



EASEMENTS: FREQUENTLY ASKED QUESTIONS

Section 1. The Basics

1.1 What is a conservation easement? A conservation easement is a voluntary agreement that a landowner may enter into with a qualified conservation organization (typically a land trust), restricting 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 agricultural lands. Conservation easements are perpetual, meaning they last forever. Once an easement is in place, it can only be removed in extremely limited circumstances typically requiring either a judicial proceeding or condemnation. Every conservation easement is unique and subject to conditions agreed upon by the parties.

1.2 What rights are typically conveyed to the designated land trust?

- All development rights are extinguished except for those specifically retained by the landowner in the deed of conservation easement (this includes the right to sell the property in multiple parcels).
- The right to share in proceeds from a condemnation action that affects the property;
- The right to enforce the terms of the conservation easement;
- The right to be a party to all negotiations of third party requests to use the land. Specifically, this relates to negotiations for oil and gas leases, surface use agreements, right-of-way agreements, etc. (**NOTE:** this right does not include the right to be a party to the negotiations of agricultural and recreational-based agreements).

1.3 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. 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. Typically, 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 tailored 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-crafted document, the only rights given up 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 can designate areas to be used for buildings, such as barns and other agricultural structures, or home sites. An easement does give the land trust 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 conservation easement. Monitoring visits are always coordinated with the landowner and the landowner typically accompanies the monitor on the visit.

1.4 Does a conservation easement require public access? No. Public access is not a requirement for conveying a conservation easement.

1.5 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 or ranch ensures that the property remains available for agriculture. In addition, there are a variety of financial incentives and tax benefits available for landowners who convey conservation easements.

1.6 Who owns the land after a conservation easement is conveyed? The landowner retains ownership of the property after a conservation easement is conveyed.

1.7 Do I have to grant a conservation easement over all of my land? In general, a conservation easement does not have to encompass an entire parcel of land and can include provisions allowing landowners to reserve portions of the property as future building sites free from development restrictions. This type of structure will impact the conservation easements value and often times reduce the value for which the landowner is compensated.

1.8 Who chooses the designated land trust? The landowner will choose the land trust that best suits their goals, objectives, and interests and will negotiate the specific terms of the deed of conservation easement.

1.9 How long does it take to convey a conservation easement? The conveyance of a donated conservation easement typically takes between 9 to 18 months to complete. However, purchased easements can take as long as 3 to 5 years, due to the amount of time it takes to secure funding and the various funding entities’ approval processes.

Section 2. The Financial Incentives

2.1 How is a conservation easement valued? Conservation easements are valued through a conservation easement appraisal. A conservation easement appraisal is basically two appraisals of the property – an appraisal of the property in its current (unencumbered state) and an appraisal of the property in a hypothetical restricted state. The hypothetical restricted state assumes that a deed of conservation easement encumbers the property. The difference between the two appraisal values is the conservation easement value and is the basis for which the landowner is compensated.

2.2 What affect does a conservation easement have on the value of the property? A conservation easement will typically reduce the value of a property between 25% and 60% depending on the restrictiveness of the deed of conservation easement, location, and type of property. **NOTE:** the value of the property will continue to appreciate after the conveyance of the conservation easement. However, the appreciation of the value of the property will be on the reduced value of the property as encumbered.

2.3 How much does it cost to convey a conservation easement? Typically, the conveyance of a conservation easement requires the following reports to be produced in support of the conveyance, (1) a baseline inventory report documenting the current condition of the property; (2) an appraisal to determine the value of the conservation easement; (3) a mineral remoteness assessment to determine the likelihood of mineral extraction; (4) title work; and occasionally, (5) an environmental assessment. There are other fees associated with the conveyance of a conservation easement including a project coordination fee, stewardship endowment and legal defense fund contribution, state tax credit application fees, and various legal fees. Together, these fees typically range from \$64,400 to \$141,150 depending on the complexity of the transaction. Bargain sale transactions tend to be more expensive due to the increased complexity involved.

2.4 What are the differences between a donated conservation easement and a bargain sale easement? Donated conservation easements occur when landowners donate the full appraised value of the conservation easement to the land trust and in return they are compensated through the federal and state tax incentives described in detail below. A bargain sale conservation easement occurs when a land trust pays for a portion of the value of the development rights. Landowners are paid in cash for the purchased portion (typically 50% or less of the overall value of the conservation easement) and compensated through the tax incentives described below for the donated portion. Due to limited financial resources, purchased conservation easements are less common than donated conservation easements and are frequently subject to additional restrictions.

2.5 What financial incentives can I expect to receive from granting a conservation easement? There are five types of financial benefits that can accompany a conservation easement, (1) federal tax deductions; (2) estate tax benefits; (3) state tax credits (only available in certain states like Colorado, Georgia, Virginia, and New Mexico); (4) property tax benefits; and occasionally, (5) cash. We will explore each in detail below.

2.5(a) Federal Deduction

A conservation 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". The federal tax incentive for conservation easements was impacted by IRS rules

regarding state and local tax deductions. The revised federal tax incentive allows a landowner to deduct the easement's value less the value of any state tax credits received up to fifty percent (50%) of his/her adjusted gross income, with a fifteen (15) year carry-forward period. Qualified farmers and ranchers are allowed to deduct the easement's value up to one hundred percent (100%) of their adjusted gross income, with a fifteen (15) year carry-forward period.

2.5(b) Estate Tax Incentive

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. 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 for estate tax purposes, and can provide a significant reduction in the estate tax burden on family members. In addition to this decrease, qualified conservation easements can earn an additional \$500,000 estate tax exemption.

