

**What Landowners Should Know When
Considering Conservation Easements
Insights from Colorado Landowners**

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A Message from the Authors

The authors of this report fully support conservation easements as a valuable tool to help protect farms, ranches and other lands in Colorado. Nevertheless, since conservation easements are usually perpetual, the cost of making a mistake in your contract, or in choosing who will hold your easement, can be substantial. Therefore, we focus on providing information that will help landowners avoid having a bad experience sometime in the future after the easement contract has been placed. We base our comments on interviews with people in Colorado who placed easements and people who considered placing them but did not. In no way should our readers interpret our intentions as a lack of support for conservation easements or a lack of confidence in reputable land trusts.

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Though the views expressed here are not their responsibility, we hope that their influence has been captured in a way that has made this a better, more meaningful report.

What Landowners Should Know When Considering Conservation Easements Insights from Colorado Landowners

When you own land, you also “own” many of the rights associated with it. Rights can be controlled by someone other than the landowner through easements for specific, limited purposes, such as having access to a utility box on your property. A conservation easement is a legal agreement between a landowner and a land trust (a private, nonprofit conservation organization) or government agency that permanently limits a property’s uses in order to protect benefits that flow from natural resource conservation. When you donate or sell a conservation easement to a land trust or government agency, you permanently give up some of your related rights. The payments and limitations related to conservation easements vary widely. For example, a conservation easement that is designed to protect rare wildlife habitat might prohibit development of any kind, while an easement designed to protect agricultural production may allow continued farming, and perhaps even the building of additional agricultural structures, but prohibit subdivision for residential housing.

Agricultural conservation easements have become a popular choice for protecting desirable agricultural lands for many of Colorado’s landowners. The non-profit land conservation organizations or government agencies that are qualified to accept and hold conservation easements (*CEs*) aim to protect Colorado’s agricultural lands from residential or commercial development that results in the loss of public interest values (*PIVs*), such as open space, wildlife habitat, and agricultural heritage, while retaining the private stewardship of these lands. While these entities are known by various terms, including “conservancies” or “land trusts”, in this paper they are referred to generically as “land trusts.” Government entities at the municipal, county, state and federal levels may also be qualified to accept and hold *CEs*. For the purposes of this document, we refer to these entities as “the government.” Of course, since the use of these tools is voluntary, landowners won’t place easements unless they help them meet their own personal goals. Sometimes these goals are financial. However, most people who place easements are also seeking to satisfy non-financial goals such as assuring that the land stays in agricultural production or sustaining the natural surroundings.

Land trusts at the national, state and local levels have accumulated a wealth of information about how to place a conservation easement, giving landowners a variety of choices in land trusts to work with. However, very little information about landowners’ experiences with conservation easements is available. Have they been satisfied? Did the easement help them accomplish their goals? Is there anything they would change if they could do it over again? We therefore initiated a study at Colorado State University to examine these lesser-known landowner expectations, experiences, and outcomes with conservation easements in Colorado. We carefully surveyed 20 Colorado landowners who had placed easements against their property, and included some people who had considered placing easements, but in the end decided not to place them (See Marshall, Hoag and Seidl, 2002 for survey results at <http://www.colostate.edu/Depts/AES/>)

The purpose of this publication is to describe what we found from our survey about landowners' experiences with easements, combine these results with literature on the subject, and provide information that might help anyone considering placing an easement on their property. In our survey, we found overwhelming support for easements, even from those people who chose not to place one. We also found that land trusts are generally very knowledgeable and that in most cases they provide information that represents both the landowner's and the land trust's best interests. However, in some instances, the interests of a land trust may differ from those of the landowner. In addition, placing a conservation easement can be complicated, which increases the chances of misunderstandings that might lead to future problems. Even though serious problems appear to be uncommon, the cost of making a mistake in a contract that is intended to be perpetual can be great. Therefore, we highlight and emphasize some of the potential problems that we found, so that they may be avoided.

