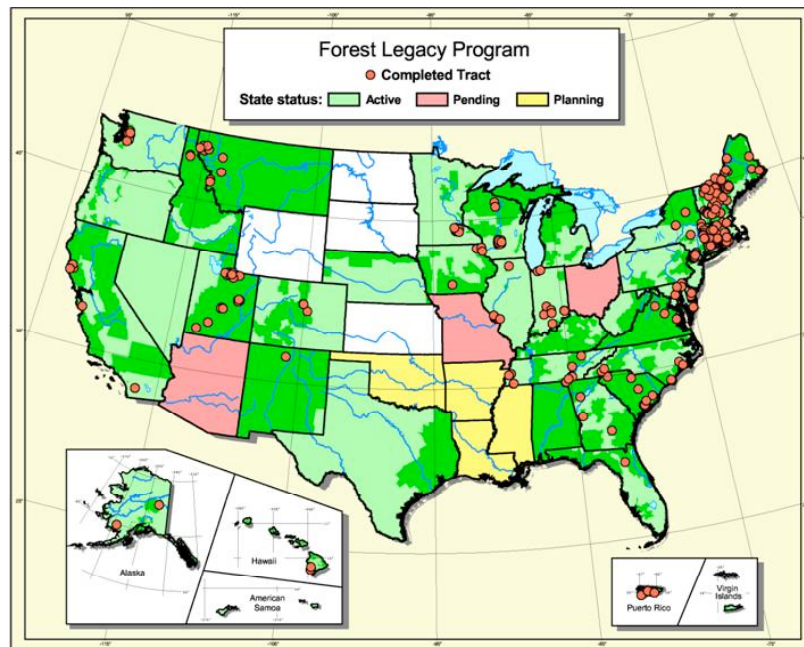
⁶ http://www.sfasu.edu/forestry/services/proceedings/carlton_owen_key_learnings.pdf

⁷ <http://www.fs.fed.us/spf/coop/programs/loa/flp.shtml>

threatened by conversion to development.⁸ The program is voluntary and focuses on working forests, meaning those “that provide forest products, water, fish and wildlife habitat and recreational opportunities.”

The Forest Legacy Program provides federal funding for both conservation easements and fee simple purchases, which must be matched with at least 25% non-federal dollars. There is a national competitive process between the states to nominate and select target areas to be protected. As of September 2005, 42 states were participating in the FLP with 279 tracts totaling more than a million acres protected.

The process of identifying potential Forest Legacy Areas involves coordination between the Forest Service and state-level interests to conduct an Assessment of Need. This assessment addresses a range of issues related to meeting the goals of the FLP, including: scenic values, fish and wildlife habitat, mineral resources, recreation, soils, forest products and timber management, watershed values, conversion threats, historic usage, current ownership patterns, cultural resources, geological features, and threatened and endangered species⁹. Public input related to decision-making is also considered.



Source: USDA Forest Service, NA FLP 2005.ppt

Information gained through the needs assessment process is used to identify high priority Forest Legacy Areas within each state and set specific goals and objectives to be accomplished by the state's Forest Legacy Program. After Forest Legacy Areas are established, landowners within the identified areas can apply to have their lands enrolled in the program.

When land is enrolled in the Forest Legacy Program there are several different ways in which an easement can be structured to accommodate the involvement of both federal and state funds as well as private interests. Under the State Grant Option, a state-based entity such as the Department of Natural Resources (DNR) can hold the easement. There

⁸ http://www.fs.fed.us/spf/coop/library/flp_overview.pdf

⁹ http://www.fs.fed.us/spf/coop/library/2003_flp_guidelines.pdf

is also a Federal Acquisition Option wherein the USDA Forest Service holds the interest in the land. Under the Forest Legacy Program, land trusts may only hold easements for lands donated as cost-share towards the program.