2.5(c) State Tax Credits

Donors of conservation easements in certain states may be eligible for conservation easement tax credits under state law. In some states these credits can be sold for cash or used against the donors state income tax liability. Currently, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Maryland, Massachusetts, Mississippi, New Mexico, New York, South Carolina, and Virginia have state tax credit programs that support land conservation.

2.5(d) Property Tax Benefits

Under Colorado law, an agricultural conservation easement will lock in the property tax valuation at its agricultural value. It is important to note that granting a conservation easement WILL NOT eliminate property tax burdens and the property will remain on the tax rolls. It is also important to note that the landowner retains responsibility for any property tax liabilities.

2.5(e) Cash Payments

Occasionally, conservation organizations are able to raise money from public and private funding sources to purchase a portion of a conservation easement with cash. This is known as a bargain sale conservation easement conveyance. Typically, 50% of the value of the easement is purchased in a bargain sale transaction. The remaining 50% is treated as a donation and compensated through the various tax benefits described above. Bargain sale transactions come with additional restrictions required by funding sources that are putting money towards the purchase of the conservation easement. Bargain sale transactions also typically take longer to complete.

Section 3. The Specifics (Water, Minerals, Renewables, Condemnation, etc.)

3.1 What is the relationship between my water rights and a conservation easement? Most conservation organizations will require that any and all water rights beneficially used on the proposed conservation easement property be encumbered in the conservation easement along with the land.

3.2 What is the relationship between mineral 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.

Surface Mining:

Due to the incompatibility of surface mining and conservation easements, the tax code prohibits surface mining. It is important to note that the definition of surface mining **does not** include oil and gas extraction.

If the mineral estate is split or severed (all or a portion of the mineral rights and surface 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. In some instances involving 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 must be made by a certified geologist, who will complete a mineral remoteness assessment (commonly called a mineral report), which will document the existence and commercial viability of any minerals present on or under the property.

If the landowner owns the minerals rights, the conservation easement donation will be eligible for tax benefits if the conservation easement contains a provision explicitly prohibiting surface mining. **NOTE:** If a landowner wishes to retain rights to certain mineral extraction such as sand, gravel, rock, or soil for personal and non-commercial use, it is important that the scope and location of the activity is limited and does not impact the conservation values of the property.

Subsurface mining:

Oil and gas development is considered subsurface mining. Oil and gas development can be compatible with conservation easements if the development is “limited, localized and not irretrievably destructive of the conservation values”. CCALT will work with landowners to negotiate leases and surface use agreements to ensure that any oil and gas development occurs in a manner that is consistent with federal and state law.

3.3 What is the relationship between conservation easements and my renewable energy development rights? Given increased public and commercial interest in renewable energy, it’s important to consider the impact that a conservation easement will have on the ability to develop renewable energy on protected land. Currently, commercial scale renewable energy projects (i.e. wind farms, solar farm, etc.) are **not** considered to be compatible with conservation easements. However, limited small scale renewable energy projects that are done primarily for the generation of energy for “on farm/ranch” purposes are considered to be compatible with conservation easements.

3.4 Can I sell my property if I encumber it with a conservation easement? Yes. Landowners retain ownership of the property and all other rights that are not conveyed in the deed of conservation easement. However, a conservation easement can extend the period of time it takes to sell a property and it will likely reduce the overall price for which the property can be sold. A small transfer fee is also due to the land trust at the time of sale.

3.5 Will a conservation easement prevent condemnation? No. However, a conservation easement will make condemnation more difficult. In any condemnation proceeding, the condemning entity must pay the full fair market value of the property as if there were no conservation easement in place. The condemnation award will be split between the landowner and the land trust based on the conservation easement appraisal.

3.6 Will a conservation easement tie the hands of my heirs? A conservation easement is intended to restrict certain activities from occurring. These restrictions are in perpetuity and will therefore continue to tie the hands of future owners. It is essential that the landowner and land trust give a great deal of thought to the restrictions that are contained in the conservation easement. Furthermore, it is strongly encouraged that landowners to include their families in the process to ensure that the restrictions that are negotiated are understood and agreed upon.

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 banks will continue to offer loans that are collateralized by property encumbered by a conservation easement. As conservation easements typically prohibit the subdivision of the property, a mortgage will likely have to encumber the entire property. Conservation easements can also be placed on property that is currently mortgaged; however, doing so requires a subordination of the mortgage by the lender prior to conveyance of the conservation easement.

3.8 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 make it easier for a landowner to defend themselves in the event of an IRS audit. With all that being said, in the past decade there have been a number of easements that have been audited. Prudent advice to a landowner is to thoroughly investigate the land trust you intend to partner with and choose the contractors that complete the due diligence requirements wisely. A reputable land trust will assist a landowner in the selection of these contractors and will work with the landowner and the contractors to ensure that all aspects of the transaction satisfy the requirements of the Treasury Regulations and IRS code.

Section 4. Conservation Easement Monitoring

4.1 How do ag-focused land trusts approach their relationship with landowners who have conservation easements on their property? The stewardship philosophy of PORT members promotes private land stewardship and ensures the defense of every PORT member held conservation easement. Landowner relationships represent the foundation of the stewardship program. PORT members believe that personal, honest, and open relationships with each landowner is the best way to ensure that our perpetual stewardship obligations are met. Because the agricultural community differs in significant ways from the larger landowning community, PORT members intentionally employ a unique approach to stewardship with landowners. This concept is based upon, (1) a deep understanding of the agricultural community in which we

operate; and, (2) a great respect for privacy and recognition of a landowner's ability to make individually responsible management decisions related to the day to day activities on protected properties.

4.2 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 the relationship with the landowner. Typically, monitoring visits occur once each year. Landowners typically accompany land trust staff on monitoring visits.