We divided our presentation into four major sections, which include information from popular literature:

- Integrating Your Property Goals with a Societal Conservation Purpose
- Conservation Easement Values and Participant Responsibility
- Common Terms and Components of Conservation Easement Construction
- Other Critical Issues When Considering an Easement

1. Integrating Your Property Goals with a Societal Conservation Purpose

Protecting agricultural land with a conservation easement (*CE*) involves a voluntary contract (usually a deed restriction) between two parties for accepted land-uses. As a landowner, you are the grantor (of certain use rights), and a land conservation organization or governmental agency (land trust) is the grantee, holding a bona-fide real property interest in your agricultural land on behalf of society or an unnamed public beneficiary. When considering a *CE*, it is important to identify what benefits you may gain (or objectives you may achieve) and recognize what society expects to gain (via a land trust holding the easement) with such a binding voluntary agreement. Both you, as landowner, and the land trust should make certain that your interests match, and that there is no confusion about what each of is are getting from the *CE*. Even an apparently obvious term like “agricultural use” can be interpreted differently between two parties. One party may think agricultural use allows a confined hog operation or a vegetable-processing shed, while the other disagrees. Most grantees are experienced and will help you make sure that you both understand what you are agreeing to. Nevertheless, careful planning on your part, and asking a lot of questions, might avoid problems in the future.

Specific issues in this regard are:

a. Is a conservation easement right for me?

Many professionals talk about the need to define goals. With regard to *CEs*, you have at least three options: 1) do not act (continue to farm/ranch without an easement); 2) sell and reinvest your proceeds in some other endeavor (farming/ranching in some other location, or a non-agricultural investment); 3) place an agricultural conservation easement against your property and continue to farm/ranch within easement restrictions. Each of these options has long-term implications for you and for your current and future family. Clearly, planning is important, but people commonly put it off. Placing a *CE* trades potential future earnings, such as the ability to develop your property, for direct payments and/or tax savings today. Ask yourself which is more important to your long term objectives, using a *CE* to gain immediate cash flow—that you can spend or use for some investment opportunity, or keeping your options open for the future by not placing a *CE*. If your primary motivation for utilizing a *CE* is improving financial conditions, a *CE* may provide some immediate economic benefits, given current tax laws and possible public funding. However, once an easement is placed, some future alternative land uses, i.e., high-density residential, commercial or industrial development, are no longer options on this land. Therefore, future family or landowner financial enterprises are more restricted and your flexibility to sustain your farm or ranch reduced. You can maintain or increase your flexibility by investing your earnings from the easement sale wisely.

Surveyed landowners told us that the initial financial benefits of easements, such as tax savings and direct payments from private or public land trusts, were not as high as they expected. They also told us that the financial benefits were initially important when they started the easement, but that in the end non-financial goals, such as preserving agricultural production, were more likely to be achieved.

b. What does the public gain (and what do I give up) with a conservation easement?

Easements must have a legitimate conservation purpose that provides a “public benefit.” The IRS considers public benefits to include habitat protection, open space, scenic lands, certain historic buildings or lands (with a National Historic designation such as civil war battlefields, etc.), providing public recreation or other public values as identified in the Internal Revenue Code. The Code, and Colorado Tax Code, also requires *CEs* to be perpetual to qualify for any potential tax benefits. While land trusts and governments work toward various goals, they all work under the legal requirements of the Code.

Societal benefits of *CE* placement focus on the protection and production of public interest values (*PIVs*) flowing from agricultural land, such as open space, scenic vistas, wildlife protection, water conservation, or agricultural preservation, as shown in the table below. *PIVs* represent an array of open-space and biological or physical attributes of agricultural land. The *CE* for an agricultural property may or may not require public access (as for recreation) if other conservation values or *PIVs* are present. Many times government entities will require public access as a part of their *CE* transaction. Land trusts may require public access if such is the focus of their mission, but many land trusts explicitly state in that the *CE* does not grant any level of public access. *PIVs* for agricultural lands typically represent an array of open-space and biological or physical attributes/benefits and not a public access benefit.

