

Land Camp Conservation Easement Panel – Nancy Duhnkrack

- I. Conservation Easement Drafting Overview
 - a. How many of you have drafted a conservation easement? A working lands easement?
 - b. Definition of a Conservation Easement (CE): a voluntary legally binding agreement between a landowner and an eligible organization to protect specific conservation values on the property in perpetuity. The terms of the easement restrict development and other uses to protect these conservation values.
 - c. The landowner retains the property. Land ownership includes a bundle of ownership rights, only some of which are transferred through the easement. The rights given, sold, or otherwise transferred by the land owner to the land trust easement holder could include for example, the right to construct buildings, subdivide the land, graze livestock in riparian areas, or clearcut timber. The landowner retains all the rights that have not been deeded to the easement holder. Land protected by a conservation easement may be sold, bequeathed, or transferred like any other property.
 - d. The easement is permanently recorded with the deed, and runs with the land, that is, the original owner and all subsequent owners re bound by the restrictions in the easement.
 - e. So how do we draft for perpetuity?
 - f. First, there is the advance work. You may be familiar with the phrase “draft from the ground up,” that is, each easement should be drafted to reflect the unique characteristics and features of the property and to preserve and protect specifically identified conservation values of the property. Baseline documentation is important. Reference a particular conservation purpose in an easement only if it is clear on the ground what resources you are agreeing to protect or restore, the resources is capable of being monitored, and you have the organizational will to enforce against violations. (Risk assessment story)
 - g. As important as familiarity with the land is familiarity with the landowner – as one land trust put it, if all you talk to the

landowners about is the easement, you don't know them well enough to do the deal. Spend time with the landowner, learn what they know about the property and their traditional uses and their conservation vision.

- h. Now for some principles of drafting: First, Clarity: Easements should be drafted to be easily used by the staff who will be monitoring the property and interpreting the easement and also easily understood by the current and future landowners who must live by the terms of the easement. Include definitions for specific terms and maps to help explain provisions in the easement.
- i. Once you have identified specific conservation purposes, evaluate and determine whether to putting them in priority order, rather than listing all purposes as co-equal. Why? It is possible, particularly with working lands, that purposes could conflict with each other, leaving the land trust and landowner unsure which trumps. For example, a conservation easement states that its purposes are to protect agricultural uses and productivity and to preserve and protect the natural habitat and scenic and open-space values of the property. At some point grazing cows begin to impair rare plant habitat or the land owner proposes to erect an ugly and very visible fence to protect the rare plants. If certain conservation values are more important on specific sites on the property, use Zones to delineate and differentiate.
- j. Types of restrictions: Avoid restrictions that cannot be monitored and enforced. Standards should be measurable. Use prescriptive standards – absolute and quantifiable – for example, no grazing in identified riparian areas. You can also use performance standards – limiting activities based on measurable goals – for example, maintaining soil productivity
 - i. Do not use subjective terms such as major, minor, low, and high
 - ii. Quantify and use definitions
- k. Flexibility - The degree to which activities are controlled in the easement should correspond to the severity of the

threat they pose to the conservation values. Fully compatible uses can be permitted without restriction; fully incompatible uses can be prohibited outright. Between these extremes potential adverse impacts can often be controlled through by setting performance standards and notice and approval requirement coupled with clear evaluation parameters.

- l. Defer specific and/or changing reviewable management issues to management plans that can be easily altered, adjusted, and updated over time
- m. Include a catch-all which requires all future land uses be consistent with the conservation purposes of the easement.
- n. Another way of evaluating particular provisions:
 - i. Is this provision capable of being monitored? Do you have the stewardship staff expertise and resources?
 - ii. What sort of relationship with the landowner will this engender? Are you being consistent with all your landowners (no private benefit)?
 - iii. Is this clause necessary to protect the conservation values?
 - iv. Are you willing to go to court to enforce this clause? Not only do you have the funding, but will the community support your enforcement efforts.
 - v. Do not over-regulate where you do not need to or someone else already does – refer to the existing regulation or defer to the regulating jurisdiction – for example where the Department of Fish and Wildlife regulates as to hunting and fishing
- o. Occasionally the landowner wants the easement language to be more restrictive than the land trust – consider refusing to include such provisions if there is no relationship between the restriction and conservation purposes.
- p. Creating and maintaining stewardship records for admission into evidence – LTA Standards and Practices Key documents for CE enforcement actions: CE, Baseline Documentation Report, Monitoring Reports. Use of the business records exception to the hearsay rule. Rule allows for admission of a document that was made a) in the regular course of business; b) by an employee with personal

knowledge whose regular course of business is to make such a record; and c) at or near the time of the act, event, or condition or reasonably soon thereafter. To meet the business records exception, a land trust should have written policies regarding preparation of baseline and monitoring reports and should comply with these policies.