Conservation Easements and Oregon's Land Use Program:

How rural land values and special assessment tax programs create disincentives for landowners.

ForestCare conservation easement, held by the McKenzie River Trust.

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Note: This Project is a small taste of a much larger subject. There are many things that should be in here, but are not for (mainly) lack of time. If you would like to offer questions, concerns, comments, challenges, or requests for more information, please feel free to contact me at running@efn.org. Thank you, and may this work benefit all those working to protect our state's special places.

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Chapter 1 – Introduction

I. Statement of Problem and Purpose of Study.

Oregon has a long history of policies intended to conserve lands for agricultural and forestry. In 1973 the state adopted the first statewide planning program in the nation. This program protects rural lands from urban-type development, and created a statewide strategy that encourages the productive use of agricultural and forest lands. Nearly 30 years later, the program is still considered one of the most effective growth management programs in the nation. The revered program, however, is not without its problems.

On November 7, 2000, Oregon voters demonstrated that State regulations over private land are both fallible and subject to change. The passage of Measure 7, requiring state and local governments to compensate landowners when any regulation diminishes the value of their land, sent shock waves throughout the planning community in Oregon and across the nation. The ramifications of such a sweeping initiative could have jeopardized the entirety of Oregon's land use program by requiring compensation for everything from zoning designations and the like. Many in Oregon and beyond saw the planning program as a model for managing growth. Of course governmental regulations are subject to political, economic, and social change, which Measure 7 proved. However, such a potentially comprehensive alteration of the program planners take for granted had never been so effectively achieved.

Before, during, and after the campaigning for Measure 7,[1] there were a few non-profit organizations quietly working with private landowners in Oregon to preserve, in perpetuity, some of the state's most important habitat for fish and wildlife. Land trusts, or private land conservancies, offer services sanctified by both federal and state governments that compliment regulations over the use of private land. These services, fee title acquisition and conservation easements, are largely resistant to the vacillation of voters.

Of particular interest to many, and the subject of this Terminal Project, ***conservation easements*** are a unique tool for land trusts and public agencies to protect land in perpetuity while keeping land in private ownership. A conservation easement can be understood as a legal and enforceable deed restriction landowners choose to place on their land, which voluntarily regulates what can and cannot occur in order to protect identified and documented conservation values in perpetuity. Conservation easements serve to codify and protect landowners' wishes for their property well into the future; something regulations by and large fail to achieve.

Conservation easements run with the land, meaning that whoever owns the land must abide by the restrictions in the easement. Conservation easements protect the conservation values forever. They have specific IRS codes and Treasury Regulations that create financial incentives for their use protecting private lands. [2] These regulations, which allow the donation of a conservation easement to a non-profit organization (or a public entity) to qualify as a charitable contribution, require that easements protect properties with identifiable conservation values in perpetuity.[3]

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[1] As well as during its subsequent overruling by the Oregon Supreme Court

[2] IRS Code §170(h) and Treasury Regulations 1.170A-14.

[3] Termed easements, conservation easements that exist for a specified amount of time (i.e. 15, or 30 years) do exist, but cannot qualify as a charitable contribution under IRS Code. Perpetuity is a legal term, which means, "to exist forever."

As a legal construct, conservation easements are exceptionally unique and do not fit any of the traditional common law understandings of less than fee property restrictions. Essentially, conservation easements do not exist at common law, but must have specific enabling statutes in each state they are used to provide the legal standing for their existence. In Oregon, the enabling legislation was passed in 1983.[4]

However, conservation easements are still a relatively underutilized tool for private land conservation in the state. For instance, by the end of 2000, local Oregon land trusts (not including national or regional land conservancies, or public agencies) had protected 13,597 acres with conservation easements. Compared with New York (280,499 acres), Vermont (319,580 acres), or Montana (449,445 acres), Oregon has yet to tap the effectiveness of easements.[5] Many of the states with more aggressive and successful easement programs have different land use and ownership patterns than Oregon, where much of the critical resource lands are in public ownership.[6] However, in a state this is revered by many for its comprehensive work creating a regulatory system that protects private rural resource lands, understanding why there are so few conservation easements in Oregon deserves focused attention.

II. Scope of Terminal Project

Oregon's land use program set a nation-wide precedent for protecting farm and forestland (collectively, "resource land") that has still yet to be matched by any other state. To illustrate, the state has protected from development over 16 million acres of farmland. [7] This is staggering when compared to the 800,000 acres protected by regulation in all other states combined. [8] Oregon's planning framework is based upon a simple concept, executed with effectiveness: manage the development of land by keeping it close to urban areas. The fundamental intention behind the enabling legislation, Senate Bill 100 passed in 1973, was to keep Oregon free from the rampant development of rural lands taking place in other sates by preserving our rural farms, forests, and communities through a comprehensive growth management program.[9]

The land use planning program uses a number of tools to accomplish this purpose, two of the more important being property tax incentives and farm and forest zoning. However, it seems that the attractiveness of conservation easements is greatly impacted by these two tools. How the relationship between zoning laws, special tax assessment programs, and conservation easements impacts landowners' abilities to place conservation easements on their land is the subject of this paper.

In this Terminal Project, I will look at whether conservation easements are being hindered by Oregon's land use and tax policy framework by examining the statutes that define and implement the state's Land Use Goals and property tax special assessment programs for farm and forestland. Goals 3

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[4] ORS 271.715-271.795.
[5] Figures taken from the Land Trust Alliance's *National Land Trust Census of 2000*.
[6] In Oregon, a little over 57% of the land is publicly owned, compared with 16% in Vermont.
[7] James E. Meacham and Erik B. Steiner. *Atlas of Oregon CD-Rom*. University of Oregon Press, 2002.
[8] U.S. Representative Earl Blumenauer is a speech to the U.S. Congress, October 4, 2001. Found at http://www.house.gov/blumenauer/floor_speeches/fl347.html (visited on December 8, 2002.)
[9] Senate Bill 100 (1973) § 1(1). See also Sumner Sharpe. "The Origins and Future of Land Use Planning." *Oregon's Future*. Spring 2000, p. 16. Sharpe interviews Arnold Cogan, the first Director of the DLCD, and Richard Brenner, the current Director, about the state's comprehensive planning program.

(Farmland), 4 (Forestland), and 5 (Natural resources and open space) will be addressed, as will some of the special assessment programs. These tax programs intend to protect resource lands from inappropriate development by providing property tax breaks for landowners who manage their resource land in accord with specific requirements.

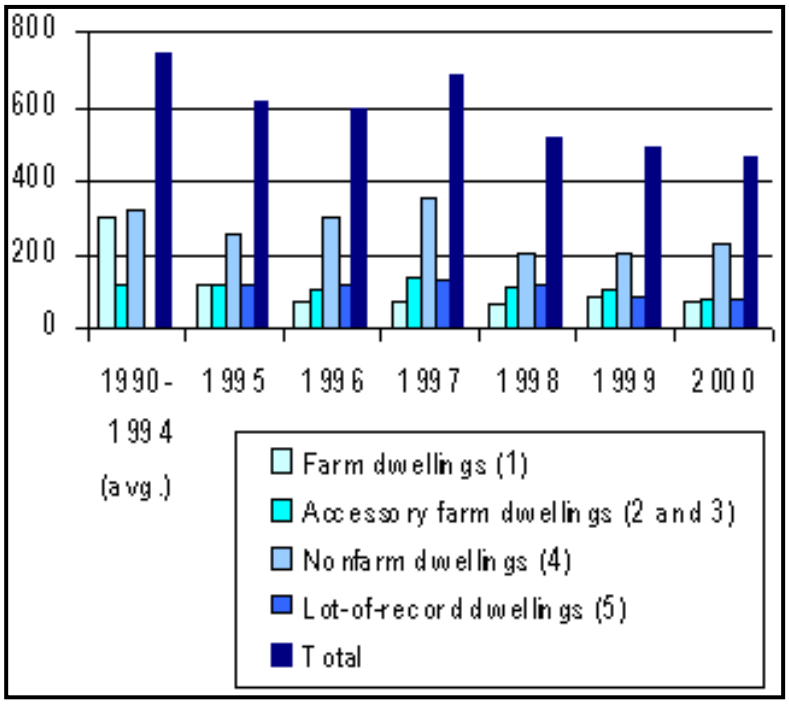
III. The Problem for Conservation Easements

The need for the protection of Oregon's rural lands does not have the urgency that many states experience. Across the nation, conservation easements are often accepted complements to local and state land use controls in the face of ineffective zoning regulations to protect land from development. In Oregon, there are few ways rural lands can be developed. For example, farmland is tightly controlled to keep productive lands free from land uses incompatible with farming. There are only seven different ways new dwellings can be approved on land zoned for farm use:

1. As a dwelling for the farm operator
2. As an accessory dwelling for a relative of the farmer who will live on the farm and help operate it
3. As an accessory dwelling for farm help not related to the operator
4. As a "nonfarm dwelling"
5. On "lots-of-record" owned before 1985 (three separate sets of criteria based on the quality of the land for farming)
6. Temporarily, during a medical hardship of a family member
7. To replace an existing dwelling.

Figure 1.1 below shows how approved farm dwellings (one of the largest threats to farmland across the nation) do little to jeopardize the viability of Oregon's rural landscape.

