

Are You Asking the Right Questions about Conservation Easements or Purchased Development rights?

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In recent decades, Conservation Easements (CEs) and Purchased Development Rights (PDRs) have become a trendy way to acquire tax write-offs on private lands. Reasons as to why varies with each owner, but the common thread has been tax relief and to retain the land in agricultural production. Many of these landowners have placed portions, or all, of their private land holdings into a split estate situation without fully understanding the impacts to themselves, or their community. This is largely due to not asking enough questions, or the right questions. To truly understand the problem: land trusts come on to landowners and communities with the claim that they are working to protect rural agriculture from development pressures. Development is not the problem, as rural economic pressures come from:

- Government Restrictions and Regulations,
- Tax Exempt Non Government Organization Environmental Lawsuits,
- Weather Fluctuations,
- Market Fluctuations,
- Operators Being Price Takers Without Control of the Market Pricing Structure
(or the ability to pass on increased business costs, such as fuel expenses),
- Subsidized Foreign Market Dumping Without Protection,
- Influx of Wealthy Urbanites Competing for Control,
- Estate Taxes and Compliance Costs.

These cumulative pressures force the economic demise of rural economies, and create compromised-sellers ready for a quick economic fix, not willing sellers desiring to leave their cultural practices or heritage. So the question simply put is, do CEs protect agriculturalists from these real pressures as is claimed? Simply put, **NO THEY DO NOT!** The secondary question to this is, if land trusts are concerned with protecting agriculture, then what have they done to alleviate these real pressures?

Splitting the title of private land has other consequences as well. Some comments on CE and PDR impacts by financial officers:

- "Owners give up management and control of the land" : Jimmy Hall, PCA, NM
- "Severely diminished loan value of land" : John Johnson, First Western Bank, SD
- "CEs eliminate property loan value" : Dee Gidney, Texas Bank Ag Loans, TX
- "Fragmentation of land title to deny future generations a full range of productive land use options" : David Guernsey, Alliance for America
- Loan Value for Operational and Other Loans is Reduced up to 90 percent with an Easement

Interviews of landowners with CEs and PDRs have revealed some common misunderstandings held when they got involved. Some misconceptions are:

- "Perpetual means 99 years." False: perpetual is forever.
- "I retain full title to the land." False: title becomes split with easement holder.
- "A CE (PDR) is the only way the land is managed to my intent." False: the easement holder and future easement holder can change management practices at any time, including development! Easement management loopholes also allow easement holders to sue the landowner and impose habitat restrictions.
- "A CE (PDR) allows me to use the property as I always have." False: you give up management control of all easement property, forever!
- "Property with a CE (PDR) will sell easy." False: a CE (PDR) may reduce the property value, and affect the willingness of financial institutions to loan money on a split title.

Economic impacts may also be encountered as the result of CEs and PDRs. Some of the impacts already experienced by landowners and communities have been:

- Reduced management options on taxed lands of landowner and heirs

- Restrictions on farm and ranch management practices

 - Restrictions on chemicals used

 - Restrictions on seed and plant types

 - Restrictions on farm and ranch management practices

- Reduction of income due to restrictions

- Reduction in management options with land and business value decline, forcing owner into a "willing seller" status (actually a compromised seller)

- Imposition of Environmental Assessment (EA) and Environmental Impact Study (EIS) expenses on landowner for restriction and management changes, especially if a Federal Nexus exists

- Legal and penalty expenses for CE and PDR violations (It's built into the fine print)

- Vulnerability from non-trust third party lawsuit - Litigation Exposure is in the Easement Act

- Decreased, or eliminated, production, translating into negative economic impacts to agriculture and related industries within community, county, and state

- Recent reports indicate a majority of lands with CEs (PDRs) have not remained in agriculture, and are rendered to untaxed "open space" in the hands of the government, or owned by wealthy non-agriculturalists comfortable with "open space" restricted lands without production

- Reduced Management Options on Taxed Lands of Landowner and Heirs

- Reduction of Income due to Restrictions Reduction of Direct, Induced, and

- Indirect Economic Benefits to all Related Industries within Community, County and State

- Reduction of County Tax Base Forcing Tax Increases and Reduction of County Services on Other Property Owners in County to Make Up Loss (a disproportionate burden)

Impacts resulting from violations were studied by the Land Trust Alliance and published in the Winter 2000, Vol. 19 #1 issue of *Exchange*. It revealed that the landowner always pays legal and penalty expenses for violations, as this condition is built into CE and PDR language. Average cost per case is \$35,000 with range of \$5,000 to \$100,000. Of 498 violations reported, 22 were litigated; only one landowner won in court, but was still made to pay land trust expenses (the \$100,000 case).