Examples of Forest Legacy Programs

Massachusetts

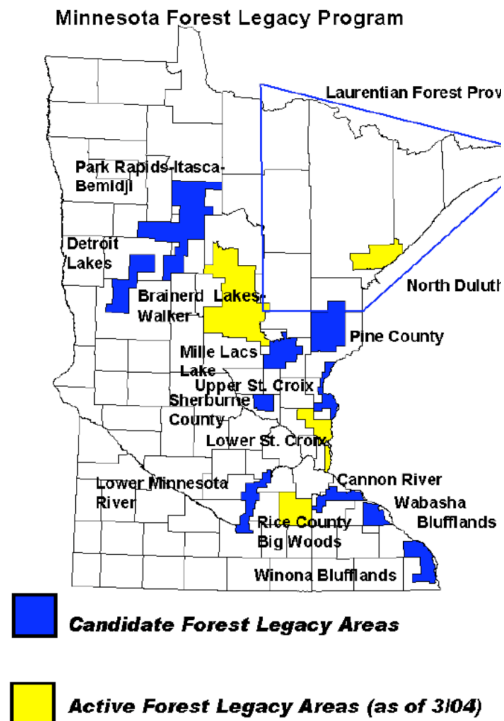
Massachusetts was the first state to complete and have an Assessment of Need approved. The Massachusetts Forest Legacy Program was approved in August 1993 with amendments made in 2001. The program currently has 2,999 acres enrolled with a total value of more than \$12 million dollars. A little more than \$5 million in federal Forest Legacy funds have been contributed to the program in Massachusetts.

Maine

Maine has the largest Forest Legacy Program with more than 400,000 acres enrolled with a total value of almost \$58 million. The program was approved in 1994 and has utilized \$32.7 million in federal funds.

Minnesota

The program in Minnesota was approved in 2000 and has 1,171 acres enrolled and a total value of \$3.4 million. Federal contributions through December 2005 totaled \$2 million. A newly established Minnesota Forest Legacy Partnership involving the Blandin Foundation, The Nature Conservancy, The Conservation Fund, the Minnesota Department of Natural Resources, and a number of other public and private partners aims to dramatically increase the acreage enrolled in the coming years¹⁰.



<http://www.dnr.state.mn.us/forestlegacy/map.html>

Challenges Facing Working Forest Conservation Easements

Land Valuation and Property Taxes

Conservation easements are often promoted as a mechanism for reducing the cost burden of owning property by potentially reducing property taxes. Although reduced property

¹⁰ <http://www.conservationfund.org/pagespinner.asp?article=3151&back=true>

taxes can be a powerful motivator for landowners, it can also be a point of concern for local governments and others that may not want to see the local tax base reduced. State laws related to real estate taxes often require assessors to consider conservation easements and the associated restrictions on land use. However, assessors are given considerable leeway in these considerations.

Several studies have been conducted to evaluate both the potential tax benefits for landowners with easements and the potential impacts on the local tax base. These studies show that conservation easements often result in no reduction in real estate taxes. After an easement is put in place, landowners may apply for a new tax assessment or enroll in a “current use” tax classification if the land previously was classified under a “highest and best use” category. Land that is already enrolled in current use or a special farm or forest tax classification rarely realizes a reduction in taxes after an easement.

A study conducted in 2001 in Wisconsin¹¹ found that local assessors generally were not considering conservation easements in their assessments. Even when easements were considered, they didn’t generally result in lower tax assessments. In instances where taxes were reduced after establishing an easement, these reductions were correlated primarily with other changes in statewide tax law.

Another important consideration is the extent to which conservation easements can positively impact the costs of providing public services such as utilities, fire protection, and road maintenance. Since open space and protected lands do not make significant use of these services, well planned conservation easements can help concentrate the need for public services into a more manageable area.

The Need for Good Information

The Society of American Foresters (SAF) adopted a position statement on conservation easements in 2001¹². The SAF statement supports conservation easements as “one tool for ensuring sustainable forest management.” However, the statement goes on to warn that easements are not appropriate for all forestlands and “should only be entered into with a full understanding of their consequences.” The SAF asserts, “Foresters have a

Stakes are high as timber giant plans massive land sale
DANIEL CUSICK, GREENWIRE,
01/03/06

Private forest ownership in the United States is expected to continue on the path of radical transformation this year as large industrial owners of timberland quicken the pace of forest divestment -- a byproduct of industry consolidation and efforts to streamline operations.