Figure 1.1 Dwellings on farmland approved statewide



Source: Department of Land Conservation and Development

In Oregon, the urgency for conservation easements is experienced by the loss of natural habitat that once defined the landscape generations ago. For example, an estimated 87% of the historic wetlands have been converted to other uses in the Willamette valley.[10] As the vast majority of rural lands are protected from development by regulations, most land trusts and public agencies working with conservation easements in Oregon protect natural and native habitat that is at risk of conversion.

Conservation easements have been and will continue to be an effective tool for protecting private land across the country. Indeed, many local, state, and federal agencies use conservation easements as part of their planning regime. For example, in Oregon, the Bureau of Land Management hold easements in connection with the protection of wetlands in west Eugene; the U.S. Forest Service has an easement program in the Columbia Gorge protecting scenic landscapes; and local governments are beginning to use conservation easements to protect open space, fish and wildlife habitat, and land for mitigation.[11] While easements have been tried and tested successfully in other states, private and public entities in Oregon are just beginning to grasp their utility to protect native habitat. However, we have yet to understand the limitations to easements that exist in our regulatory framework.

It seems that the special tax assessment requirements may deter some landowners from participating in conservation easement programs due to penalties they could face if they place an easement on lands participating in special assessment programs. For example, for land zoned for Exclusive Farm Use (EFU), a landowner must use his or her land "for the primary purpose of obtaining a profit" in farming.[12] Managing for wildlife habitat by converting the property to wetlands or a meandering river channel may run counter to this requirement and disqualify the landowner from the special assessment program. When a landowner is disqualified, not only will s/he be taxed at a higher property tax rate, but s/he may also be liable for back taxes. There is a similar possibility for landowners of forestland. The statutes for these special assessment programs limit landowners' abilities to place a conservation easement on their land by insisting they continue to meet the requirements for the programs. In effect, the State of Oregon does not recognize a landowners' choice to manage his or her land primarily for conservation purposes to be consistent with the goals of the land use planning program.

A larger and more complicated issue with Oregon's land use statutes and conservation easements is one of land values. Land values directly determine the value of a conservation easement.[13] This is critical for some landowners, as the easement's value, either donated or an acquired, may provide enough financial incentive to encourage their participation. In states such as Montana or Wyoming, where almost a half a million acres are permanently protected with easements, a conservation easement that extinguishes any right to subdivide the land can be worth millions of dollars. Given a landowner's financial disposition, the donation of an easement of this value can result in significant income tax benefits from both the state and federal government.

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[10] Oregon Wetlands Joint Venture, found at http://wetlands.dfw.state.or.us/oregons_wetlands/willamettevalley.html (visited on December 18, 2002)

[11] In November 2002, Lane County acquired its first conservation easement on 265 acres of farmed wetlands, using federal Title III funds (payments to counties in lieu of timber receipts) to mitigate for the expansion of the county landfill.

[12] ORS 308A.056

[13] The value of an easement is generally determined to be the difference between the value of the land with full rights (within the law) and the value of the land with the rights in the easement extinguished. This "before and after" appraisal is the most common approach to valuing easements. This is discussed more in Chapter 2.

In Oregon, because of our effective land use and zoning regulations, the value of a conservation easement is many times so small as to be negligible for the landowner. For example, a conservation easement on rangeland in eastern Oregon that restricts any development may be worth little, as the landowner may all ready be prevented from developing their property under existing zoning laws. Farmland zoning only allows dwellings for "farm purposes,"[14] and non-farm dwellings are rare in Oregon.[15]. Therefore, land trusts in Oregon (as non-profit organizations) often do not have the incentive of significant tax benefits to offer to landowners who donate conservation easements. As most easements in the U.S. are donated, this is significant for Oregon land trusts. This is situation is unavoidable, and actually appreciated, as the zoning laws do an effective job a keeping rural land relatively free from urban types of development. The challenge for conservation practioners in Oregon, then, is to help landowners participate in conservation programs either working with or helping to eliminate as many of the disincentives as possible, since the primary economic incentive of a valuable conservation easement is largely unavailable in Oregon.

Many states have evaluated the success (or lack thereof) of conservation easements.[16] However, there has yet to be an examination of conservation easements in Oregon. Our unique land use system is relatively successful in protecting private land outside established Urban Growth Boundaries. At the same time, the state's planning system is moderately unreceptive to conservation easements; there does not seem to be a welcomed role for their use in Oregon's planning toolbox. Understanding and reconciling this unreceptivity will be significant as private land conservancies and public agencies rely more on easements to serve as a primary protection mechanism.

A comprehensive study of the implications of the state's regulatory framework for conservation easements is beyond this Project. Rather, I will focus on two main aspects of this larger context: 1) property tax special assessment requirements for resource lands and the implications for conservation easements; and 2) land valuation, as determined by zoning laws, and how this effects the attractiveness of conservation easements. The intent of this examination is to clarify some impediments to conservation easements for the benefit of both landowners and land conservancies.

This Project will address three questions: 1) What implications does the limitation on land values for resource lands have on the use of conservation easements? 2) Do the requirements for the special assessment property tax programs pose barriers for landowners to use conservation easements in Oregon? These two questions will attempt to address the third, which is 3) Are conservation easements a viable tool to protect private land in Oregon?

To be effective at not only protecting resource lands from inappropriate development, but also ensuring private land practices do not eliminate much of the quality fish and wildlife habitat left in the state, planners in both the public and private sector need many tools to achieve these goals. There is much Legislative Policy touting the State's interest in protecting fish and wildlife habitat. Therefore, landowners, who many times voluntarily give up significant rights to their land through donating an easement, should be fairly compensated, at the least, by the state recognizing and valuing their land use choices, rather than penalizing them. There have already been cases in Oregon where landowners have been penalized because they chose to place conservation easements on their property that run

[14] ORS 215.213(1)(e)(A)
[15] See Figure 1.1 above.
[16] For example, see the Bay Area Open Space Council's *Ensuring the Promise of Conservation Easements*, 1999. Evaluates the usefulness of conservation easements in protecting areas in the San Francisco Bay.

counter to the use requirements of their particular special assessment programs.[17] The questions I intend to answer with this Terminal Project will be of vital use to conservation organizations (private as well as public) as easements become a tool of choice for the perpetual protection of private lands.

IV. Organization of this Report

In Chapter 2 – *Conservation Easements* – I discuss conservation easements, their use nationwide, the benefits to landowners, and the obligations of a holder of a conservation easement. The majority of the chapter will outline the legal history of conservation easements, focusing on developments in the last two decades that have elevated their legal status out of a potentially problematic legal framework. The chapter concludes with how Oregon has codified conservation easements in its state statutes.

Chapter 3 – *Oregon's Land Use Program* – presents an abbreviated discussion of three of Oregon's Land Use Goals dealing with farmland, forestland, and natural resource protection, focusing on how these goals are implemented. I conclude this chapter with a discussion on how the Goals provide or not provide incentives for landowners to voluntarily place conservation easements on their land.

In Chapter 4 – *Oregon's Special Assessment Programs* – I focus on Oregon's property tax special assessment programs. I discuss in detail the components of farm, forest, open space, and wildlife habitat conservation management programs that offer lowered property tax liabilities in exchange for land utilized in accord with the relevant program's requirements. Additionally, I discuss the implications each program has for conservation easements.

Finally, Chapter 5 – *Conclusions and Recommendations* – summarizes the main conclusions of this Project, and offers recommendations for legislative changes to alleviate some of the identified disincentives landowners face in placing their land under a conservation easement. I also suggest areas where further research is needed.

Additionally, this report contains six Appendices, beginning on page 48. ***Appendix A*** contains the text of IRC 170(h) that allows for the deductibility of a donated conservation interest. ***Appendix B*** contains the Oregon Revised Statute (ORS 271.715-271.795) that enables conservation easements in the state. ***Appendix C*** is miscellaneous notes and quotes from the latest *Restatement of Law – Property (Servitudes)* that was published in 2000. ***Appendix D*** contains the text of House Bill 3564 (Wildlife Habitat Conservation Management Program). *Appendix E* is a fictitious example of how land trusts work with landowners to protect special lands with a conservation easement. Finally, ***Appendix F*** is a real-world example of how landowners can be penalized by the property tax special assessment programs when protecting their land with a conservation easement.

[17] For a recent example, see Appendix F.

Chapter 2 – Conservation Easements

Conservation easements are a unique tool that protects private land, while keeping it in the hands of landowners. Essentially, they extinguish certain rights landowners may have to their property. If one thinks of all the rights one has with a piece of property as a bundle of sticks, each stick being a specific right given the regulatory framework of the time, the easement takes a certain number of these rights or sticks and gives them to the grantee: a land trust or a public agency. Barrett & Livermore summarized the basic idea behind conservation easements:

> *[A] landowner grants an easement that limits by its terms his right to develop [or negatively impact] certain property. For its part, the grantee of the easement [e.g. a land trust] assumes the responsibility of assuring that the terms of the easement are honored. It [can be understood as] a transfer of development rights, not for the purpose of using them elsewhere, but rather for the purpose of not using them at all.*[18]

By and large, conservation easements are "perpetual" in duration, meaning they protect the land forever, and cannot be invalidated except under rare conditions. Land trusts have a special obligation to monitor each property they hold a conservation easement on, to ensure the conservation values they are protecting are not compromised by activities on the land.

