

# **Land Trusts and the Cattle Rancher: A Conservation Easement Primer**

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## **I. Land Trusts Are as American as Apple Pie**

Land trusts and conservation easements have been part of American life since at least the 1880's when the first conservation easements were created to protect parkways in the Boston area designed by the landscape architect and designer of Central Park, Frederick Law Olmsted. Between the late 1800's and the early 1970's conservation easements were used to protect many landscapes, but they were still a relatively unknown and relatively little used tool for land protection. However, with the passage of IRS Section 170(h) in the early 1970's, which allowed landowners donating lands and conservation easements to land trusts to deduct the value of such donations from their income taxes, the land trust movement rocketed. Today there are approximately 1,500 land trusts in existence, which have collectively negotiated 18,000 conservation easements protecting literally millions of acres of land. Land trusts are as American as apple pie when it comes to land protection.

Although conservation easements have a long history, the protection of working lands such as farms, ranches and harvestable forests is a relatively new, and definitely positive, phenomenon. The new emphasis on the protection of such properties represents the realization by the land trust community that *working* ranches by their nature can be protective of scenic views, open spaces, wildlife habitat, migration corridors and riparian zones. In other words, cattle ranching is increasingly viewed as an environmentally positive use of the land, especially when compared to the alternative of urban sprawl.

## **II. Conservation Easement Basics**

Land trusts use a number of land protection tools, including purchasing the land outright and placing deed restrictions on its future use. More importantly for this paper, is another land protection tool: the conservation easement. Stated simply, a conservation easement is a contractual agreement between a landowner and a land trust which restricts and specifies the uses to which a given piece of real estate can be put to. Even though a conservation easement is drafted like a contract, it is technically a deed in that it is recorded and placed in the chain of title for the property in question. The consequence of a conservation easement being a deed is that it is binding on all future owners of the eased property. To qualify for tax benefits to the donor of such an easement, the easement must not only be placed in the chain of title, it must state on its face that its purpose is to protect conservation values "in perpetuity."

Although the legal definition of "perpetuity" for conservation easement purposes has yet to be tested in our court system, for all intents and purposes it means "forever." What this means for the landowner is that when negotiating and drafting a document that

says it will literally last forever, the landowner should be very careful to have the easement allow any and all uses that the landowner may want to make of the property (but which are not contrary to the conservation goals of the property). For example, if the landowner thinks he or she may want to build a second home on the property at some point, this should be in the document.

While every conservation easement will be different, they tend to share many similarities, especially those easements that are based upon the model conservation easement in the “Conservation Easement Handbook” available from the Land Trust Alliance. One such similarity is that most conservation easements in a sense reduce to a series of lists. For example a typical conservation easement will include general statements of allowed and prohibited uses, with these statements fleshed out by lists of particular activities allowed for the landowner and land trust and lists of activities prohibited for each of these parties. These lists are obviously of critical importance as they determine what can and cannot take place on the land for generations to come. While the lists must operate generally to protect public values such as recreational use, natural habitat, open space and historically important structures for the conservation easement to meet IRS requirements, the specifics of the lists are left to the parties drafting them.

In addition to keeping in mind the list aspect of the conservation easement, it should also be kept in mind that a conservation easement can easily be drafted to protect conservation values on certain parts of the ranch while allowing much greater flexibility in other parts of the ranch. For example, grasslands may be protected by specifying the number and type of animals allowed to graze on them. On the other hand, an area may be set aside as an “improvement zone” where homes, barns, sheds, other structures and roads can be built, firewood harvested and equipment maintained, all with much more relaxed standards for protecting conservation values.

Also keep in mind that seemingly small changes in the language of a conservation easement can have large consequences in terms of the rights of the parties. For example, language prohibiting the landowner from activities which “adversely affect” the conservation purposes of the easement may set a higher standard of conduct for the landowner than language prohibiting activities which “significantly adversely affect” the conservation values. While the rancher will ideally be familiar with every word in the conservation easement, it remains critically important to retain an attorney to assist in the negotiating and “fine tuning” of the conservation easement.

### **III. Financial Benefits of Conservation Easements**

The financial benefits to the donor of a conservation easement will vary from case to case, but in most instances will involve one or more of the following: In many instances land trusts are able to put together funding packages to purchase a conservation easement outright. The purchase price of conservation easements can be quite high, often running into the millions of dollars. This can mean an immediate cash infusion for the rancher who sells the easement. In other cases, the conservation easement is donated,

rather than purchased, in which case the donor rancher may be able to use the value of the conservation easement as a tax deduction, assuming all the requirements are met, including the requirement of perpetuity. In some cases the transaction may involve a combination of purchase and donation, with the tax deductibility of the donation reducing the income taxes paid on the purchase price. The sale or donation of a conservation easement can also lower the value of the property for estate tax purposes. In this way the conservation easement can be used as a means to avoid the home ranch from being sold to pay estate taxes, allowing it to go to the owner's heirs instead.

#### **IV. Willing Sellers**

A typical scenario in which ranchers and land trusts may be brought together occurs when urban sprawl reaches the land near working ranches. As such development "pressure" builds up, land prices begin to skyrocket, increasing the appraised value of the adjacent ranches and increasing the pressure to sell working ranch lands for development purposes. Those ranchers who want to continue ranching as development begins to surround them often also find themselves burdened with increased property taxes as a result of the escalation in value of comparable lands. At this point, the landowner may start seeking out potential land trusts to work with to preserve the ranch. Likewise, the alert land trust will attempt to seek out and work with the rancher to protect the working ranch land.