Commonly, some uses of land (e.g., agricultural, recreational) have more *PIVs* than others (e.g., residential, commercial). These interests are realized via negotiated land-use restrictions in a management plan. The *CE* recognizes your

<i>PIVs</i> Protected by U.S. Land Trusts			
	% of Land Trusts		% of Land Trusts
Land <i>PIV</i> 's Protected	Protecting	Land <i>PIV</i> 's Protected	Protecting
Wildlife habitat	76.6	Historic and cultural	46.2
Forests	70.5	River corridors	35.3
Open space	69.5	Ranch land	34.3
Watersheds	64.3	Mountains	34.3
Wetlands	60.4	Hillsides	33.8
Scenic views and roads	55.7	Lakes	32.9
Ecosystems	55.2	Urban Land	28.9
Farms	51	Prairies	27.6
Greenways	50.3	Archeological sites	25.7
Recreation and trails	49.0	Deserts	15.8

Source: Adapted from J. A. Gustanski, Land Trust Interviews, (1996-98) as quoted in Gustanski and Squires, 2000, p. 21.

responsibility to manage and maintain your property with respect to those societal interests or conservation values as identified in your *CE* document. While land trusts share common goals, such as preserving open space, you must clearly understand what each party is interested in conserving on your property. Subtle differences may matter. Open space to one entity might mean grazing and to another it might mean curtailing grazing in the interest of wildlife. Generally, if you receive compensation for your *CE*, you are likely to face more requirements than if you donate your *CE*. Funders (such as Great Outdoors Colorado—“GOCO”; USDA through the Farmland Protection Program—“FPP”; and/or Colorado Division of Wildlife—“DOW”) have their own set of requirements to be inserted in the *CE* document. Most of these funders will require a land management plan in addition to the *CE* document in order to support and further protect the conservation values of the property. Land trusts typically do not have the funds to purchase a *CE* directly, but instead prepare grant requests on behalf of the landowner.

You should therefore:

- Know and identify your short-term and long-term property goals.
- Determine short-term and long-term financial impacts and estate planning needs to assure your financial sustainability.
- Decide what rights you are willing to relinquish.
- Consider what goals the potential *CE* can address for a land trust or the government (e.g. wildlife habitat protection, open space protection). What you want to protect may not be the same as a land trust that wants to purchase an easement from you. Where possible, try to match your land-use goals with the goals of the easement holder. You may want to protect the exact same thing (agriculture, wildlife, open space, scenic values) as a specific conservation organization, but it is often the case that you want to protect something different, such as agricultural production, that is not in the mission of that land trust. Think broadly about what you are giving up either through a donated or purchased *CE*. Approach offers to sell *CEs* as a business. That is, you will get a higher price if you sell the grantee what *they* want to conserve as opposed to what *you* want to conserve.

“The key to success is a carefully crafted document that embraces the goals of both the landowner and the land trust and that showcases the relationship as a partnership”

Lynne Sherrod, Colorado Cattlemen’s Agricultural Land Trust

2. Conservation Easement Values and Participant Responsibility

Conservation easement agreements represent the legal acquisition of partial interests in agricultural land by qualified land conservation organizations or government agencies for conservation purposes. An easement for conservation purposes means that you voluntarily give up your development rights. The *CE* can be fully donated or, in a limited number of cases, some funding can be provided to the landowner for the value of the *CE* (the value of the development right). Typically, purchased *CEs* are “bargain-sale” purchases, which means the *CE* is partly purchased and partly donated. The *CE* extinguishes the non-agricultural developmental value, while establishing protection of conservation values or *PIVs* situated on that land for the benefit of society.

a. *What is my role as landowner?*

The owner of the property is the only one who can grant permission to place a conservation easement on his or her property. Partnerships or corporations with multiple owners must all agree to easement placement. Some general information is provided below. *Anyone considering a CE should contact a professional financial advisor before acting on this information, which may have changed or not apply to your situation.*

- **Choose the right land trust:** Find a land trust that complements your property goals and that is equally committed to such a long-term agreement. Currently, there are nearly forty conservators operating in Colorado ranging from local grassroots to national organizations, including almost two dozen municipal, county, state and federal funding agencies. Government entities such as cities, counties and state agencies are also qualified to hold conservation easements. Certain municipal, county, state and federal entities, such as GOCO, DOW, the federal Farmland Protection Program (see box) and counties such as Boulder, Douglas, Pitkin, Mesa and Jefferson provide funding (many times through a land trust) for the acquisition of *CEs*. Not all *CE* holding and funding entities view protecting agriculture as their primary conservation or funding purpose. Some focus on open space or wildlife protection, while others, such as Boulder Open Space, focus on providing public recreation opportunities. Find a conservation organization that is financially secure and that you trust to honor the spirit of your agreement indefinitely.