Since the first conservation easements were signed in the 1880s, local and regional land conservancies have used easements to protect over 2.6 million acres of land nationwide.[19] A conservation easement is a seemingly effective way to protect specific aspects of land ("conservation values") in perpetuity, while leaving the land in private ownership. They are voluntarily donated or sold by a landowner on his or her property, and held by a qualified organization or public entity. The easement "runs with the land" (meaning subsequent landowners *ad infinitum* must abide by the restrictions in the easement) and limits what type of activities can take place on the land to protect the identified conservation values. Land trusts have selected easements over ownership of land as their protection mechanism of choice: As of the year 2000, 68% of the 3,835,000 acres protected by land trust ownership or conservation easements were protected with easements.[20]

Conservation easements not only provide effective protection of private lands, but can also offer significant financial benefits to landowners. These benefits come in three possible ways: 1) A landowner can sell a conservation easement at full market value based on the rights s/he is given up with the restriction; 2) A landowner can see tax benefits from a donation or partial donation of an easement, as IRS code 170(h) allows for the deductibility of donated property interests; and 3) The estate and property taxes due on an encumbered property may be significantly reduced, as the full market value (and likely the assessed value for taxation purposes) is reduced with a conservation easement.[21]

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[18] T. Barrett and P. Livermore. *The Conservation Easement in California* Covelo, Calif.: Island Press, 1983, 5.
[19] Land Trust Alliance, *Land Trust Survey for 2000.*
[20] Ibid.
[21] Though, these financial benefits depend on a number of factors, not least of which include the value of the easement and the landowner's financial situation.

Conservation easements can protect a number of landscapes, archeological sites, lands of historic value, historic buildings, building facades, hillsides, rivers, wetlands, recreational trails, parks, open space, forests, working farms, and more. IRS code 170(h) allows for the deductibility of a donated easement if the easement is donated "exclusively for conservation purposes."[22] Additionally, many states have their own criteria for what a conservation easement can protect. This is discussed later in this Chapter.

While easements have been widely used in conserving private lands, they remain somewhat of an enigma in the legal world.[23] They are a creation of necessity, a tool that has been grafted from some of the more commonly used property restrictions in the law of real property. They don't fit with much of the time-tested and honored principles of conventional less-than-fee property restrictions: covenants, easements, and equitable servitudes. Conservation easements must be buttressed with legislation to ensure their legality. And still, the conservation and legal communities are unsure of how easements will stand the rigors of the judicial system over time, faced with the myriad situations that have begun and will continue to define the case law for conservation easements. It is worth a look at the validity of all the promises and expectations conservation practitioners place on easements.

In this chapter, I will present an abbreviated examination of conservation easements: how they are used, their history, what they are (and what they are not), legal barriers to easements, legislative responses, new developments in common law, and finish with a look at the conservation easement in Oregon.

I. How conservation easements are used[24]

Before delving into the legal intricacies of conservation easements, it is helpful to describe how conservation practitioners use them. As mentioned earlier, conservation easements are widely used by land conservancies when landowners wish to protect their property, but would like to retain ownership of the underlying fee value. Easements are voluntarily sold or donated to a qualified entity (a non-profit land trust or public agency.)

In return for a landowner voluntarily extinguishing rights on his or her land, the land trust or public agency that "holds" the conservation easement must ensure that future activities that take place do not violate the terms of the easement, or go against its purpose. The Grantee has the right of enforcement, and may, if a violation occurs, seek and obtain an injunction that stops or prevents violating activity, and seek compensation for any damage.

To protect the identified conservation values, the easement describes what "rights" the landowners are giving up. However, as the Barrett and Livermore quote above mentions, these rights do not exist for the grantee's benefit, but are extinguished with the easement.

There are usually six main components to a conservation easement document:

- ***Background and Parties' Intentions***[25]

[22] IRC 170(h)(1)(c)
[23] Although conservation easements are sometimes called many things (servitudes, restrictive covenant, equitable servitude), I will use the more common term of "conservation easement," or just "easement," throughout this document.
[24] For a fictitious example of how a land trust and landowners use a conservation easement, please see Appendix E.
[25] These categories may be called different things by different land trusts, but the meaning of them is the same.

- Why are the landowner and the land trust interested in protecting this land? What is special about it? What are their intentions by entering into this agreement?
- Outlining the intentions and/or objectives of the easement is critical to its enforceability, as these will largely direct a court's interpretation of a dispute.
- This section is synonymous with the "whereas" clauses in contracts.

- ***Legislative Intentions***
  - How important is this property to local, state, and federal conservation priorities?
  - These first two sections justify the existence and validity of the easement in accordance with IRS regulations.[26]
- ***Purpose of the Easement***
  - This is a very broad and general statement, providing the framework for the easement. Many purpose statements include something to the effect of, "Grantor intends to keep the Property in its natural and scenic state…forever."
  - The Purpose of the easement is the foundation and reference from which the easement provisions (and future actions on the property) are interpreted.
  - Nothing in the easement document (or any use of the property) may be inconsistent with this purpose statement.
- ***Prohibited Uses***
  - This is the critical section of the document, which spells out, in language that must be enforceable, the rights the landowner is extinguishing with the easement.
- ***Reserved Rights***
  - This section describes what specific rights the landowner is reserving for him/herself and the future landowners. These can include everything from additional houses to forestry practices to the use of trails by off road vehicles.
- ***Other Provisions***
  - The rest of the document spells out various items that strengthen the enforceability of the document.
  - This is the "boilerplate" of the easement, which changes little with each property.

For conservation easements to take effect, they must be signed by the landowner, notarized, and recorded in the county records.

Easements can be amended only by the landowner and the holder (Grantor and Grantee), but any amendment must continue to meet the Purpose statement of the easement. To receive federal tax deductions, an easement must be in perpetuity.[27] A court may invalidate an easement, but this is very rare and occurs only under special circumstances.[28]

A landowner who donates an easement can deduct the donative value of the easement, up to 30% of his or her adjusted gross income, from his federal income taxes, and possibly his state income tax. Any residual value not taken up in that year can be carried forward for up to an additional five years. The

[26] IRC 170(h). See Appendix A herein for the whole text of this Code.
[27] IRC 170(h)(5)(A)
[28] These circumstances differ from state to state. As we will learn later on in this chapter, state statutes enable conservation easements and provide the legal framework for their interpretation. However, an easement must be enforceable, and if enforcing the easement threatens a person's constitutional rights (freedom of speech, religion, etc.), then the easement may be invalid. Also, the government may exercise eminent domain over a property with an easement, which also may invalidate the document.

value of the easement is determined to be the difference between the fair market value of the property before and after the easement is placed, as determined by a qualified appraiser. Typically, the more the easement restricts (the more rights that are extinguished), the greater the value of the conservation easements.

II. History of Conservation Easements

A conservation easement is a "less than fee" interest in property. Historically, there have been three types of these interests: easements[29], restrictive covenants, and equitable servitudes. These collectively can be described as property servitudes, which restrict uses of the land to achieve particular goals. Servitudes have been an element of property law for hundreds of years. Their use has been relatively limited until this century, where growth pressures, population increases, and land use planning created a boon in their use. As commentator Susan French points out,

> *Private arrangements that bind particular burdens or benefits to the occupier of land have been known to the common law since medieval times. The arrangements were relatively limited in scope and variety, however, until the Industrial Revolution precipitated a substantial demand for protection of urban residential areas…The number and variety of private land use arrangements have increased dramatically since World War II, and show every indication of continuing to increase.*[30]

Conservation easements in some form have been around for well over 100 years. Former president of the Land Trust Alliance, Jean Hocker provides a thumbnail history of easements in her forward to the book, *Protecting the Land: Conservation Easements Past, Present, and Future*:[31]

> *…the first conservation easements in the United States were written in the late 1880s to protect parkways designed by Frederick Law Olmstead in the Boston area. In the 1930s, the National Park Service made extensive use of [conservation] easements to protect land along the Blue Ridge and Natchez Trace Parkways. And in the early 1950s, the state of Wisconsin established a highly successful easement acquisition program to protect land bordering the Great River Road along the Mississippi River.*

Conservation easements began to be used by private land conservancies in the 1920s, but were largely a rare and esoteric tool used by a few organizations in New England. It wasn't until the 1980s that "their application [became] popular."[32] As we will see in this chapter, their rise to prominence coincided with a widespread acceptance of state enabling legislation creating the legal foundation for this unique property restriction. It is now well recognized that conservation easements are the premiere tool for private land conservation in the United States.[33] Table 2.1 below shows this significant rise to prominence since the late 1980s.

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[29] Not to be confused with a "conservation" easement.
[30] Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*. 55 S. Cal. Law Review 1261, 1262 (1982).
[31] Hocker, "Forward." *Protecting the Land: Conservation Easements Past, Present and Future*. Washington, D.C.: Island Press, 2000, xvii.
[32] Julie Ann Gustanksi, "Protecting the Land: Conservation Easements, Voluntary Actions, and Private Land." *Protecting the Land: Conservation Easements Past, Present and Future*. Washington, D.C.: Island Press, 2000, pg. 16.
[33] Martha Nudel, "Conservation Easements Emerge as the Decade's Top Land Protection Tool." *Land Trust Alliance's Exchange*. Winter 1999, 5.

Table 2.1 -- Total Acres of Land Protected by Local and Regional Land Trusts

Protection Method	1988	1990	1994	1998	2000	12-year % Change
Fee Simple Ownership	300,000	435,000	535,000	828,000	1,245,000	315%
Conservation Easements	290,000	450,000	740,000	1,385,000	2,590,000	793%
Total	590,000	885,000	1,275,000	2,213,000	3,835,000	550%
Easements as % of Total	49%	51%	58%	63%	68%	

Source: LTA Land Trust Census data for 1990, 1995, 1998, and 2000. Numbers do not include land transferred to third party.

