

# **A Constructive Reformist's Perspective on Voluntary Conservation Easements**

by Nancy A. McLaughlin

*In an article written especially for the **Ecosystem Marketplace**, Nancy A. McLaughlin, an expert on the legal issues surrounding easements, argues that conservation easements, with some reforms, can be a relatively efficient and effective means of pursuing conservation goals in the United States.*

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Over the past two and half decades the use of conservation easements as a land protection tool has grown dramatically. Mounting development pressures, a growing understanding of the need to incorporate privately-owned land into conservation efforts, and an inability to protect that land through regulatory measures have led the federal as well as state and local governments to increasingly rely on voluntary easement conveyances to accomplish their land protection goals and, in the process, to pour significant public funds into easement purchase and tax incentive programs.

The increasing reliance on voluntary easement conveyances has not been an unqualified blessing. There are reports of abuse and serious questions about the efficiency and efficacy of the use of easements as a land protection tool. Indeed, it has become quite fashionable to criticize easements, and some have gone so far as to suggest that we should abandon the use of easements altogether in favor of regulation.

In the hopes of dispelling some of the confusion surrounding the use of this fairly novel land protection tool, and of finding some middle ground between over reliance on and abandonment of easements, the following outlines the main criticisms being levied at easements and, where those criticisms are warranted, suggestions for reform.

## **The “Problem” of Perpetuity**

Perhaps the most often stated - and fundamentally flawed - criticism of conservation easements is that they are permanent and, thus, unwisely and unfairly limit the choices available to future generations.

First, the perpetuity issue is neither new nor unique to easements. The legal doctrine of *cy pres* has been developed and refined over the centuries to deal precisely with the issue presented by conservation easements – how to adjust when the charitable purpose to which property has been “perpetually” devoted becomes obsolete due to changed conditions. Under the doctrine of *cy pres*, if the charitable purpose to which property has been devoted becomes “impossible or impracticable” due to changed conditions, a court generally can formulate a substitute plan for the use of such property for a charitable purpose that is “as near as possible” to the purpose specified by the donor. Thus, if the charitable purpose of an easement becomes “impossible or impracticable” due to changed conditions (i.e., due to changed conditions the easement no longer

provides the conservation benefits for which it was conveyed), the easement could be extinguished in a judicial *cy pres* proceeding and the value attributable to the easement could be applied to similar conservation purposes in some other manner or location.

Moreover, it is the likely alternative to a conservation easement – the development of the land – that is far more certain to limit the choices available to future generations. The destruction of wildlife habitat and ecosystems, of scenic and historic sites and landscapes, and of rural, agricultural communities as a result of development will almost always be virtually irreversible – at least on any time scale relevant to human beings. Conservation easements, on the other hand, hold far more options open to future generations because they do not involve physical changes to the land and, as noted above, they can be modified or terminated to respond to changed conditions.

### **Privatization of Traditionally Public Decisions**

An oft-repeated criticism of conservation easement conveyances is that they privatize important land use decisions that should be made through a more open, democratic process. This criticism is overstated because conservation easements are not conveyed in a state of complete anarchy. State and federal laws enacted by our democratically elected representatives govern conservation easement conveyances, and those laws play a central role in shaping easements and ensuring at least indirect public participation in the acquisition process.

All 50 states and the District of Columbia require that conservation easements be conveyed: (i) for one or more specified conservation purposes and (ii) to a government agency or charitable organization, each of which is either directly or indirectly accountable to the public. A few states have gone a step further and also require that conservation easements be approved by a public official and/or consistent with local land use plans. Moreover, many easements are eligible for the federal charitable income tax deduction and state tax benefits because they encumber land that has been expressly designated as worthy of protection by the federal or a state or local government.

While even greater public participation in the easement acquisition process may be warranted, it must be weighed against the dangers associated therewith. For example, requiring that all easements be approved by a local official or consistent with local land use plans might make easements that protect lands of national conservation value a thing of the past, as local governments can be expected to give greater weight to local economic interests than to national conservation interests.

### **Abuse**

The public funds being poured into the purchase of easements and generous tax incentive programs have, perhaps not surprisingly, led to increased reports of abuse. The primary forms of abuse appear to be the sale or donation of easements that have little or no conservation value and exaggerated appraisals inflating the purchase price of easements or the tax benefits accruing to easement donors.

It is important to remember, however, that the reports of abuse are, at least at this point, anecdotal, and it would be unwise to make major shifts in policy without determining the true extent and manner of the abuse. In addition, the existence of significant abuse does not necessarily imply fundamental problems with the use of easements. Abuse can be dealt with in a variety of ways that do not involve throwing out the baby with the bathwater, such as, for example, the implementation of a mandatory accreditation program for the government agencies and charitable organizations acquiring easements and the development and enforcement of easement appraisal standards.