Farmland Protection Program

FFP is a national program, found in the Conservation Title of the Farm Bill, run by the Natural Resources Conservation Service, which directs federal money to help farmers and ranchers keep land in agriculture. As of May 2002, 108,000 acres in 28 states have received assistance conserving prime, unique or productive soil, or historical or archaeological resources. The 2002-2007 budget for the FFP is \$985 million. For more information see: www.nrcs.usda.gov/programs/fpp/

- **Compensation:** Financial compensation is typically a driving factor for *CE* placement. In Colorado, agricultural landowners have the providential condition of an active and well-funded public open-space and land protection agenda. Therefore, as landowner you have multiple financial options in *CE* construction. Financial benefits come in three forms:
 - income tax savings for donations (state credit or federal donations),
 - estate tax savings, and
 - direct payments for the *CE* (which may be exposed to capital gains taxation)

Tax implications can be highly complicated and therefore are only summarized here. The land trust you work with will know how to get you more information and how to find a lawyer or accountant that can assist you with your specific needs. You may wish to find advice independent of the land trust.

Income taxes: Most *CE* projects that involve payments also involve some donation by the landowner. For a non-C-Corporation entity, the federal government allows a deduction against taxes owed for the donated component of a *CE* of up to 30 percent of adjusted gross income, which is taken in the year of the gift and the five subsequent years.

Colorado provides an income tax credit for the donated component of a *CE* of up to \$100,000, and it allows you to sell your tax credit to someone else if you don't have enough income to take advantage of the credit. However, this transfer can incur up to a 20% discount (buyer discount and/or broker fee). You may end up selling a \$100,000 credit for \$80,000. You can also take the income tax credit over time (against the Colorado income tax owed) instead of trading it. The Colorado income tax credit changes in 2003, increasing the cap to \$260,000 based on a specific formula related to the value of the *CE*. In order to fully capitalize on the \$260,000, the donated portion of the *CE* must have an appraised value of at least \$500,000. Another provision allows for a cash rebate of these tax credits from the state in the years that the state is operating in a surplus.

Estate taxes: Many landowners are interested in reducing the value of their farm or ranch to a point where estate taxes will not be so high that their heirs cannot afford to take over the farming or ranching operations. Any reduction in the property's value, whether donated or compensated, will reduce estate tax liability. Up-front financial compensation through direct payments or income tax savings can also be a part of a landowner's estate planning. It could allow a landowner to separate out the non-agricultural value of an estate and pay it immediately to his or her heirs rather than when the estate is settled. The value also could be paid out in increments as gifts, which substantially reduces tax liability.

There are two potential problems that may arise in any estate-planning situation. First, you need to take precautions so that your heirs will not challenge the estate. Some heirs have successfully overturned their parents' CEs. Talk with them and with your lawyer.

Second, there are instances in Colorado where the easement did not reduce the value of the property commensurate to the agricultural value. That is, taking away the potential to develop made the property more attractive to people that wanted the land for something other than farming or ranching. Therefore, the heirs' tax burden was still too high to continue farming.

Direct payments: On average, respondents to our survey received compensation for over half the value of the easement and donated the rest. Compensation can be raised through one of the many private, non-profit land trusts that are generally awarded their funding for the purchase of CEs from state or federal sources. Each funding entity requires different types of restrictions or land management depending on their conservation objectives. Anticipate indirect costs involved with CEs, including possible non-financial costs such as public access (generally a requirement of the counties and municipalities) or requirements for nature and the environment. It is not uncommon for a landowner to receive payments from multiple sources. The land trust that you select can discuss potential funding options (and some of their related requirements) with you.