An almost 800% increase in the number of acres protected with conservation easements in 12 years speaks to the importance both landowners and conservation practioners place on this type property restriction.

III. Conservation Easements as an Enigma

As conservation easements have become the most widely used and effective protection tool available to landowners, it is a bit disconcerting to understand that while over 2.5 million acres have been "protected" in the U.S. using conservation easements, these conservation restrictions, at best, have had a problematic relationship with traditional legal doctrine and the common property law concerning servitudes.[34]

Conservation easements are only as good as they are enforceable. In accordance with IRC 170(h), the Grantee (i.e. a land trust) has the responsibility to monitor the condition of the property and, if a violation to the easement is ever discovered, then seek measures to either stop the violating activity or seek appropriate corrective measures and remuneration.

However, common law has traditionally been hostile toward conservation easements, threatening their validity.[35] Many legal commentators have observed this hostility, noting that the purpose, intention, and operation of conservation easements contradicts many long-standing principles of common law regarding traditional real property covenants and easements.[36]

Land trusts and public agencies have operated under the pretense that easements will not only be around in perpetuity, but will be enforceable if and when a violation occurs. However, this assumption has been little tested. The case law for conservation easements is just beginning, and yet millions of acres have been "protected" using a device whose enforceability is vague at best.[37] As Walliser points

[34] "Servitude" is used here and throughout to represent any one of the three primary property restrictions: easements, restrictive covenants, and equitable servitudes.

[35] Common law can be defined as legal principles, of judicial origin, that interpret existing civil and statutory law. Common law is established by precedent, and is flexible, meant to change with the times.

[36] For example, see French, *op cit*; Andrew Dana and Michael Ramsey, *Conservation Easements and the Common Law*. 8 Stan. Env. L.J. 2 (1989); John Walliser, *Conservation Servitudes*. 13 J. Nat. Resources & Envtl. L. 47 (1997); Todd D. Mayo. "A Holistic Examination of the Law of Conservation Easements." *Protecting the Land: Conservation Easements Past, Present and Future*. Washington, D.C.: Island Press, 2000; Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 Drake L. Rev. 477 (1985).

[37] Walliser 54, *op cit*. He quotes Baldwin: "In several states…no issues regarding the statutorily created conservation easement provisions have been litigated….Furthermore, when issues pertaining to conservation easement are questioned in court, often the validity of the easement itself is not challenged." Melissa Waller Baldwin, "Conservation Easements: A Viable Tool for Land Preservation." 32 Land & Water Law Rev. 89, 110 (1997)

out, "Perhaps the most unsettling concern with conservation [easement] validity is that the questions arise when certainty is needed most – when the land trust wants to enforce the restriction."[38]

In the past 20 years, two significant developments have seemingly eased many of the long-standing tensions between perpetual conservation easements and traditional servitude law. The first has been the widespread adoption of state statutes that enables conservation easements. All but three states have legislation that provides a legal foundation for conservation easements.[39] The second has been a recent publication of the *Restatement of the Law Third, Property (Servitudes),* which has updated the legal morass of servitude law to reflect modern social standards and purposes. As this chapter will show, both of these developments have hopefully dispelled many of the potential conflicts between traditional servitude law and conservation easements.

To understand the context in which conservation easements operate today and the hope these two developments bring to conservation practioners, one needs a briefing on the modern common law of servitudes. This is no easy or pleasant task. As Susan French aptly put it, "The law of easements, real covenants, and equitable servitudes is the most complex and archaic body of American property law remaining in the twentieth century."[40] Legal professionals and commentators have wondered for decades what a conservation easement is at common law, and how will court interpret them. "One of the fundamental obstacles to enforcement and validity of conservation [easements] at the common law level is the 'confusion over the appropriate label for these conservation interests and over the nature of the property rights conferred.'"[41]

While a comprehensive look at easement law is beyond the scope of this paper, a brief sketch of their legal history and context provides a fascinating look at their uniqueness of conservation easements as a protection tool, as well as insights to help ensure that conservation practioners are able to protect what they intend.

Common law has generally recognized three main types of less than fee property restrictions: easements, restrictive covenants, and equitable servitudes.[42] While the label "conservation easement" is widely used, it is truly a misnomer; it is not an easement at all. Indeed, a conservation easement is an enigmatic type of property restriction. While it restricts property without "owning" it, it does not conform to the three types or restrictions accepted and respected by traditional the common law of servitudes.

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[38] Walliser, 56.

[39] Oklahoma, North Dakota, and Wyoming.

[40] French, 1261. She reports on one of her favorite quotes on the topic, by E. Rabin from his *Fundamentals of Modern Real Property Law* (1974, pg 489):

> *The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and for weeks of effort emerge not far from where they began, clearly the worse for the wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.*

[41] Walliser, 63, quoting Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 436.

[42] Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 Real Prop. Prob. & Tr. J. 540, 543 (1979)

A). A Conservation Easement is Not an "Easement"

The traditional easement understood by common law grants affirmative rights from a landowner to another party for a beneficial use of his or her land. Easements are considered property rights, rather than a contract with respect to the use of land: a landowner grants one of his or her property rights to another to achieve a beneficial use.[43] A common easement is a utility easement, where a landowner grants a utility company the affirmative right to attend to their utility infrastructure ("Grantor grants to Grantee the right to enter on the property for the expressed purpose of…").

Conservation easements, on the other had, are generally considered "negative easements" since they consist of numerous negative statements ("Grantor shall *not* do X…") to prevent the destruction of the conservation values of the property. While some conservation easements do have affirmative obligations, they are commonly understood as negative easements because they restrict a landowner's right to the full use of his or her property. As Dana and Ramsey put it, "A conservation easement is fundamentally different [than a traditional easement] in that it *disallows* conduct by the landowner, rather than *permitting* an activity by the holder of the easement."[44]

Common law generally recognizes only three reasons negative easements can be created: for the protection of 1) light and air; 2) the support of buildings; and 3) the flow of artificial streams.[45] As Dana and Ramsey explain, "…conservation easements have no ready analogue in the traditional negative easement recognized by common law." What does this mean, for "conservation easements" then? As conservation easements are generally only as good as they are enforceable in a court of law, if a court has no legal precedent or framework to interpret and justify their validity, conservation easements, as negative easements, have no legal standing.

Another difficulty with traditional easements is the legality of the durability of conservation easements. Traditional easements can either be of indeterminate duration ("run with the land"), or they can "die" with the original grantee. What makes them either one is, 1) the parties intentions; and 2) whether they are "appurtenant" or "in gross." Assuming the parties to an easement intend for it to run with the land and last in perpetuity, their durability then rests with the latter distinction.

An appurtenant easement means that the benefit provided by the easement "appertains" to a specific property.[46] As the *Restatement of the Law Third, Property (Servitudes)* (hereafter, Restatement) defines the term, "'Appurtenant' means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land."[47] Practically speaking, this means that the benefits of the easement must be connected to and intended for the improvement of another piece of property. For example, an easement that provides driveway access across property A to property B, is appurtenant to property B. If the parties intended for the easement to run with property A, then the easement is unlimited in duration.

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[43] Walliser, 64.
[44] Andrew Dana and Michael Ramsey, *Conservation Easements and the Common Law*. 8 Stan. Env. L.J. 2 (1989), 13 (emphasis in original.)
[45] Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177, 1187 n. 42.
[46] Steven H. Gifis. *Law Dictionary*. Hauppauge, NY: Barron's.1996, 29.
[47] American Law Institute. *Restatement of the Law Third, Property (Servitudes).* St. Paul, MN, American Law Institute Publishers, 2000, vol. 1 §1.5

This is problematic for conservation easements since many easements land trusts hold do not necessarily appertain to another parcel of land, since most land trusts do not own property to which an easement directly appertains.[48] They generally only pertain to the mission of the land trust and the intention of the original Grantor. If a court were to interpret a conservation easement under this traditional common law interpretation, it could find it invalid because the benefits of the easement do not involve a "dominant estate."

An easement held "in gross," on the other hand, does not need to be tied to a specific property. Baron's law dictionary defines an easement in gross as one that provides "personal benefit of land to an individual…[It does not require a] dominant estate" to be valid.[49] This definition is more relevant to the purpose of a conservation easement held by a land trust since there does not need to be another property involved. Hamilton states that, "[A Conservation easement] is categorized as negative and in gross, i.e., it restricts the actions of the fee holder [i.e. the landowner] and the benefit of this burden does not run to any property, or dominant estate, owned by the holder..."[50]

Common law generally does not recognize easements in gross that run with the land, except for commercial purposes.[51] Neither the benefits nor the burdens of easements held in gross are assignable (i.e. transferable), and "hence die with the person who acquired it."[52] So while conservation easements seem to be similar to negative easements in gross, they do not and cannot exist at common law. Conservation easements, then, are not technically easements.

B). A Conservation Easement is Not a Covenant or an Equitable Servitude

A restrictive covenant is promise by the Grantor to restrict the use of his or her property.[53] Dana and Ramsey suggest that "conservation easements more closely resemble restrictive covenants than easements," in that they are contracts or promises that impose negative burdens ("thou shall not") on the use of a particular property, rather than property rights that allow certain uses by another party.[54] However, common law is unclear whether covenants can be enforced upon successors of the original grantor; meaning, covenants might not be assignable.[55] This question, in effect, threatens both the ability of conservation easements (in gross) to run with the land, as well as their enforceability.

