

Conservation Easements Discomfort ... Or Forever is a Long, Long Time

By Catherine Moore

Thanks to the [Alabama Forest Owners Association](#) who ran this article in their October 2021 newsletter

Catherine Moore is a National Woodland Owners Association (NWOA) member from Montana. She wrote the following response to an article in NWOA's publication, National Woodlands, Spring 2021, which featured a family that chose to use a conservation easement in their legacy planning.

I have owned forest land since 1989 and have in that time seen articles in just about every forestry journal out there promoting conservation easements. I have yet to see an article that provides a true cost/benefit analysis. It is past time to rectify this.

First let us enumerate the essential parts of a conservation easement. A conservation easement is a contract where the property owner sells or donates a portion of his property, often the development rights, to a conservation organization or a governmental agency. The fine details of what portion of the property is donated and under what terms varies with each agreement. The role of the conservation organization is to ensure the terms of the contract are followed and that the listed conservation values are preserved. It is worth noting that the property owner seldom gets any or much cash for his property exchange. His benefit generally comes in the form of a tax break based on the devaluation of his property.

The benefits are well advertised in other articles. Briefly, conservation easements provide tax breaks by devaluing the property and permit the property owner to lock his property into a vision that he believes will conserve and preserve his land forever. In actuality, the only real reason I would consider utilizing a conservation easement is to recover from poor inheritance planning. I have met ranch owners whose parents died without a solid will or trust in place. The IRS came knocking for immediate payment of the inheritance tax and all the money was locked in probate or in the land. The heirs devalued their land via the conservation easement to keep it in the family. It works, but the land is permanently devalued and its use is permanently constrained. This can be a hard tradeoff to maintain moving forward. The first and largest potential problem with a conservation easement is the "forever" feature. Once enacted, the terms of the conservation easement and thus the management of the property cannot be changed, but the rest of the world is an ever-changing environment. Let's briefly explore a few ways this can bit the property owner.

The easement is permanent but your neighborhood is not. You have to be very careful not to box yourself into a corner in property management. Suppose you own 100 acres of mixed woodland. When you crafted your easement contract to permit future forest management, you were in a rural area, surrounded by farms and wood lots. There were 5 lumber mills within 25 miles to accept your wood. The closest large town was 50 miles away. Fast forward 30 years. That large town has now sprawled to 5 miles away and you are now surrounded by ranchettes with wealthy suburban residents. The closest lumber mill is now 200 miles away. Your new neighbors object strenuously to normal forestry operations and the price you can get for your wood cannot cover the expenses of maintaining your land and pay your property taxes. This income is no longer possible, so your land is now suffering from forced

neglect. Your easement does not permit any other form of land use, so now you are stuck with a white elephant.

The easement is permanent, but the people managing it are not. You will inevitably face a rollover in the personnel of your conservation organization. With a change in personnel comes a change in interpretation of the easement terms, and that change may not mesh with your interpretation anymore. The case of Martha Boneta comes to mind for an example of how bad it can get when the holder of the easement and the property owner do not see eye to eye. Martha Boneta bought a 65-acre farm in Virginia in 2006 and then endured 8 years of harassment via the Piedmont Environmental Council, who held the easement, with the alleged purpose of driving her off the property. Her lawyer made the following statement - "For all the venality that has come to light, the whole exercise appears to have served the simple purpose of driving her off her land. By standing up to her well-heeled tormentors, she has shown how David can bring down Goliath. The lesson for farmers and other landowners is clear. Steer clear of conservation easements, because once you start surrendering your property rights, you are entrusting your future to people who don't necessarily have your best interest at heart."

The easement is permanent, but your regulatory environment is not. When you crafted your easement, it was completely legal to rotate your choice of row crop and permit a year or two of fallowing to refresh your fields. Some bright boy in your county zoning department decides that a change in the actual plant in the ground that year is a change in property use and locks you forever into growing potatoes. Potato blight afflicts your fields and destroys your ability to grow potatoes. The county will not allow you to even fallow the land anymore under penalty of zoning violation.

The easement is permanent, but you made errors in the provisions. This can appear in a lot of ways. When we were shopping for land a few years ago, we inspected piece of land that had a conservation easement. It was a beautiful property, but the terms of the easement were unworkable. It required that any future house use the footprint of the original house. This house was reduced to the foundations and its shape was not a house we would want. It also required that no animals outside of horses could be present. This was also unacceptable since we wanted a guard dog and a cat for rodent control. It even controlled what color we could paint things on the property. We asked if any of this could get renegotiated and were told it could not, because of the permanent nature of a conservation easement. When we owned forest land in California, we crafted a Nonindustrial Timber Management Plan, which is a permanent forest management plan that could be melded into a conservation easement. We used the best available science and practices, but 15 years into the plan, we discovered that it did not serve our forest well in times of drought. Our land would be better served with a heavier harvest schedule to provide more water for the remaining trees. This same sort of error is entirely possible in the formation of a conservation easement, and is as impossible to fix, since the contract is permanent and cannot be modified.

The easement is permanent, but climate change... You started with forest land and your easement is crafted around forest land, but your land is now a scrubby grassland because of climate change. Now what? Your heirs are not going to be amused.

You also have to remember that you donated or sold a portion of your property (usually the development rights) but you did not destroy them. Your development rights are now owned by your conservation organization. What happens if they choose to exercise them? What happens if they get in financial straits and sell them? What happens if your conservation organization dissolves and your easement is transferred to another organization? Your control over what happens in this arena are nonexistent.

The self-appointed elite of the world, who happen to be heavily represented in these conservation organizations, are actively trying to gain control of our real property. Once they own your development rights, all they have to do to obtain the rest of your property is make it so unusable and expensive to maintain that you will sell it to them at the price they dictate or you will be forced to flat out give it to them. By this time, they will be the only buyer interested. I have been to one of their conferences and I came away with the distinct belief that there is a complete other economy operating in the world between NGOs and the government. It is funded by our taxes and its purpose is to separate us from our property.

Is there another answer to conserving your property? Absolutely. Even California sometimes comes up with a good idea, and in this case it is the Williamson Act. This is very much like a conservation easement in that it exchanges a reduced property valuation for the commitment to keep the land in agricultural production, but the main difference is that the contract only lasts 10 years, at which time the property owner can reevaluate and adjust the agreement to meet his current circumstances. I would never enter into a conservation easement. For ever-is too long in a changing world. I would seriously consider a 10-year contract with options for renewal.