- **Subordination:** If your property has any financial encumbrances such as a mortgage, the mortgage holder must also be in agreement with, and recognize a subservient position to, the easement position.
 - **Property rights affected:** Realize that surface water, mineral and oil/gas rights will also be affected. The IRS specifically prohibits surface mining, so you cannot deduct a donation from federal taxes if your property is mined. Some trusts may place limits on continued water rights and their usage. Also, if you restrict only part of your agricultural land, any resulting appreciation on the adjoining unprotected property will offset the donated portion's eligibility for a tax break. Finally, the agreement may limit other property rights. For example, some agencies, such as the Division of Wildlife, may require public access.
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b. What is the role of a grantee (land trust or government agency)?

Since a *CE* is a long-term deed restriction (likely in perpetuity), it is necessary for the grantee to be responsible for the monitoring and maintenance of the *CE*. Whether the easement holder is a public or nonprofit organization, it is important that as landowner you recognize a grantee has the right and responsibility to enforce the requirements stipulated and adherence of current and future property owners to the terms of the easement.

There may be a big difference between what is required for a donated versus a purchased *CE*. In a sense, you get what you pay for. If you donate a *CE*, you essentially paid for the development right yourself, since you gave up the right to income from development. If another party pays for the *CE*, they have more rights regarding the performance of the contract.

Typical steps for a *CE* include:

- **Establishing baseline documentation:** A baseline documentation report (BDR), which is required for tax purposes and donated *CEs*, includes supporting information on the conservation values of the property, a description of existing conditions of the property and identification of the property's overall characteristics. The BDR typically includes maps of the property, property descriptions, photographs (land and air), ecological reports, etc.
 - **Monitoring land-use:** This may require regular visits to the property to ensure that easement restrictions are being upheld. Generally, the trust visits the property annually and asks for permission to inspect your land. Donated easements are less likely to be visited on a regular basis.
 - **Maintaining property/easement records:** This includes providing information and background data regarding the easement to new or prospective owners.
 - **Enforcement:** Because easements are a form of "partial interest" in agricultural land, they create important issues associated with monitoring and enforcement of the agreement. The holder is charged with enforcing the easement's conditions.
 - **Establishing a review and approval process:** Collaborative approval between the landowner and trust may be stipulated in the agreement for some land activities as. Therefore, you may want to create an arbitration process in advance that specifies how any conflicts in the future between the trust and landowner will be settled. For example, is it in your interest to require that major decisions, such as choosing to build a structure, require joint approval by the landowner and trust?
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3. Common Terms and Components of Conservation Easement Construction

Conservation easement design and construction can be as flexible as any other legal contract, *as long it conforms to pertinent real-property law and includes a clearly stated conservation purpose*. This flexibility leads to many different viewpoints on requisite land-use restrictions, management decisions, and each party's duties to ensure the easement's purpose is upheld.

a. What are the common forms of CE consideration?

- **Donated Conservation Easements:** Altruistic landowner motivation and tax benefits have created the viable option of simply donating a *CE* to a qualified land trust or the government. Often, these donations qualify for tax relief, which offsets a portion of the cost of donation.
- **Purchased Conservation Easements:** Sometimes also called "Purchase of Development Rights" (PDR), "Purchase of a Conservation Easement" or "Purchase of an Agricultural Conservation Easement" (PACE). This is a compensatory approach to conservation that attempts to fund the acquisition and extinguishment of development rights in order to preserve land, which may include agricultural lands. A Bargain-sale purchase of a *CE* is the most common form of consideration for a purchased *CE* that blends a partial purchase with a partial donation—the "bargain-sale." The portion of the *CE* value donated by the landowner may be offset by tax benefits. The actual purchased portion may be subject to capital gains taxation.

b. How much compensation can I realistically expect?

A wide range of compensation is common with *Ces*, depending on your real motivation for *CE* placement. Surveyed landowners who chose not to place an easement all cited funding or valuation inadequacies as the primary reason they did not complete a *CE*. Surveyed landowners who did place an easement stated that they did not achieve their financial goals as much as they did other

Should You Donate Now?