A troublesome requirement for restrictive covenants running with the land is the "touch and concern" rule, which is similar, to some commentators, to the appurtenant requirements.[56] Baron's law dictionary defines "touch and concern" as when a covenant "enhances the enjoyment of one parcel of real property by burdening the enjoyment of another."[57] Most courts will only recognize covenants that

[48] Though, the argument that, taken from an ecosystem perspective (i.e. a land trust using acquisition and easements to protect salmon habitat), easements to appertain to property owned by a land trust has yet to be tried in a court of law.
[49] Gifis, 162.
[50] Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 Drake L. Rev. 477 (1985), 502.
[51] French, 1268.
[52] Gifis, 162. See also *Restatement*, §1.5
[53] Gifis, 439.
[54] Dana and Ramsey, 17.
[55] Ibid.
[56] See Thomas E. Roberts, *Promises Respecting Land Use – Can Benefits be Held in Gross?,* 51 Mo. L. Rev. 933.
[57] Gifis, 518.

run with the land if they meet this touch and concern rule.[58] This means that generally it can only be the neighboring property owners that are able enforce a restrictive covenant that runs with the land.

Similar with the appurtenant requirements of traditional easements, the touch and concern rule poses a significant burden on the land trust to the point that, under a pure common law system, a land trust would need to purchase fee title to land adjacent to a property burdened with a conservation easement to ensure its perpetual validity. This obviously is a burden most organizations are unwilling and unable to take on. Therefore, while the form and function of a conservation easement is similar to a restrictive covenant, the common law seems to limit the applicability of conservation easements.

Equitable servitudes are "covenants enforced in equity."[59] They were created at common law in the early 1830s and 1840s to "circumvent the common law's traditional hostilities toward 'novel' easements and covenants restricting the use [of land]."[60] The two main requirements for the validity and enforceability of equitable servitudes held in gross are the parties' intentions (i.e. do they intend for the servitude to run with the land) and whether subsequent owners of the property receive due notice of the servitude.[61]

However, it seems that courts are hesitant to relinquish the appurtenant or touch and concern rules for equitable servitudes. The previous *Restatement of the Law on Servitudes* (published in 1944) declared that the touch and concern rule did not apply to the enforcement of equitable servitudes (meaning, they could be held in gross), but most judicial jurisdictions did not put this into practice.[62] Therefore, it is unlikely (and unwise to expect) that courts would uphold conservation easements if they are understood as equitable servitudes held in gross. Therefore, conservation easements are not technically covenants or equitable servitudes.

IV. So, what are conservation easements?

It is difficult to interpret conservation easements through the common law of servitudes. There seems to be little reason why common law has developed the way it has, as Susan French notes,

> *Easements, covenants and equitable servitudes serve the same general purpose – they create rights, obligations and restrictions affecting ownership, occupancy and use of land. However, each has a distinct set of rules governing its formation and application. Why the common law developed three doctrinally separate devices to accomplish similar and overlapping functions is a matter of history rather than of logic or necessity.*[63]

Regardless, it should be evident that conservation easements, as perpetual property restrictions, have no warm welcome at common law. They are not (nor should be) interpreted as traditional easements, restrictive covenants, or equitable servitudes. Under a pure common law regime, conservation easements are not illegal *per se*, but if ever challenged, they would not be enforceable unless they met the very specific and burdensome requirements discussed above. Be that as it may, conservation easements have dramatically increased in number from World War II, and many landowners and

[58] Walliser, 66.
[59] Dana and Ramsey, 16.
[60] Netherton, 551.
[61] Walliser, 69.
[62] Dana and Ramsey, 17.
[63] French, 1264.

conservation practioners are working under the assumption that they will be enforced in perpetuity. They are property restrictions unlike any other, and thereby have commanded special attention and additional measures have been taken to ensure their viability.

V. The UCEA

Many interested people began to recognize this disconnect between the desires of landowners and conservation practitioners and the common law's inability to properly interpret conservation easements.[64] In early 1981, the National Conference of Commissions on Uniform State Laws met to develop a uniform state statute that enable conservation easements by transcending many of the hostilities evident at common law. At that time, there were only a handful of states that had enabling legislation for conservation easements: California, Connecticut, Massachusetts, New York and a few others.[65] These state statutes differed in many ways, and some were inadequate in meeting the challenges presented by common law.[66] In effect, there was little statutory authorization for conservation easements. The federal revenue code allowing for a charitable deduction of a donated conservation easement does not enable conservation easements, doing little to ease the difficulties at common law. Before the Commissioners met, conservation easements in most states had existed in a legal vacuum: neither supported statutorily, nor recognized by traditional property law.

The product of the Commissioners was the Uniform Conservation Easement Act (UCEA), written in 1981.[67] Its purpose is to enable "private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments."[68] To date, all but three states have enabling legislation for conservation easements.[69] Twenty-one states have passed legislation similar to or influenced by the UCEA.[70] The other 26 states have legislation not modeled after the UCEA, but that do enable conservation easements.

The importance of these legislative actions at the state level cannot be overstated. Without enabling legislation, conservation easements would have continued to exist in a purely common law environment. As a result, one of three scenarios would have occurred: 1) Both land trusts and public agencies would have had to dramatically alter their protection strategies to meet the cumbersome requirements of traditional servitudes; 2) the common law would have had to be updated to reflect current social needs; or 3) most conservation easements in place would have had to been deemed unenforceable.

Therefore, the effectiveness and enforceability of conservation easements are very much dependent upon the legislation in the state they work in for their existence. State statutes unseat common law as

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[64] Including the federal government, which, in 1980, passed IRC 170(h), which allows for a donated conservation easement to qualify as a charitable contribution, indirectly and ineffectually statutorily authorizing the legality of conservation easements.
[65] Jean Hocker in her Forward to *Protecting the Land: Conservation Easements Past, Present and Future*. Washington, D.C.: Island Press, 2000, xviii.
[66] Ibid.
[67] See the full text of the Act in Appendix XX.
[68] Uniform Conservation Easement Act, 3.
[69] Restatement, 37. Only Oklahoma, North Dakota, and Wyoming do not have enabling legislation.
[70] Todd Mayo, "A Holistic Examination of the Law of Conservation Easements." *Protecting the Land: Conservation Easements Past, Present and Future*. Washington, D.C.: Island Press, 2000, 28-30.

the framework used for interpretation by authorizing their existence regardless of the precedent established common law. While the UCEA attempted to create consistency from state to state, there are significant differences between those states influenced by the UCEA and those that developed their own statutes.[71]

The UCEA has a number of significant provisions that has freed land trusts and public agencies from the threats of invalidation and the morass of servitude law. One commentator has said, "The passage of the UCEA was a monumental advance for conservation easements, the organizations that employ them, and landowners wanting to protect their cherished land."[72] Fortunately, the UCEA elevates conservation easements beyond the confusion of common law.

The UCEA begins by defining both a conservation easement and a qualified holder. It states that a conservation easement is a,

nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values or real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[73]

It limits the definition of a qualified holder to governmental agencies allowed to hold real property and charitable organizations with purposes that include the protection of natural and scenic values of real property.[74]

The Act's basic goal is to "remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends."[75] In Section 4, the Act clarifies some of the more important questions in common law. It states that,

A conservation easement is valid even though:

1. *It is not appurtenant to an interest in real property;*
2. *It can be or has been assigned to another holder;*
3. *It is not of a character that has been recognized traditionally at common law;*
4. *It imposes a negative burden;*
5. *It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;*
6. *The benefit does not touch or concern real property; or*
7. *There is no privity of estate or of contract.*[76]

In states that have enabling legislation for conservation easements, landowners and land trusts are better able to protect land, because of the legal standing statutory authorization provides. Be that as it may, those states with legislation modeled after the UCEA are at an advantage than those states that

[71] Mayo, 26. Some of these differences include what term (easement, servitude, restriction, etc.) is used, what can be protected, who is a qualified holder, how they may be created, how long they last, and others.
[72] Gustanksi, 16.
[73] UCEA, §1.
[74] UCEA, §1(2)(i).
[75] Ibid, 10.
[76] UCEA, §4.

did not follow the Act, since it was created to deal with common law's unreceptivity to perpetual conservation easements.

VI. The Restatement of Law (3rd) – Property, Servitudes

To buttress the benefits of state enabling legislation, a very recent and encouraging development in the interpretation of servitude law is the publication of the *Restatement of the Law Third, Property* dealing servitudes.[77] Restatements, published by the American Law Institute, analyze the "modern trend of the law"[78] by looking as case law and judicial decisions regarding the treatment of servitudes. Simply put, Restatements summarize for the legal community the common law of a certain area.[79]

The Restatement for servitudes updates the "archaic body of American property," as Susan French put it, for the 21st century. While the Restatement is not common law itself, it is a concise summary of the trends offered by judicial precedent. It essentially updates the common law to reflect current social needs and due process available to landowners. The traditional requirements for servitudes (discussed above) "were developed in England before there was an adequate land-records system, and they all tended to assure that successors would have notice of servitudes burdening land they purchased. They are all redundant in the United States [today], where recording acts universally serve that function."[80]

What is the most significant about the latest Restatement for servitudes is that:

> *…none of those traditional requirements [whether the servitude is appurtenant, assignable to another holder, imposes either a negative burden or affirmative obligation, or benefits do not touch and concern real property] is an impediment to [the] creation or enforcement of a servitude under this Restatement."*[81]

This means that conservation easements, with or without state enabling legislation, can impose negative burdens, run with the land, and be in gross (not pertaining to another property) and still be enforceable. As the earlier sections of this chapter pointed out, these were significant barriers to the validity and enforceability of conservation easements.