### **Enforcement Problems**

The difficulties associated with the enforcement of conservation easements over the long term are very real. One can readily imagine the challenges that would be associated with raising funds to monitor and enforce easements encumbering privately-owned land to which the public has neither physical nor visual access. Although significant public benefits in the form of “ecosystem services” can flow from the protection of such lands, that fact is not yet widely understood, and a great deal of education would have to occur before the public would be willing to donate cash for the continued protection of such services.

Enforcement problems could, however, be dealt with proactively. For example, strict requirements regarding up-front stewardship endowments for all easement acquisitions could be imposed, and at least some of the public funds currently being poured into easement purchase and state tax incentive programs could, instead, be used to build stewardship endowment funds for existing easements.

### **Undermining Regulatory Measures**

The proliferation of conservation easement purchase programs and the provision of overly generous state tax incentives to easement “donors” is very troubling. Paying landowners full or close to fair market value to retire the rights to develop and intensively use their land reinforces the notion that land ownership consists solely of compensable rights and does not entail any stewardship obligations – thus undermining our ability to protect land through regulatory, rather than voluntary, compensated means.

But the federal tax incentives offered to easement donors have the potential to do just the opposite – that is, to facilitate a transition from a purely rights-oriented view of property ownership to a more responsibilities-oriented view. Under the existing federal tax incentive program, an easement donor is compensated for only a modest percentage of the reduction in the value of his land. The typical easement donor is, therefore, a landowner who loves his land and for that reason is willing to bear the lion’s share of the cost of its protection. While we may hope that someday landowners will neither expect nor be entitled to any monetary compensation for fulfilling their stewardship obligations, under the current view of property ownership, landowners who voluntarily undertake such obligations do forego some of their investment expectations. The federal tax incentives help to create a reasonable transitional phase, wherein the public offers partial compensation to landowners for their lost investment value, but requires that landowners bear a significant percentage of the cost of adopting a stewardship approach to

their land. Moreover, whenever a landowner donates a conservation easement to a government agency or charitable organization, the public acquires an interest in the encumbered land similar to the interest it would have under a property ownership regime that contemplates stewardship obligations as well as ownership rights. Thus, one donation at a time, and without the baggage of perceived unfairness that plagues regulation, conservation easements are altering the traditional form of property ownership in our society.

It also is important to acknowledge that we have always relied to a large extent on “conservation philanthropy” to accomplish our land protection goals. The history of the national parks is a case in point, with many - such as Grand Teton, Acadia, and the Great Smoky Mountains - protected in large part through the (voluntary) generosity of private individuals. Rather than abandoning the federal tax incentive program, which encourages a unique and potentially transformative form of conservation philanthropy, we should acknowledge the dangers associated with the fair market value easement purchase and overly generous state tax incentive programs.

### **The “Hold Out” Problem**

Because conservation easement sales and donations are voluntary, they do not directly address the “hold out” problem – that is, the risk that a few landowners will undermine the efforts of their neighbors to protect entire landscapes or ecosystems. That same criticism can, however, be levied at regulatory measures, although for a different reason. Regulatory measures also have not been particularly effective in addressing the hold out problem because we simply have not had the political will to regulate entire landscapes or ecosystems. Indeed, it is the very ineffectiveness of regulation that has led to our heavy reliance on voluntary easement conveyances to accomplish land protection goals.

Rather than criticizing the relative weakness of voluntary versus regulatory measures, we should explore how the two approaches could be employed in a complementary manner. Landowners who donate easements in exchange for partially compensating incentives could provide the foundation for broader and more complete regimes of protection. It is not unreasonable to assume that once an area has been largely protected by voluntarily conveyed easements, such an expression of the will of the majority of landowners in the area would make it easier to build the political consensus to protect the entire area through more coercive means. And the prospect of this occurring is increasing as more and more land trusts and government agencies focus their efforts on protecting entire landscapes or ecosystems.

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In short, abandoning voluntary conservation easement conveyances as a land protection tool in the hopes that we will develop the political will to regulate would be a very dangerous experiment indeed. It would be far wiser to acknowledge the strengths and weaknesses of such conveyances, and to work to reform the current laws and practices to make such conveyances a more efficient and effective land protection tool; one that complements rather than undermines regulatory efforts and capitalizes on an innovative –and uniquely American—form of conservation philanthropy.

*Nancy McLaughlin is Professor of Law at the University of Utah's S.J. Quinney College of Law. She writes and speaks frequently about the use of conservation easements as a private land protection tool and the appropriate use of tax and other financial incentives to promote conservation and preservation. Many of her articles are available at <http://www.law.utah.edu/faculty/bios/mclaughlinn.html>. She can be reached at [mclaughlinn@law.utah.edu](mailto:mclaughlinn@law.utah.edu)*