While this paper discusses what conservation easements are, it is also helpful to have a sense of what conservation easements are *not*. For example, the drafting and recording of a conservation easement is not a governmental action such as a condemnation (i.e., the forced sale under the governmental power of eminent domain). Instead, it is always a transaction between a willing seller and a willing buyer. Another important feature of conservation easements is that they do not require governmental approval. This is because conservation easements do not require zoning changes, subdivisions or lot divisions which would trigger governmental oversight. Likewise, land trusts do not work for or report to governmental entities. This is not to say that governmental entities do not get involved. For example, a very common scenario involves governmental funding of conservation easements which are purchased from landowners by land trusts. While governmental bodies can hold conservation easements, whether this can happen for a particular easement is entirely up to the parties who drafted the easement. In other words, if the conservation easement states that it cannot be held by any body of government, then the landowner will never have to worry about having a governmental body holding that easement.

#### **V. Land Trust Monitoring and Stewardship**

Because the landowner-land trust relationship is ongoing, it is important for the landowner to know at the outset what types monitoring and stewardship will take place on the property. Typically, land trusts will send staff to visit a conservation easement site several times a year. During these visits, the land trusts may test the water quality, soil condition, and presence or absence of certain plant or animal species. Such visits almost

always require notice from the land trust and almost always the landowner will accompany the land trust staff during the site visit.

Again, the key to how much or how little monitoring and stewardship will go on will depend upon the conservation easement terms. Some landowners may be concerned about the condition of the conservation values of the property and thus may want fairly frequent monitoring. Other landowners may want a more hands off approach. While land trusts will do everything possible to negotiate monitoring and stewardship terms agreeable to both parties, it should be kept in mind that some funders of conservation easements may specify the amount of monitoring the land trust is to engage in. This will be spelled out in the conservation easement, which the landowner is free not to sign if uncomfortable with it.

## **VI. The Rancher's Conservation Easement Toolbox**

**Find a Land Trust You Like to Work With.** The rancher should feel free to shop around for the right land trust to establish a relationship with. In some cases there may be no choice as to which land trust to work with as only one land trust may be interested in the property. However, in many cases there will be several interested land trusts and it may be possible to choose among them. Because smaller land trusts frequently partner with larger land trusts in working on major acquisitions, it may be possible to specify which of a team of land trusts the rancher wishes to work with. In other words, find a good fit in the land trust you are working with so that a relationship of trust and confidence can develop.

**Retain Well Trained Professionals.** Make certain that you retain professionals who are well trained in dealing with conservation easements. Conservation easement appraisals are still rare enough in the appraisal profession that they require special training. Be as certain as possible that you retain an appraiser who will be able to provide you with a "bullet-proof" appraisal that will withstand IRS scrutiny. The same goes for accountants and attorneys that work with you on the project – make certain that you retain someone who has either worked on conservation easements before or has some similar experience that will enable him or her to quickly get up to speed and do a good job protecting your interests.

**Read What the Land Trusts Read.** In this country the umbrella organization for land trusts is the Land Trust Alliance, based in Washington D.C. This outstanding organization maintains a website on which upcoming land trust events can be monitored and also sells a number of excellent publications on such topics as the history of the land trust movement, land trusts themselves and more technical documents discussing such things as conservation easements and tax ramifications of donations to a land trust. Of particular value among these publications are those by Steven Small on using donations of land and conservation easements to land trusts to protect family lands by taking advantage of the tax benefits of such donations. Also helpful is the highly regarded book "The Conservation Easement Handbook" published by the Trust for Public Lands and the Land Trust Exchange and now in its second edition. As one becomes more familiar with

terminology and operating procedures of land trusts, they will become much less mysterious and much more user friendly.

**Hire a Conservation Easement Attorney.** If you are at the stage of actually working with a land trust on a conservation easement, it is critical to remember that the document being drafted is a creature of negotiation and drafting and should reflect the special needs and circumstances of all the parties. In other words, the document drafting process is so important that not only should you be highly focused and involved in the document drafting process, you should also always retain a trained conservation easement attorney to guide and represent you.

## VII. Conclusion

The bottom line is that the conservation easement you sign will become in effect the “Constitution” for your property. However, if the proper attention is paid to its negotiation and drafting, it will be a “Constitution” perfectly tailored to your needs and circumstances and one that you and future generations of your family can easily live with in “perpetuity” while protecting the land and the life-style that you cherish.

*Jim Olmsted is the founder of Conservation & Preservation Counsel, a boutique law firm dedicated exclusively to representing land trusts and landowners in conservation easement transactions. Mr. Olmsted received his J.D. degree from the University of California, Davis, School of Law. During law school, he interned with Judge Edward C. Reed at the Federal District Court for the District of Nevada. After graduating from law school, he clerked for Justice Charles E. Springer on the Nevada Supreme Court. Mr. Olmsted is an active member of the state bar associations of California, Nevada, Oregon and Washington. He has been practicing zoning, land use, real estate and conservation easement law for 18 years. In addition to his legal practice, Mr. Olmsted has taught on the faculty of the University of Oregon School of Law and has a wealth of experience in the public interest sector. He has served on the board of directors of the Friends of the Columbia Gorge, the Friends of the Evergreen Highway (past vice president), the Heritage Trust of Clark County, the Historic Preservation Advisory Commission of Truckee, California, and the Truckee Donner Land Trust (past president). He has also represented major luxury golf and ski resort developers in California's Lake Tahoe region. Mr. Olmsted is a frequent speaker and published writer on topics relating to conservation easements, land preservation and land protection. He is related to the famed landscape architect Frederick Law Olmsted who designed New York's Central Park. His mother's family has been raising cattle in Modoc County, California, since 1867. He can be reached at [olmsted@landprotect.com](mailto:olmsted@landprotect.com).*

**This fact sheet prepared by Conservation & Preservation Counsel.**

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