All eyes are now on timber giant International Paper Co., whose sale of 6.8 million acres of timber holdings, much of it concentrated in the South and Great Lakes regions, has been described as a 21st century version of the Louisiana Purchase of 1803.

http://www.redlodgeclearinghouse.org/news/01_03_06_stakes.html

¹¹ Meyer, Ezra. 2001. The Impacts of Conservation Easements on Property Taxes in Wisconsin. Gathering Waters Conservancy. U of WI. 32pp

www.gatheringwaters.org/documents/The_Impacts_of_Cons_Easements_on_Property_Tax_in_WI.pdf

¹² Conservation Easements, A Position Statement of the Society of American Foresters, Dec. 9, 2001, <http://www.safnet.org/policyandpress/psst/conservation.cfm>

responsibility to ensure that the landowners they are working with understand the benefits and restrictions of conservation easements.”

One of the most significant opportunities for fraud or misinformation during the development of a conservation easement arises during the land value appraisal. Property enrolled in a conservation easement is evaluated with “before” and “after” valuations. An appraiser first determines the value of the land and its potential use “before” the easement exists and then the value “after” the use of the land is restricted by the easement is also appraised. These values are determined by looking at comparable market sales and fair market values. For purposes of getting a higher payment for the easement or a larger tax deduction for an easement donation, landowners and appraisers have occasionally engaged in unethical appraisals. In response there have been calls for greater governmental regulation of appraisals and increased auditing¹³. For purposes of the Forest Legacy Program, the *Uniform Appraisal Standards for Federal Land Acquisition* is used.

Furthermore, to help address the need for reputable conduct in the creation and enforcement of conservation easements, the Land Trust Alliance (LTA) offers a Land Trust Accreditation Program¹⁴. The LTA promotes voluntary private land conservation and is the national convener for land trusts across the country¹⁵. The LTA’s Accreditation Program provides independent verification of the 42 practices included in the *Land Trust Standards and Practices*¹⁶. These practices provide an indication of “a land trust’s ability to operate in an ethical, legal and technically sound manner and ensure the long-term protection of land in the public interest.”⁷ The LTA requires its members to adopt the *Land Trust Standards and Practices*.

The Issue of Perpetuity

Critics of conservation easements often challenge the permanent nature of the restrictions. Arguably, permanently protecting a property or current land use could create long-term problems. What if the protected forest becomes an island surrounded by urban development? What if science discovers the land management stipulated in the easement is no longer appropriate? What if the landowner changes her mind? Generally, many of these concerns can be addressed in the negotiations of the easement language. Changes in forest science may be addressed by including guidance for periodic review and updating of the forest management plan. Changes of heart may be addressed through a “buyout clause” that outlines a process for the repayment of the easement and any additional penalties. Also, land trusts and other groups responsible for conservation easements implement mechanisms to evaluate candidate properties for eligibility and long-term conservation compatibility. It is important to recognize that federal tax benefits for conservation easements generally only apply to the donation of perpetual restrictions on the property. That being said, conservation easements do not necessarily

¹³ <http://www.stevesmall.com/art/articles/050415.html>

¹⁴ <http://www.lta.org/accreditation/>

¹⁵ <http://www.lta.org/aboutlta/index.html>

¹⁶ <http://www.lta.org/sp/>

protect land from being seized through eminent domain and federal and state laws allow for termination or modification of easements if the original conservation purposes can no longer be met¹⁷.

Monitoring and Enforcement of Conservation Easements

The monitoring and enforcement aspects of conservations easements can be a considerable challenge to their long-term viability and legitimacy. Conservation easements are legally binding agreements with strict guidance on what is and what is not allowed on the property. In the case of working forest easements, this guidance may include details related to how harvests may be conducted, what species and volumes can be harvested, what types of equipment are permitted, and how riparian areas and other resources are protected. Monitoring to this level of detail can be onerous for small land trusts or when lands under the easement are large, remote, or geographically dispersed. Land trusts have to secure adequate funding through fees or grants to support the monitoring and enforcement aspects of managing conservation easements. High quality monitoring and enforcement are important for protecting the reputation of conservation easements as effective conservation tools.