If you are going to have sole control over your land for several years, then the land is already protected from development (by you). You may want to hold off donating an easement in order to provide yourself with more flexibility in an uncertain future. In addition, holding off for a while may present a buyer willing to pay something for the easement. You can always donate the easement later. Consider both the benefits (such as tax credits) and costs of donating now to donating later.

goals such as preserving agricultural values or open space. The survey clearly showed that landowners' expectations about being compensated for the *CE* are inflated when they begin to investigate the market. It also showed that some people will donate the full value, and some will receive compensation for nearly all the value, but most will be compensated for a portion of their easement value.

The following table describes valuation outcomes from our survey and also from national studies (that may not fully reflect Colorado values).

	Easement Value (\$/ac)	Compensation	
		(Percent of Appraised land Value)	(Percent of Easement Value)
Colorado Landowners	2,071	51%	65%
National Studies:		20-80%	
Development intensity			
Low	\$600 - 1,000		
High	\$3,000 - 5,000		

The portion of total land value (\$4,061/ac) associated with a *CE* averaged 51 percent (\$2,071/ac) for the landowners that we surveyed. On average, the landowners received compensation on 65 percent of this easement value (\$1,346/ac). Surveyed values are all pre-tax total values based on placement prior to year 2000 (when Colorado tax credits became available). Your exact value will vary with location, the size and the extent of the *PIV*s found in your property; your motivation for donating needs to consider actual capture of possible state tax credits.

c. How long is a conservation easement granted?

Legally, a *CE* can be written for any specified period, but we are not aware of any trusts in Colorado that have agreed to a less-than-permanent agreement. Conservation easements are almost always permanent. The IRS and State of Colorado require this as part of the eligibility for tax benefits and public direct payment.

d. What should be included in a conservation easement contract?

- **Descriptive elements:** A description of the property, its ecological conditions, and known environmental hazards. In addition, there is a broad “statement of purpose”, delineating the conservation goals sought.
- **Auditing requirements:** Agreement to identify and correct any encroachments onto the property and identify and/or remove any disamenities, such as uncontained trash.
- **Affirmative rights:** The grantee has the right to enter the property in order to confirm that the grantor is abiding by the terms of the *CE*. This is typically undertaken within the provisions of notification for the annual site visit. Typically, if the grantee determines that a violation of the conservation easement has taken place, the grantee may also be entitled to enter the property to inspect, document, prevent and/or to mitigate any

such violation. In a certain cases, especially if a management agreement is a part of the conservation transaction, the grantee may be granted the right to enter the property in order to observe certain ecological conditions.

- **Extinguished rights:** The grantor's ability to commercially or residentially develop the land or alter existing land uses is limited through terms of the *CE*. What is and what is not allowed should be identified as clearly as possible.
 - **Reserved rights:** A description of land uses that the grantor can pursue in the future, such as the ability to build a structure or to sub-divide parts of subject property for sale. Provisions of the *CE* may also allow limited development and may exclude sections of agricultural land from any limitations altogether.
 - **Demonstration of unencumbered ownership:** The grantor must demonstrate that the property has no liens attached to it or establish subordination of all encumbrances with respect to the *CE*. A title company typically undertakes this research through a review of title. A title insurance policy is typically a part of any *CE* transaction.
 - **Remedies for breach of contract:** In the event that a party breaches the terms of the *CE*, the other party is entitled to seek monetary damages or remedial actions from the breaching party in a court of law.
 - **Statement on indemnification of the grantee:** The grantee is indemnified against existing and future liabilities associated with the property, including third-party claims and tax liabilities.
 - **Statement of *CE*'s transferability:** The *CE* binds all subsequent owners of the property in perpetuity, and the grantee (land trust or government) must be notified in the event the property is sold. Likewise, any change in the grantee's or grantor's status must be addressed prior to transferring or consolidating the *CE*.
 - **Sale related provisions:** These provisions relate to responsibilities, deadlines, and payments associated with the original *CE* sale itself. Typically, when a *CE* is purchased, the grantor and grantee will enter into a separate agreement (a purchase and sale agreement) for the acquisition of the *CE*. The actual *CE* document may have terms and provisions related to the refund of dollars used for any purchase of the *CE* in the extremely slim case that the *CE* is condemned – in whole or in part, typically in cases where a road is widened.
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- **Easement condemnation:** In rare circumstances, all or parts of a *CE* on a property may be terminated under mutual agreement of the landowner and the *CE* holder/grantee. Usually, this could occur through a condemnation (or threat of condemnation), typically from an entity such as a highway department for the widening of a road/highway. In this case the donated and/or purchased values (appreciated values) of the *CE* are returned to the funders and to the land trust that accepted any donated portion of the *CE*.