Whether or not courts take the same position as the Restatement in their interpretation of conservation easements is yet to be determined. However, with revised common law and numerous state statutes, the conservation easement is supported with a stronger legal foundation that is has been in the past.

VII. The Conservation Easement in Oregon

The State of Oregon passed its enabling legislation for conservation easements in 1983.[82] By and large, Oregon chose to model the legislation after the UCEA, but adapted a few key aspects of it to meet the interests of the state.

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[77] American Law Institute. *Restatement of the Law Third, Property (Servitudes).* St. Paul, MN, American Law Institute Publishers, 2000, 2 vols.
[78] Gifis, 438.
[79] Other Restatements have tackled legal subjects such as Torts, Contracts, Foreign Relations, Lawyers, and more.
[80] *Restatement*, 50.
[81] Restatement, 39. The Restatement also offers a definitive answer to what to call less-than-fee conservation restrictions: "conservation servitudes." It does not matter what one calls them, and most likely the widely-used term "conservation easement" will continue.
[82] ORS 271.715-271.795. See Appendix B for the full text of the statute.

ORS 271.715(1) uses the same definition of a conservation easement as the UCEA (noted above.) Similarly, ORS 271.715(3)(b) defines a non-governmental holder of an easement the same as the UCEA. However, ORS 271.715(3)(a) alters the definition of a qualified governmental holder of a conservation easement. The UCEA defines a governmental holder as "a governmental body empowered to hold an interest in real property under the laws of this State or the United States."[83] Oregon, on the other hand, has chosen to list the governmental entities empowered to hold easements in the state. The legislation states, "The state or any county, metropolitan service district, city or park and recreation district acting alone or in cooperation with any federal or state agency, public corporation or political subdivision" may hold a conservation easement.[84] One significant weakness of this definition is that the federal government is not listed as a qualified under Oregon law, without "acting…in cooperation" with a listed governmental holder. As noted in the Conclusion (Chapter 5), this omission has caused difficulties for landowners.

Another more benign difference appears in ORS 715.735 (*Hearing; notice*), which requires qualified governmental entities to hold at least one public hearing before acquiring a conservation easement. The UCEA does not require such hearings. Qualified charitable organizations are not required to meet this provision in the state statute.

Another interesting difference between Oregon's statute and the UCEA appears in ORS 271.785 (*Taxation of property subject to conservation or highway scenic preservation easement*), which states,

> *For the purpose of taxation, real property that is subject to a conservation easement or a highway scenic preservation easement shall be assessed on the basis of the real market value of the property less any reduction in value caused by the conservation easement or a highway scenic preservation easement. Such an easement shall be exempt from assessment and taxation the same as any other property owned by the holder.*

This section ensures that local tax assessors will recognize any reduction in value of the property due to a conservation easement. Again, however, this may cause some confusion and inconsistencies regarding the valuation conservation easements in the state, as noted in Chapter 5.

The statute enables conservation easements without regard to common law, and, like the UCEA, has a section (271.745 *Validity of conservation or highway scenic preservation easement*) that clarifies the validity of easements in the face of the traditional hostilities to negative easements held in gross present in common law. This section is nearly verbatim from the UCEA and states,

> *A conservation easement or highway scenic preservation easement is valid even though:*
> *(1) It is not appurtenant to an interest in real property;*
> *(2) It can be or has been assigned to another holder;*
> *(3) It is not of a character that has been recognized traditionally at common law;*
> *(4) It imposes a negative burden;*
> *(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;*
> *(6) The benefit does not touch or concern real property; or*

[83] UCEA §1(2)(i)
[84] ORS 271.715(3)(a)

(7) There is no privity of estate or of contract.

By and large, Oregon's statutes help ensure conservation easement validity in the face of their enigmatic relationship with common law. If an easement in Oregon is properly drafted and meets the requirements of ORS 271.715 – 271.795, then land trusts can be assured that the document will be enforceable and valid in a court of law.

VIII. Conclusion

Conservation easements are a common and effective tool to permanently protect land across the country. Easements enable local nonprofit land trusts to protect land, while leaving the management of the conservation values and the use of the land in private ownership. In many states, conservation easements are the premier protection mechanisms for land trusts. Their usage has grown extensively since the widespread passage of enabling statutes in most states. This legislative trend has eased many of the concerns conservation professionals saw from common law's traditional hostility toward conservation easement. This, along with the recent Restatement on servitudes, ensures that conservation easements, if written with care, will be enforceable.

Oregon has nearly adopted the model legislation word for word, which provides for the legal protection and authorization of conservation easements in the state. However, easements are not widely used. The following chapter looks at how Oregon's land use program may create disincentives that minimizes the attractiveness of easements to landowners.

Chapter 3 – Oregon's Land Use System

Oregon's progressive land use planning program began with passage of Senate Bill 100 in 1973. To date, no other state had created such a comprehensive, state-coordinated land use planning system. Land use planning champion Governor Tom McCall, in his famous "sagebrush subdivision" speech, presented the case for Oregon's innovated land use planning program:

> *There is a shameless threat to our environment and to the whole quality of life-unfettered despoiling of the land. Sagebrush subdivisions, coastal 'condomania,' and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the nation. We are dismayed that we have not stopped misuse of the land, our most valuable finite natural resource.*[85]

The ideological underpinnings of the system rest in the notion that growth must be managed and concentrated to conserve valuable resource land, open space, and community identity. Arnold Cogan, the first Director of the Oregon Department of Land Conservation and Development (the regulatory agency that oversees the state's land use planning), stated that the protection of agriculture and resource lands "were definitely part of the [original] vision [of the state-wide planning system.] Timber and agricultural land were to be protected. Rampant growth was underway; those resources were endangered, especially in the Willamette Valley."[86] The State intended to help create a policy framework to guide development and preserve the rural resources and character that made Oregon a place loved by many people.

The land use planning program codifies a comprehensive conservation strategy that preserves farm and forestland through local comprehensive plans, regulations, and zoning laws that protect and encourage the industries that rely on resource lands. However, the state planning program's focus on the economic viability of resource lands can hinder a landowner's ability to conserve his or her land using conservation easements. Essentially, in many situations, the State penalizes a landowner who chooses to manage his or her property primarily for wildlife habitat. In the discussion that follows, this will frequently be the central theme, which is a telling sign of how the existing land use program presents challenges and barriers to the conservation of private land for ecological benefits.

Many commentaries and studies have been written on Oregon's unique and comprehensive land use planning program.[87] The merits of Oregon's land use laws are well established: contained urban growth, productive farm and forestlands, community identify, and, most of all, livability. The State has worked to conserve some attributes of Oregon's landscape through zoning, urban growth boundaries, and tax incentive programs. However, landowners who would like to go beyond regulation and see

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[85] From Gov. Tom McCall's opening address to the 1973 Legislative Assembly, January 8, 1973.
[86] Sumner Sharpe. "The Origins and Future of Land Use Planning." *Oregon's Future*. Spring 2000, p. 16.
[87] To name a few: H. Jeffrey Leonard. *Managing Oregon's Growth: The Politics of Development Planning*. Washington, D.C.: Conservation Foundation, 1983**.** Richard H. Carson. *Paying For Our Growth in Oregon*. Beaverton, OR: New Oregon Meridian Press, 1998**.** Gerrit Knaap and Arthur C. Nelson. *The Regulated Landscape: Lessons on State Land Use Planning From Oregon*. Cambridge, Mass.: Lincoln Institute of Land Policy, 1992**.** ECO Northwest. *Urban Growth Management Case Studies Report*. Salem, Or.: Oregon Dept. of Land Conservation and Development, 1991**.** Harriett Susan Kessinger**.** *Land Use Planning in Hawaii and Oregon: An Evaluation and Comparison of Two Pioneer Land Use Planning Systems*. Master's Thesis for University of Oregon's Planning, Public Policy and Management, 1995.

their land preserved with a conservation easement face difficult challenges inherent in this most-revered planning regime. This chapter will present a select overview of Oregon's land use system, focusing on the impact of the land use laws on the conservation of private lands.

I. Oregon's Land Use Goals

The foundation of Oregon's land use program is its Statewide Planning Goals. These 19 Goals set the standards for local, regional, and statewide planning.[88] Three of the goals (Goals 3, 4 and 5) deal directly with the protection of resource lands, open space, and natural resource protection.[89] I will present each of these three goals and briefly describe the regulatory framework it uses to accomplish its intent.

Goal 3: Agricultural Lands

Agricultural lands encompass 26% of the state, and almost 60% of all private land in Oregon.[90] Farming is one of Oregon's most important industries, both economically and socially. As of 2001, there are over 40,000 farms, with over 77% 180 acres or smaller, and 85% owned by individuals.[91] Forty-seven percent of these farmers are over 55 years of age.[92] Farming produces over $3 billion in gross sales each year in the state[93], and the legislature has attempted to create a land use environment that encourages the sustainability of Oregon's agricultural industry, or at least does not jeopardize the industry.

