

# **BENEFITS AND DRAWBACKS OF CONSERVATION EASEMENTS**

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A landowner may consider granting a conservation easement for various reasons. Before signing on the dotted line and granting such an easement, a landowner must consider a number of factors in negotiating such an easement. Most, if not all, of these factors are negotiable (depending upon the proposed easement holder) and can have a significant impact upon whether a landowner grants a conservation easement and to whom. The selection of the conservation easement holder is of primary concern and may be the most important factor of all. There are over 2,000 land trusts in the United States and each one has a slightly different focus. Some land trusts are more flexible than others with respect to the terms and conditions of the conservation easement. It is extremely important that a landowner meet with and interview several different land trusts to understand what are their goals, do they have the same goals as the landowner for the future of the land, and how willing are they to work with the landowner on the terms and conditions of the conservation easement. A landowner should also talk to other landowners that already have conservation easements with different land trusts and find out what they think of the land trusts. Furthermore, a landowner may want to consider having a "no assignment" clause such that the easement holder cannot transfer the conservation easement to another land trust without obtaining the landowner's prior consent.

A second factor is whether there are threatened or endangered species or habitat on the land. A conservation easement does not expand or limit the federal and state protection given to such species or habitat. Furthermore, a landowner's obligations to comply with the federal and state laws regarding threatened or endangered species or habitats are the same regardless of whether or not there is a conservation easement. However, if a landowner grants a conservation easement and there are threatened or endangered species or habitat on the land, then the conservation easement holder may, and likely will, have the right to make the landowner comply with the respective federal and state laws. As such, the landowner should strongly consider having a qualified biologist inspect all of the land and prepare a report to the landowner about whether there are any threatened or endangered species or habitat on the land.

The next issue is in regards to fencing. Regardless of whether the land is being used for row crop or grazing, all land is going to have some type of fencing on it. The landowner will want to retain the ability to replace the existing fencing with new fencing. In addition, the landowner should retain the right to move and relocate the fencing if they so choose. One issue that may arise is if the conservation easement holder wants to fence a portion of the property to establish a wildlife corridor or to protect a riparian habitat. The

conservation easement should address whether the easement holder does (or does not) have this right and if it does, then what actions can it take to enforce this right.

Another issue is in regards to the use of the land. Regardless of whether the land is lying fallow or being used for cattle or farming, the landowner should preserve the right to use the land for either cattle or farming purposes. A conservation easement should address whether the landowner can convert the land from its current use to being used for row crops or grazing.

In addition, the conservation easement should address whether the landowner can construct additional houses for family members, barns, chutes, pole barns, wells, irrigation systems and related facilities. A landowner will not be able to develop land that is subject to a conservation easement for large scale commercial or residential housing purposes. However, the landowner may want to retain the right to build houses for one or more of their family members. This will be a matter of negotiation with the conservation easement holder but it should be a permitted use. At a minimum, the landowner should preserve the right to build any structures required for agricultural or cattle ranching purposes.

Another issue to be addressed is mineral extraction, which may include oil extraction. Most conservation easements typically prohibit mineral extraction. However, a landowner can negotiate for certain mineral extraction rights with respect to portions of the land so long as it does not significantly affect the overall conservation purposes of granting a conservation easement. These provisions need to be very carefully negotiated with the conservation easement holder. If a landowner thinks that the land may contain oil or other mineral resources, then they should negotiate to carve out an exception to extract these resources. This is true even if the landowner is not currently conducting any oil or mineral extraction from the land.

Granting a conservation easement does not prevent the government from taking the land by eminent domain and using it for public purposes. However, a landowner may, in certain circumstances, negotiate to prohibit public access rights to the land. This may be especially important if the land is being used for row crops or cattle grazing. Prohibiting public use will not be an option if the purpose of the conservation easement is for conserving lands for outdoor recreation by, or education of, the general public. However, if the conservation easement's purpose is to preserve open space, then the landowner should be able to prohibit public access to the land.

There are clearly both benefits and drawbacks to conservation easements. In the right circumstances, a conservation easement is a good way to preserve the agricultural nature of land and to provide certain estate tax benefits. However, it is imperative that the landowner clearly understands the effects and long term consequences of a conservation easement. A conservation easement will be a burden on the land for all future generations and cannot be removed.

There is no standard form of conservation easement. Rather, conservation easements are heavily negotiated contracts that may take a long time to finalize. It is important to take the time to arrive at a mutually acceptable conservation easement. Any landowner considering a conservation easement must have solid legal and estate tax advice from attorneys experienced in negotiating conservation easements and in understanding the options and alternatives to granting a conservation easement.

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