Conservation Easements: They Do Not Automatically Imply Public Access

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What conservation easements can accomplish and their effect upon access.

First of all, I would like to explain what a *conservation easement* is. Picture property ownership as owning a bundle of sticks. Each stick represents a right to use the land in a certain way. Any of these sticks, or rights, can be removed from the bundle and transferred to someone else. Water, mineral, timber rights, and utility and road easements are examples of severable property rights familiar to most people. Ownership of these limited rights gives the holder permission to do something (divert water, mine, cut trees, drive) on land owned by another person.

A conservation easement differs in purpose and function. It conveys certain development rights or other rights of use; these rights are held in trust by a government agency or private, nonprofit conservation organization. Conservation easements are used to protect *wildlife habitats, ecosystems*, and *open space*, as well as *recreational and historic features of the land.* When a conservation easement is given, some of the sticks in the landowner's bundle of rights are voluntarily conveyed to the government agency or private conservation organization in order to keep the land basically as it is. ***Only those rights which the landowner chooses to convey are included in a conservation easement.*** The major benefit of a conservation easement is the protection it provides against development and other land uses potentially destructive to the property's conservation values.

The agency or group which receives the easement does not have the authority to use the rights conveyed to it. Instead, it assures those rights held in trust are ***not*** exercised on the property. A conservation easement might limit subdivision and development rights, commercial timber harvesting rights, or the right to build new roads. Each easement is different because each parcel of land is different, and each is designed in consultation with the landowner. All land uses not specifically given up in the easement deed remain with the landowner.

Conservation easements are a voluntarily conveyed, partial legal interest in land. They are most effective in maintaining natural resources which are compatible with existing land uses. As such, a conservation easement is the formal expression of the property owner's concern for continued responsible land use and stewardship.

It has often been assumed that conservation easements automatically imply public access. Such is not the case. Public access to and over and on property or buildings protected by easements is a function of the qualifying purpose of the easement.

Because easements can be granted for a number of different reasons, among which are:

1. scenic and open space purposes
2. historic preservation
3. recreation and educational purposes
4. protection of environmental systems (rare species, significant habitats, etc.)

it follows that public access to and enjoyment of the easements should occur on a case by case basis.

To the extent that a landowner voluntarily gives an easement to a qualified private or public donee organization *and* wishes to claim a charitable donation for tax purposes, the easement must qualify on the basis of one of the above four criteria.

Recognizing that different easement purposes would imply different access considerations, Congress and the Treasury Department (IRS) drafted different regulatory language regarding access as it relates to each of the easement qualifying purposes.

In terms of scenic and open space easements, the Internal Revenue Code Reg. Sec. 1.170A-14(d)(4)(ii), the access provision reads as follows:

> (B) Access. To satisfy the requirement of scenic enjoyment by the general public, visual (rather than physical) access to or across the property by the general public is sufficient. Under the terms of an open space easement on scenic property, the entire property need not be visible to the public for a donation to qualify under this section, although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public.

In terms of recreational or educational easements, Reg. Sec. 1.170A-14(d)(2)(3) reads as follows:

> (ii) Access. The preservation of land areas for recreation or education will not meet the test of this section unless the recreation or education is for the substantial and regular use of the general public.

And in terms of easements that protect environmental systems, significant habitats or ecosystems the same section reads as follows:

> (iii) Limitations on public access to property that is the subject of a donation under this paragraph (d)(3) shall not ren-

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der the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under this paragraph (d)(3) would not cause the donation to be nondeductible.

In the case of historic easements, the deductibility of the easement donation is a function of whether the Department of the Interior has decided that the building(s) is in fact historic. If it is historic, then the "substantial and regular" public access to the property becomes a function of good judgment in balancing the public access rights with the preservation values involved.

Quite clearly, access should be a function of easement purpose on a case by case basis. Since each easement is "tailor-made" for a particular property, access too should be addressed individually and should not be assumed as automatic with any and all easements.

Because easements, particularly conservation easements, are relatively new devices in statutory and regulatory law, questions regarding their applications, purposes, deductibility, and valuation are many. It will undoubtedly take several years before private and governmental donees, private landowners, and governmental regulatory entities work out the major interpretive bugs in the easement system.

Nevertheless, the conservation easement as a protector of public values on private properties has a rosy future. Used judiciously, the conservation easement can protect significant public values at extremely modest social and economic costs.

Public and private landowners and managers would be well-advised to familiarize themselves with federal and state easement statutes and regulations. Cognizance of easement success stories such as the protection of Montana's Blackfoot River Corridor will enhance future easement attempts.

Easements should not be seen as tickets to public access, although of course in some instances an easement's primary function might be to secure and enhance public access. In other circumstances, the public values derived by protecting scenic or habitat values through easements would be diminished if public access was required. Access taken to excess diminishes public good.

As with most tools, easements are usually utilized best in the context of good data, a clear sense of purpose, and substantial interparty cooperation. The Nature Conservancy stands ready to assist any and all landowners and agencies in exploring the potential or real applications of the tool. (IRWA)

This paper was presented at the "Access in Montana" Conference in Helena, MT in November, 1986.