Another ill-understood impact of CEs and PDRs is that if there are any federal permits or expenditures involved, this creates a Federal Nexus. The landowner must now undergo a Section 7 consultation process for existing and new species, restriction and proposed management changes. The owner with a CE or PDR must also pay for all related expenses for studies.

One question that is typically missed is who is behind the push to get private property into a CE or PDR. One effort where CEs and PDRs are the centerpiece, is known as the Wildlands Project, a plan developed by Michael Soule, Dave Foreman (founder of the Earth First! movement), and Dr. Reed Noss of Idaho. The base concept is that wilderness areas need connecting corridors (without human activity) for the creatures to roam freely and keep the gene pool healthy. The key to establishing these corridors is CEs and PDRs.

Dave Foreman, as quoted in *Listening to the Land* by Derrick Jensen (Sierra Club Books), considers conservation easements as the keys to the corridors. He had this to say about conservation easements:

If we identify a ranch ... that's between two wilderness reserves, and we feel it will be necessary as a corridor, we can say to the rancher, "We don't want you to give up your ranch now, but let us put a conservation easement on it. Let's work out the tax details so you can donate it in your will to this reserve system."

It is highly recommended you research the design and implications of the Wildlands Project. It is a plan to render 50 percent of the United States land area as unoccupied, or affected by human activity. Several trusts such as the Nature Conservancy, involved with developing CEs and PDRs support and promote the Wildlands Project. A description of this plan and partial list of supporting organizations can be accessed at <http://www.wildlandsprojectrevealed.org> and <http://www.epi.freedom.org>.

Questions landowners approached for CEs or PDRs should be asking themselves are:

- What are CE (PDR) impacts to private landowners and communities?
- Do the "benefits" offset the impacts? (Lost tax revenue and future earnings opportunities)
- What are the other impacts and implications from imposing a CE (PDR) on private land? (Federal Nexus and Section 7)
- What is the long-range outcome from imposing a CE (PDR) on private landowners?
 - According to whom? (A tax-exempt organization?)
 - Would a limited liability company or incorporation better serve the landowner's tax needs, instead of a CE (PDR) that brings in tax-exempt third party and potential federal management?

Would it not be better to protect agriculture by:

- Supporting reduced environmental restrictions on agricultural producers?
- Stopping the dumping of foreign commodities on our markets by foreign subsidized products, at prices lower than what our producers' cost of operation?
- Making agriculture attractive as a viable business career and encouraging our youth to remain in agriculture as a productive and fulfilling life?

Questions State and County officials should be considering for CE regulation are:

- License and Regulate Land Trust Agents
- Regulation by State Real Estate Commission (they are acting as land brokers)
- Bonding Requirement on Each CE Transaction Equivalent to Value of Encumbered Property Before Transaction
- Renegotiation Language Built into CE Contract that Allows Grantee to Renegotiate Every 5 Years (North Dakota has 10 year limits - no perpetuity allowed!)
- If Renegotiations Cannot be Accomplished to Satisfaction of Landowner, the CE Contract Becomes Null and Void
- Land Trust pays back-taxes on land if this occurs, not landowner (don't forget that if a CE is ended, under current law the landowner pays the IRS the back-taxes back to the time of the origin of the CE, not the trust)
- Land Trust Pays Taxable Value of Severed Development Right to County to Prevent Erosion of Tax Base as Community Infrastructure Demands Increase (check with county appraiser for development right tax values)
- No CE Shall be Valid and Enforceable Unless the Limitations or Obligations Created by the Easement are Clearly Presented in Writing on the Face of Any Document Creating the CE Including Information From the UCEA 1981 (Uniform Conservation Easement Act)
- Water, Grazing, Farming and Mineral Rights Shall Not be Encumbered by Conditions or Restrictions Imposed or Agreed to in the CE Contract. Grantee (landowner) Retains Rights of Transfer on All Rights Not Expressly Identified in CE.
- Local and State Legislation Expressly Prohibiting Transfer of CE to Other Parties Without Formal Written Consent of Landowner (a common practice of land trusts is to trade CEs without knowledge or consent of landowner)
- Elimination of Third-party Enforcement Clause Language From CE Contracts - Must be State law! (Colorado apparently already has this law, and it has been upheld in one case)

Remember, restricting land through Conservation Easements in the name of "protecting agriculture" simply put, does not protect agriculture!

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