4. Other Critical Issues When Considering Placement

Conservation easement agreements, while becoming more common, remain a unique and highly flexible real property interest, uniquely tailored to every transaction. Voluntary agreements of this type tend to be viewed as a “win-win,” otherwise either party would walk away. Nonetheless, the real long-term implications, both positive and negative, for landowners and the communities where they live have yet to be fully realized. The unintended consequences will be discovered by future generations. Several critical points found in our survey are listed below. These are generalized responses. Your own situation may vary.

Can *CEs* Be Perpetual?

The language in a *CE* may say “perpetual”, but it is actually very difficult to control the fate of your property forever. There are many circumstances that can shorten the life of your contract. A contract can be terminated, for example, if conservation purposes are not achieved. This could occur unintentionally or intentionally. For example, times could change in the future, making agricultural production infeasible or undesirable (e.g. your farm is surrounded by city). Your heirs might be forced to move on, abandoning the conservation objectives. Your heirs may even terminate the *CE* intentionally if they can make more from a sale than they would be penalized. Your heirs could also sue your estate to challenge the *CE*, as some have done already.

There is no guarantee that the easement holder can or will protect you either. They could run into financial trouble or, for some other reason, choose not to enforce the *CE*. Some trusts even sell high priced conservation properties in order to buy more properties. They own the easement, and can sell it.

It is expensive to monitor and enforce contracts. For example, the Wildlands Conservancy held a 35.34-acre easement in Berks County, Pennsylvania. In order to sell the property, the grantor (landowner) had to ask to change the plan after only two years. Furthermore, the new owner of one of the two parcels tried to resell a portion of the property five years later and found that the *CE* made it nearly impossible to sell. “In frustration, he put the property up for auction” (Gustanski and Squires, p.160). But the property did not sell. On the other parcel, *by chance*, a conservancy employee noticed that the new owners had several violations, including buildings, a commercial enterprise, and too much livestock. Although the conservancy had the resources to fight the case, it essentially agreed to a new plan that was “less than desirable,” giving the new owners most of what they wanted.

The lessons here are to work with an experienced, financially secure trust, and to plan for the unexpected.

a. What did surveyed landowners identify as critical and significant after completing their agreement?