To help address the concerns about enforcement and to help assure that forestlands under easement practice responsible forestry, Working Forest Conservation Easements are increasingly being linked with forest certification programs. In addition to providing independent verification that the forest management meets endorsed standards of responsible forestry, the certification assessment and annual audits provide an additional mechanism to inspect and monitor the easement lands. A report prepared in 2004¹⁸ explored the relationship between forest certification and conservation easements and found several areas of commonality, including interest in balancing social, economic, and ecological interests, protecting the conservation interests of the landowner, use of professional foresters and forest management, and requirements for monitoring and auditing. The report concluded that, especially in terms of the annual monitoring and auditing aspects, certification and easements could be combined in ways that maintain the technical and legal requirements of each while potentially reducing costs and increasing credibility.

Posted on Wed, Nov. 30, 2005

Deal protects Brainerd forest Development pressure would be relieved

BY DENNIS LIEN
Pioneer Press

About 3,100 acres of forest in the popular Brainerd lakes area of north-central Minnesota will be protected from development under a conservation easement finalized Tuesday between the Trust for Public Land and the Potlatch Corp.

Using state and federal money, the nonprofit organization bought the easement near the Crow Wing State Forest from Potlatch, an arrangement that bans development on the property, ensures continued access for hunters and hikers, and still allows the company to log it.

<http://www.twincities.com/mld/twincities/news/politics/13287496.htm>

¹⁷ http://www.farmlandinfo.org/documents/27762/ACE_07-04.pdf

¹⁸ Newson, Deanna. 2004. Forest Certification and Working Forest Conservation Easements: Common Elements and First Thoughts on a Combined System. 29pp <http://www.rainforest-alliance.org/programs/forestry/perspectives/documents/easementpaper-nov04.pdf>

Unique Challenges of Forest Easements

Developing working forest easements, especially for large tracts, present some unique challenges. In 2000 and 2001, the Land Trust Alliance convened practitioners and formed an Advisory Panel to identify some of these unique challenges and their potential solutions. The results of these discussions are available in a guidebook from the Land Trust Alliance¹⁹. The group found that some of the unique challenges of many working forest easements include the difficulty in: managing complex public and private partnerships, addressing public access interests, establishing and conducting a sufficient baseline inventory of the land and resources, enforcing the forest management plan, measuring the easements' benefits and impacts, determining appraisal values, and ensuring forest productivity²⁰.

The full report outlines many recommended strategies for addressing these challenges, including identifying key stakeholders, establishing a plan for communicating information about the project, creating a plan for public involvement to build support for the project, using Geographic Information Systems (GIS) to conduct inventory and data collection, and using aerial and satellite imagery for monitoring easement enforcement on large parcels.

The Bottom Line

Conservation easements are an effective tool for protecting and preserving working forests and associated natural resource values. They are legally binding, long lasting, and able to target specific threats such as land use conversion and development. However, it is often no easier to buy up all the development rights to those lands that society may want to protect than it is to buy up all the land itself. As experience with working forest conservation easements grows, information is increasingly available to demonstrate the benefits and fine-tune the implementation of these programs. The benefits of conservation easements may also be enhanced by using them in concert with the other tools available for rewarding, regulating, and recognizing responsible forest stewardship such as certification, green development, conservation land use planning, and forestry incentive programs.

¹⁹ Lind, Brenda. 2001. Working Forest Conservation Easements. Land Trust Alliance. 48pp
http://www.lta.org/publications/easement_lib.htm

²⁰ <http://www.privatelandownernetwork.org/plnpro/trendsinworkingforestces.pdf>

This report was prepared by
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Dovetail Partners is a 501(c)(3) nonprofit corporation that collaborates to develop unique concepts, systems, programs, and models to foster sustainable forestry and catalyze responsible trade and consumption.

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