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Conservation Easements

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Conservation Easements

by Peter Stein

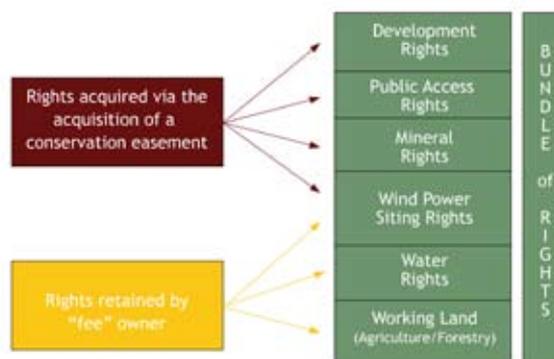
Source for map and photos: *The Nature Conservancy Adirondack Chapter, Connie Prickett*

For decades, conservationists in the US have been experimenting with a variety of techniques that allow for the integration of economic activities with the permanent conservation of natural resources. Americans hold dear both their private property rights and their land ethic, and have been searching for a permanent land conservation mechanism that resonates with the complex yet interrelated public and private values associated with land. Beginning in the 1930s and continuing to the present, this hybrid approach that disassembles the rights contained in property ownership and allocates them according to how the public's conservation interests can best be served remains a work in progress. The mechanism that achieves these dual purposes is known as a conservation easement.

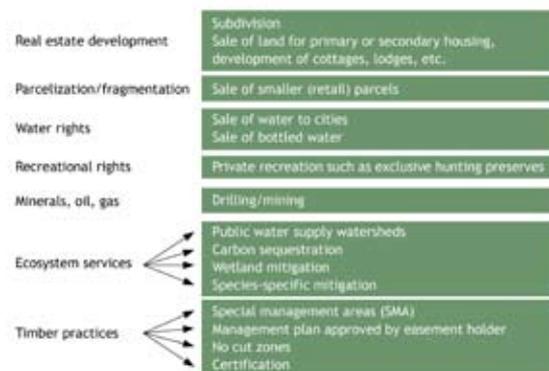
Conservation easements are legal agreements between a landowner (grantor) and an eligible organization (grantee) that restricts future activities on the land to protect its conservation values. In the US, England, and most of Canada, the concept of easements relates specifically to uses or rights that benefit a specific parcel of property. Examples include utility easements and access easements. These are generically known as "appurtenant" easements, and while they form the common law basis for conservation easements, the real differentiating attribute of conservation easements is that they benefit the public, not just a single property owner. Technically, conservation easements are easements in gross and provide a right to an outside party, the eligible recipient or grantee, which need not have a nexus or ownership interest adjoining the property affected by the conservation easement. Typically, conservation easements protect open spaces, wildlife habitat, recreational land, and historically significant landscapes by extinguishing the right to develop the property, and sometimes by providing public access. For land trusts and public land management agencies in the US, this concept of conservation easements began to have traction in the early 1980s as more state laws recognized real property interest and the US Federal government clarified the tax deductibility rules associated with the gifting of conservation easements.

Today, these "less-than-fee" interests have become the technique by which the most acreage in the US is conserved, as compared to outright acquisition by either land trusts or public agencies. This 30-year evolution has paralleled my personal career in land conservation. Early conservation easements that I worked on were smaller in scale and far from comprehensive. By contrast, recently, our private timberland investment firm has been involved in a number of conservation easement transactions that span 100,000s of acres.

What is a Conservation Easement?



Components of Value



For lands that are suitable for agricultural activities, ranching, and in particular forestry, a particular form of conservation easement has evolved that provides for discreet economic utilization of the land as well as permanent conservation. For farmland and rangeland, these types of conservation easements are known as "agricultural preservation restrictions", "purchase of development rights", or "farmland conservation easements". For forestry, the term of art is a "working forest conservation easement". A working forest conservation easement protects not only the open space values of a property, such as wildlife habitat, ecological diversity, and recreational access, but also the economic and community benefits



that arise from a forest's production of goods and services (Lind 2001).