- **Realize true income and estate tax improvements:** Tax incentives are usually the most lauded landowner benefit from *CE* placement. Yet, surveyed landowners found this somewhat misleading. Consideration for their *CE* agreements was generally a bargain sale; the tax eligible portion from the donation was typically inadequate, due to landowner's negligible tax burden. This was compounded with agricultural land markets maintaining accelerated land values even with restrictions imposed, which reduced estate tax advantages. Public conservation policy in Colorado, however, is still very active. Newer tax incentives have been enacted since most of the people we surveyed placed their easements. For example, the recent expansion of Colorado's income tax credit refunds, as well as federal amendments to lessen the estate tax burden, signifies added financial gains from donation. As you begin to negotiate your *CE*'s value, consult a tax or financial advisor for what might work best in your situation. Everyone we talked to who was familiar with *CEs* recommended using someone with experience since *CEs* can sometimes be quite complicated.
 - **Recognize transaction costs:** The required legal documentation for a *CE* contract can be overwhelming in addition to costly. Most land trusts start from a model easement template that can save you a significant amount of time. However, since *CE* agreements are flexible, some contracts can still be very time consuming. Up front transaction costs incurred by surveyed landowners averaged \$22 per easement acre. Landowners also expended, on average, 169 hours (about a month of full-time work) to construct and complete a *CE* agreement. The lesson is that *CEs* can take a lot of work to complete. Start-to-finish time on purchased *CE* transactions typically takes one to three years. Some of the financial costs may be covered in a purchase price when a *CE* is purchased. Donated *CE* transactions typically take far less time – generally six months to a year.
 - **Maintain flexibility:** Recall how much farming/ranching has changed in your lifetime. Can you ensure this much flexibility with your *CE* (land-use constraint) for future landowner viability? For example, what does agricultural use mean? Would a *CE* that restricted all but agricultural uses deny establishing a confined hog operation or other more intensive agricultural activity, or other commercial activities such as horse boarding?
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- **Prepare the contract as if it will be contested:** Repeated and early attempts to recognize all rights, whether they are affirmative, reserved or extinguished, may avoid future litigation and legal costs. While courts have recognized the intents of the *CE* as valid irrespective of time, they are also leery of an overly restrictive and permanent covenant that imposes a “dead-hand-control” diminishing alienability. *CE* agreements written today are intended to last multiple generations. We interviewed landowners who had not even asked their heirs about their feelings. This could leave the *CE* open to a legal challenge in the future, especially after one or two generations have passed.
- b. *What other points do I finally need to consider for protecting my agricultural land with a conservation easement?*
- **Consider landscape impacts:** A *CE* affects your land and neighboring landscapes. Protecting your agricultural land may influence surrounding development and land values, which in turn may affect your agricultural values, particularly if your agricultural neighbors do not also enter into easements or your community does not establish agricultural districts. Producers have experienced mixed results. Most find that their land does not depreciate as much as the easement value would suggest. Still, other producers have been very frustrated because they could only use the land for farming or ranching but cities grew around them, making it difficult to conduct agricultural activities or to sell their land and move somewhere else.
 - **Dependence on agricultural infrastructure:** *CE* agreements put the landowner in place of greater dependence on the surrounding farming/ranching infrastructure. This can act as an economic reinforcement but also as a long-term limitation if the surrounding unprotected agricultural land eventually develops, leaving an isolated non-viable agricultural operation.
 - **Take into account your credit needs:** Immediate credit needs may be improved from the cash infusion from *CE* compensation, but future (long-term) credit needs will be determined by market value accounting for the fact that the land is now encumbered with a *CE*. Typically, agricultural lenders will be lending on the agricultural operation’s ability to repay the loan. The *CE* takes into consideration the developable value of the land. Thus, you may reduce future borrowing power (on development values of the land), as you have taken some of the asset value that you would have borrowed against up-front in the *CE* payment.
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- **Future land-use implications:** The primary concern for future landowners may stem from their ability or inability to transfer remaining affirmed land-uses. The specificity and durability of the restrictions the *CE* imposes are among its greatest virtues, but from a future landowner's perspective, they may also provide a persuasive argument for invalidating it. Of course, if your alternative is to sell the farm to developers, you have also made a choice (the sale of the farm) with permanent implications for future generations, both yours and your community's.

Summary

Keep conservation easements in perspective. They are one type of tool that compensates you for limiting your land-use options and managing your farm toward social objectives. You can expect direct compensation (payment) and/or indirect compensation (income tax, property tax, and/or estate tax relief) in exchange for a portion of your private property rights. Other tools, both regulatory and incentive-based, exist and may be more appropriate for your community and/or for you. Usually a mix of such tools is used. In deciding whether placing a conservation easement against your property is right for you, take time to identify your family's goals and alternatives regarding your land. Consider your options. Conservation easements can be a very effective way to reach both private and public objectives, and there are many conservation groups that are recognized for their efforts. Nevertheless, if and when a land trust or government agency approaches you, remember that they are representing the interests of the public or their contributors. You need to take care to represent your own interests before entering into any agreement. Conservation easements are no different. Resources are increasingly available to help you to get informed, weigh your options and reach your goals.

References

Gustanski, J.A. and R. H. Squires. Protecting the Land: Conservation Easements Past, Present and Future. Island Press, Washington, D.C. 2000.

Marshall, Andrew, Dana Hoag Andrew Seidl. Colorado Landowner Conservation Easement Survey. Technical Bulletin # 02-03, Colorado Experiment Station, Colorado State University

Where can I get more information about conservation easements?

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