This land use environment is codified in Land Use Planning Goal 3, which intends to "preserve and maintain agricultural lands." OAR 660-015-0000(3) states in part that "agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy." This Legislature policy is defined in ORS 215.243(1): "Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state…"

Goal 3 directs all 36 counties to designate land as suitable for Exclusive Farm Use based on its soil class and existing land-use patterns.[94] Over 16 million acres are zoned statewide for Exclusive Farm Use[95]

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[88] The 19 Goals are: 1) Citizen Involvement 2) Land Use Planning 3) Agricultural Lands 4) Forest Lands 5) Open Spaces, Scenic, Historic, and Natural Resources 6) Air, Water and Land Resources Quality 7) Areas subject to Natural Disasters and Hazards 8) Recreational Needs 9) Economic Development 10) Housing 11) Public Facilities and Services 12) Transportation 13) Energy Conservation 14) Urbanization 15) Willamette River Greenway 16) Estuarine Resources 17) Coastal Shorelands 18) Beaches and Dunes 19) Ocean Resources

[89] Two other goals deal with mitigating harmful activities to both land and development, but are not addressed in this paper. Goal 6 (Air, Water and Land Resources Quality) deals with discharges (sewer, runoff, air pollution, wastewater, etc.) from development that could threaten air and water resources of the state and does not have a bearing on conservation easements. Goal 7 (Natural Hazards) encourages local governments to plan development so as to minimize the impacts from fire, flood, and other natural disasters. Additionally, Goal 15 (Willamette Greenway) is not addressed, as it is geographically focused, and this paper evaluates the consequences of the planning program statewide for conservation easements.

[90] Meacham and Steiner, op cit.

[91] *Oregon Agriculture: Facts and Figures*. Oregon Department of Agriculture, October 2002 (found at http://oass.oda.state.or.us/handoutOctober01.pdf, visited November 22, 2002)

[92] Ibid.

[93] http://www.lcd.state.or.us/rural.html (Visited December 8, 2002)

[94] Ibid. However, any land within Urban Growth Boundaries cannot be designated as EFU lands.

[95] Meacham and Steiner, op cit.

(EFU), compared to roughly 800,000 of farmland protected nationwide.[96] County zoning enforces such designations, and activities on EFU lands must meet the requirements of "farm-use," set forth in ORS 215.203(2)(a):

> *Farm-use means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof.*

The central aspect of this definition is its economic intent. Zoning and other regulatory programs encourage the economic use of the land in accord with State policy. There are few non-agricultural uses that aren't prohibited by the state. Fines and other punitive measures await those who do not abide by existing laws protecting the agricultural economy.

Goal 3 and the corresponding regulations make it difficult for farmland to be developed. Houses and other buildings are allowed only in certain situations, and, generally, these must be "farm related."[97] There are circumstances where a non-farm dwelling may be built on EFU lands, but these must meet very specific criteria established in ORS 215.284 and by the relevant county authority.

ORS 215.213 allows counties to designate lands in EFU zones as "marginal" (defined in ORS 197.247), where some uses that are not farm-related are permitted. These may include uses such as schools, churches, certain dwellings, mining operations, roads, wineries, golf courses, personal airports, destination resorts, creation of wetlands, and others.[98] Nowhere in this list (or any description involving agricultural lands) is the allowed use of the land for the primary purpose of conserving natural resources. Suffice to say, the State's policy in protecting agricultural lands is informed by the economic value created through agriculture and other permitted uses on farmland.

The intent of Goal 3 is clear: to protect agricultural land from uses incompatible with faming. The state, in administering this Goal, seems to be most concerned with keeping development away from prime agricultural lands; an either/or scenario (either it is farmland, or it is developed.) This doesn't recognize a "third position," where landowners can protect their EFU lands from development by restoring and conserving wildlife habitat and native ecological conditions.

This situation has restricted landowners' and conservation organizations' ability to restore, protect, and conserve our state's natural resources. This difficulty is created by the definition of farmland. The State has limited approved uses on farmland to those that further the "primary purpose of obtaining a profit" in farming. In general, the existing regulatory framework can penalize anything that does not further this goal by imposing higher tax assessments, fines, and other measures. Incentives (laws, tax programs, and the like) ensure that landowners use farmland in a way that supports the State's agricultural policy. By definition, landowners' rights on farmland are limited only to farming.

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[96] U.S. Representative Earl Blumenauer is a speech to the U.S. Congress, October 4, 2001. Found at http://www.house.gov/blumenauer/floor_speeches/fl347.html (visited on December 8, 2002.)
[97] ORS 215.213
[98] Only two counties to date (Lane and Deschutes) have used this marginal lands process. (Robert Parker, Director Community Service Center, University of Oregon. Personal interview. December 14, 2002.)

Goal 4: Forestlands

Over 44% of Oregon is forestland.[99] Of this, 60.5% is publicly owned, and 39.5% (10.9 million acres) is privately held. Of this private forestland, 53% is owned by industrial timber owners, and 47% by family forest and tribal owners.[100] Over 14.5% of Oregon's land base (33% of all private land) is zoned as private forestland.[101] Goal 4's purpose is:

> *To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.*[102]

This Legislative policy is further stated in ORS 527.630(1):

> *Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources and scenic resources within visually sensitive corridors as provided in ORS 527.755 and to ensure the continuous benefits of those resources for future generations of Oregonians.*

Similar to the State's definition of farmland, ORS 321.005(5) and (6) define forestland as "any land producing…products from harvested timber." More specifically, ORS 321.257(3) defines forestland in western Oregon as "land…(a) which is being held or used for the predominant purpose of growing and harvesting trees of a marketable species and has been designated as forestland, or (b) the highest and best use of which is the growing and harvesting of such trees…" ORS 321.805(1) has a very similar definition for forestland in eastern Oregon.

Marketable species means "any tree species capable of producing logs, fiber or other wood materials suitable for the production of lumber, sheeting, pulp, firewood or other commercial forest products" (ORS 527.620(6)). Highest and best use means that given the zoning designation of a particular tract of land, its soil type, slope, etc., the use that results in "highest" value is the land's highest and best use.

Again, the central theme is in the State's regulation of forestland is protecting lands' economic use, where the "predominant purpose [of forestland is the] growing and harvesting of trees." The Oregon Forest Practices Act (OFPA), passed in 1971, governs the "economically efficient forest practices" on state-owned and private forestland. Oregon was the first state in the nation to pass such forest rules, which have been used as a model for other states.[103] The OFPA requires landowners to meet the State

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[99] Meacham and Steiner, op cit.
[100] http://www.oregonforests.org (visited on December 9, 2002)
[101] Meacham and Steiner, op cit.
[102] Oregon's Statewide Planning Goals & Guidelines. Goal 4: Forest Lands.
[103] Forest Learning Opportunities for Workers. Found at http://www.forestlearn.org/flowhtm/flowcycl/forest/FORFRAME/forfaqs/OFPA/OFPA.HTM (visited on December 8, 2002)

Board of Forestry's Best Management Practices. These practices attempt to strike a balance between the economic use of timberlands and the protection of natural resources. Some features of the OFPA include the following:

- Forest plans and harvest notifications approved by the Department of Forestry;
- Clearcuts must be replanted within two years of harvest;
- Clearcuts can be no larger than 120 acres;
- Roads must be properly designed and built to minimize soil erosion and protect streams;
- Some riparian vegetation (amount dependent upon type and size of stream) must be left along streams;
- Some wildlife trees, snags and down logs must be left after harvest for wildlife;
- The State Forester must be notified before most types of forest operations; written plans may be required;
- Forestlands must meet the minimum stocking requirements of marketable species, designated by the State Forester;
- Violations can result in large fines.

Goal 4's Administrative Rules (OAR 660-015-0000(4)) require local governments to inventory and zone forestlands. Zoning and local Comprehensive Plans ("official document[s] adopted by a city or county which sets forth the general, long-range policies on ho the community's future development should occur"[104]) must "provide certainty to assure that forestlands will be available now and in the future for the growing and harvesting of tress."[105]

Goal 5: Natural Resources, Scenic and Historic Areas, and Open Space

Goal 5 directs cities and counties to "protect natural resources and conserve scenic and historic areas and open spaces." The Goal 5 process is rather complex, and requires local governments to "adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations."[106] This six-step process is outlined below.

Step 1 – Inventory Resources

Local governments are required to inventory the following resources:

a. Riparian corridors, including water and riparian areas and fish habitat;
b. Wetlands;
c. Wildlife Habitat;
d. Federal Wild and Scenic Rivers;
e. State Scenic Waterways;
f. Groundwater Resources;
g. Approved Oregon Recreation Trails;
h. Natural Areas;
i. Wilderness Areas;
j. Mineral and Aggregate Resources;
k. Energy sources;

[104] Oregon Department of Land Conservation and Development. Oregon's Coastal Management Program: A Citizen's Guide. No date, pg. 4.
[105] Oregon's Statewide Planning Goals & Guidelines. Goal 4: Forest Lands.
[106] Oregon's Statewide Planning Goals & Guidelines. Goal 5: Natural Resources, Scenic and Historic Areas, and Open Space.

l. Cultural areas. [107]

Inventories include "data from as many sources as possible," enough to evaluate the "location, quality and quantity of each resource."[108] Analysis must also determine whether the resource is "significant" or not. The criteria for a significant determination are not established by the state, and local governments have some flexibility in the criteria they use.[109] If a site is determined to be "significant," it may be included in the additional four steps of the process. If it is not significant, then it is not further considered under the Goal 5 process. This step generally has a public involvement component to comment on the proposed inventory of sites.[110]

Step 2 – Conflicting Use Analysis
Local governments must analyze potential conflicting uses on proposed sites. OAR 660-016-0005 states "A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site." If a site is proposed, and conflicting uses have been identified (i.e. a scenic forested hillside which, under current regulations, could be clearcut[111]), such potential Goal 5 regulations must be included in the analysis in Step 3.