Working forest conservation easements are acquired by gift, bequests, and purchase. The acquiring entities have included local, regional, and national land trust organizations, local government, state government, and US Federal agencies such as the US Forest Service. In a number of regions in the US, land trusts have developed sophisticated expertise in the design and application of working forest conservation easements as part of a land protection scheme that focuses on landscape scale conservation values. In the Northwest it's the Pacific Forest Trust, in Maine it's the Forest Society of Maine, in Florida and Georgia it's the Tall Timbers Research Station/Land Trust and in New Hampshire it's The Society for the Protection of NH Forests, which are all examples of land trust organizations with specialized skills and a track record of working with private forestland owners to realize both conservation and sustainable economic utility of the forestlands in that region. In the early years of putting this technique into practice, most of the deals were relatively small - less than 1,000 acres - and typically were donations of easements, not purchases. With the advent of the US Federal Forest Legacy Program, created in the 1990 Farm Bill and administered by the US Forest Service and a variety of state funding mechanisms in New York, Minnesota, Colorado, Maine, Vermont, New Hampshire, Wisconsin, California, Tennessee and Florida, the majority of the acreage conserved through the use of working forest conservation easements are now secured through purchase agreements with private timberland owners covering many parts of the US.

As the scale of conservation action on private forestlands increased in the US, the utilization of working forest conservation easements began to dramatically increase as well. The movement to landscape scale conservation was based upon a combination of factors including: better understanding of the biodiversity protection requirements of natural communities, an increase in the amount of public and philanthropic capital available for conservation, and the divestiture of land ownership by the large forest product companies. As the extent of acreage designated for conservation grew, the need to find a mechanism that allowed continued, sustainable, economic utilization of the forest resource plus permanent conservation was critical. Since the late 1990s, large-scale working forest conservation easement transactions, many accompanied by protection of core "reserves", have been successfully completed in New Hampshire, Maine, Vermont, New York, Wisconsin, Minnesota, Tennessee, California and Washington State.

Between 2000 and 2009, more than two dozen deals occurred where the acreage conserved via working forest conservation easements was greater than 75,000 acres per deal. The Nature Conservancy, the Trust for Public Land, and The Conservation Fund are all national land conservation players with vast experience in the use of working forest conservation easements. Together, these three organizations have permanently secured the conservation of more than 3 million acres of private forestlands using this easement technique. A number of these deals are profiled in the book *Investing in Nature*, by William Ginn.

Domtar Example

In New York, 105,000 acres in the north central portion of the Sable Highlands in the Adirondacks had long been identified by both The Nature Conservancy-US (TNC) and the New York State Department of Environmental Conservation (DEC) as a conservation target. The owner, Domtar Industries, elected to sell the property in its entirety in 2004. TNC and DEC designated 20,000 acres of this land as having ecological attributes warranting core reserve status and eventually transferred the outright ownership of this portion of the Domtar property into the Adirondack Park. The balance of the property was deemed to have important habitat and recreational characteristics, adjoined existing State conservation lands, and served as a "buffer" to the core reserve parcels. It was conserved via the purchase of a working forest conservation easement. However, since Domtar was pursuing a rapid sale of the entire 105,000 acres, a private

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The extent and degree of complexity of working forest conservation easements have grown as their scale has increased. Forest stewardship was minimally addressed in the older vintage of these agreements. Now, it is commonplace to see easements containing comprehensive forest stewardship requirements including Forest Management Plans approved by the easement holder, or mandatory certification by the Forest Stewardship Council (FSC), or The Sustainable Forestry Initiative (SFI). For example:

5.1 Forest Management Activities on Tracts. Grantor reserves the right to conduct Forest Management Activities. However, grantor's Forest Management Activities shall comply with either: (1) a qualifying Forest Certification Program such as FSC or SFI; or (2) a Forest Management Plan approved by grantee. (New York State DEC, 2006)

In closing, there are early examples of the use of the working forest conservation easement technique underway in BC, Ontario, and Quebec. Many of the same challenges exist on both sides of the border, including how climate change and adaptation strategies can be accommodated into this legal device. †

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party was needed to hold the 85,000 acres that would eventually be eased. Hence, a collaboration was designed between Lyme Timber Company, a private timberland investment management organization, and the New York State Chapter of the Nature Conservancy. These two entities, one a private profit-making investment group and the other a charitable conservation non-profit, joined together to purchase all of the lands owned by Domtar in the Adirondacks in a complicated simultaneous transaction. It took almost four years, from the time of purchase in 2004, to accomplish the dual conservation outcomes for the property. In the summer of 2008, DEC acquired the 20,000 acres held by the Nature Conservancy for transfer to the Adirondack Park, and at the very end of 2008, DEC purchased a working forest conservation easement over the 85,000 acres held by the Lyme Timber Company. This public-private partnership was recognized by New York State DEC in 2006 with its "Environmental Excellence Award" noting how the collaboration demonstrated both sustainable forestry and enduring land conservation.

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