Step 3 – ESEE Analysis
Local governments must determine what the economic, social, environmental, and energy (ESEE) consequences, including other planning goals (i.e. buildable lands inventory [Goal 14: Urbanization]), of a proposed site being protected or not under Goal 5.[112] This ensures the local government can justify a site's candidacy in light of current local economic and planning needs.

Step 4 – Policy Recommendations
Given the results of the previous steps, local governments recommend to the relevant authority whether it should 1) Protect the resource site; 2) Allow conflicting uses fully; or 3) Limit conflicting uses.[113] The first and third option may include zoning standards, easements or other property restrictions, cluster development, preferential assessments, acquisition of land or development rights, or other protection methods.[114]

Step 5 – Adoption
The local government makes its decisions upon the findings of the previous four steps.

Local governments must keep their Goal 5 inventories up to date with the periodic review of their comprehensive plans.

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[107] Ibid.
[108] OAR 660-016-0000(1)
[109] *Draft Inventory of Goal 5 Riparian and Upland Wildlife Habitat Sites Within the Eugene Urban Growth Boundary*. City of Eugene. November 15, 2002, 6
[110] OAR 660-016-0020
[111] Though the State can only regulate forest practices. Counties can only regulate non-forest uses on forestland (ORS 527.722.) The Oregon Department of Forestry consults with the Oregon Department of Fish & Wildlife if they receive a harvest notice on property that has been identified as harboring "significant" resources by any jurisdiction. (ODLCD, op cit. 13)
[112] OAR 660-016-0005
[113] OAR 660-016-0010(1)-(3)
[114] Pam Wiley. *No Place for Nature: The Limits of Oregon's Land Use Program in Protecting Fish and Wildlife Habitat in the Willamette Valley*. Washington, D.C.: Defenders of Wildlife, 2001, pg. 29.

II. Oregon's Land Use System and Conservation Easements

As it should be evident from the abbreviated discussion of Oregon's Land Use Goals 3, 4 and 5 above, much of the resource land in the state is protected from development. Indeed, the amount of land zoned for farm or forest use encompasses over 92% (over 25 million acres) of the private land in the state.[115]

There are a few publicly funded programs for private landowners of these resource lands who desire to protect or restore the habitat or natural resource value of their land in cooperation with, or instead of, using the land primarily for economic purposes. The federal farmland programs, administered by the Natural Resource Conservation Service, include the Wetlands Reserve Program[116], the Conservation Reserve Program,[117] the Environmental Quality Incentives Program,[118] and the Farmland Protection Program.[119] State programs include the Riparian Lands Tax Credit Program,[120] the Forest Resource Trust,[121] Stewardship Agreements,[122] and the Wildlife Habitat Conservation Management Program.[123] The only state-funded program to encourage or acquire conservation easements is administered by the Oregon Watershed Enhancement Board (OWEB), using voter-approved funds from the state lottery.[124]

Easements can serve as a valuable complement to state regulation of private lands. However, conservation easements meet some barriers inherent in Oregon's land use program that may hinder their attractiveness to landowners. No one method of helping or encouraging landowner to conserve their land is effective by itself. Heavy-handed regulations can have unintended consequences and breed discontent and an eventual backlash,[125] and the permanent restriction of private land can create a stagnant land base unable to adapt to future needs.[126] Through their regulations, Goals 3 and 4 have caused lands with significant natural resource values to continue to be in industrial production. Our planning program favors economics over resource protection, which is exemplified by the state's

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[115] Meacham and Steiner, op cit.

[116] Acquisition of a 30-year or perpetual conservation easement to protect restored wetlands. Funding for wetland creation may also be included.

[117] Provides annual rent payments for landowners who voluntarily agree to practice more conservation-oriented farming practices (such as cover-cropping with less water-dependent crops.)

[118] Provides cost-sharing for landowners who would like to install or implement structural and management conservation practices on eligible farmland.

[119] Acquires perpetual conservation easements protecting farmland. Oregon is not currently participating (as of 2002) in the Farmland Protection Program.

[120] ORS 315.113. This is a newer program, beginning in 2004, administered by the Department of Forestry that allows landowners to receive an income tax credit for up to 75% of the market value of crops forgone when riparian lands (up to 35 feet from a stream) is taken out of production.

[121] Provides monies for the direct cost payments of site preparation, tree planting, seedling protection, and competitive release activities on forestlands over 10 acres in size, and not subject to reforestation requirements of the OFPA. See OAR 629-022-0030-0700.

[122] ORS 527.662. Also administered by the Department of Forestry, a landowner can enter into an approved "stewardship agreement" where s/he manages his/her property is managed in accord with agreement, and can possibly be exempt from conventional administrative requirements of the OFPA.

[123] Discussed at length in Chapter 4.

[124] OAR 695-020-0051 and Article XV, section 4(b) of the Oregon Constitution.

[125] The passage of Measure 7 by Oregon voters in November of 2000, requiring state and local governments to compensate landowners when any regulation devalues their land, is a good example.

[126] Conservation easements are difficult to amend, and more difficult to extinguish. See Chapter 2 for more on the law and durability of conservation easements.

definition of farm and forestland. Allowing and supporting both economic uses and management for wildlife would increase choices for landowners, as well as sharing the burden of enforcement between government and land trusts. U.S. Representative Earl Blumenauer, from Oregon's 3rd Congressional District, expressed it well in a speech to the U.S. Congress in 2001:

> *Leaders in protecting Oregon's farmland are in agreement that no one tool alone does the job of protecting farmland. In addition to the state's zoning system, conservation easements would be appropriate in Oregon in selected locations. They would serve as a complement to, not a replacement for, the zoning administered by the Land Conservation and Development Commission.*[127]

Oregon, however, does not provide the opportunities that exist in other states for conservation easements programs to thrive along side effective state and local regulations. The land use system in Oregon is not necessarily hostile to conservation easements. Rather, the incentives and encouragement found in other states do not exist in Oregon.

One of the primary incentives for easements in other states are the financial benefits landowners can see from a donation. The vast majority of conservation easements across the country are donated.[128] One can surmise two reasons for this: 1) Landowners care about their land, and are willing to forgo the development potential to protect the land; and 2) The potential tax benefits (described in Chapter 2) are a strong incentive to encourage landowners to donate an easement. Landowners who donate a conservation easement can deduct the value of the easement up to 30% of their Adjusted Gross Income per year, and up to six years. The value of the easement is determined to be the difference between the real market value before the easement, and the value after the easement. Generally, the more the land is worth before the easement, the larger the potential tax deduction.

In Oregon, landowners tend to have two factors going against them: 1) The real market value of rural lands are lower than in other states, as regulations limit development in Oregon; and 2) Many rural landowners are "land rich and cash poor" where they are unable to realize any tax benefits from donating an easement.[129] The first factor is a consequence of Oregon's effective zoning program, while the second is related to Oregon's rural economy (and outside the scope of this paper.)

Land use values are lower due primarily to the development potential in rural lands which is significantly restricted by Oregon's statewide planning program. As mentioned above, in both farm and forestlands, landowners are strictly limited to the type of development that may occur. Many times, lands are not allowed to be developed at all. The zoning laws necessarily limit the fair-market value of rural properties to their value as economically productive resource land.

There have been some telling analyses on how Oregon's land use system effects property values, both in and out of urban growth boundaries.[130] There are generally two ways land can be valued: 1)

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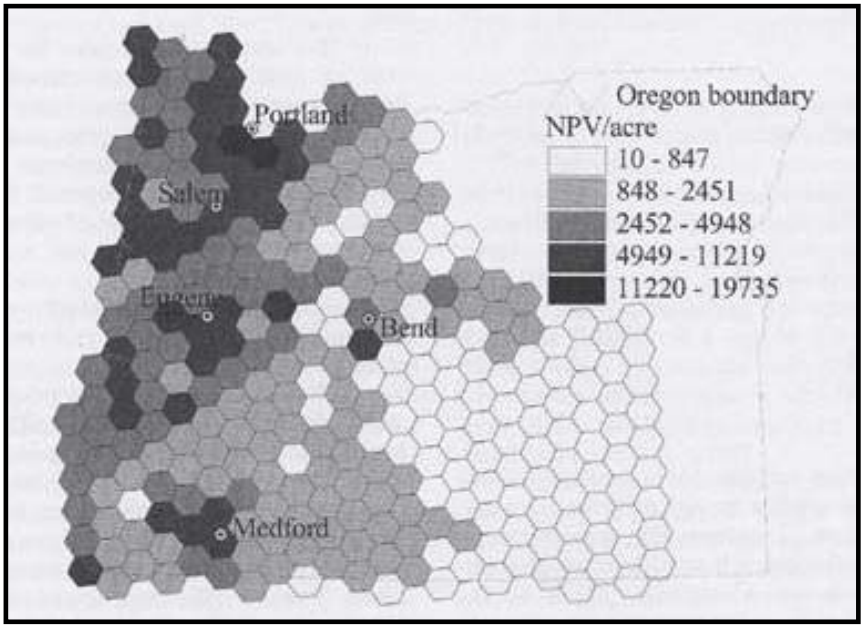
[127] U.S. Representative Earl Blumenauer is a speech to the U.S. Congress, October 4, 2001. Found at http://www.house.gov/blumenauer/floor_speeches/fl347.html (visited on December 8, 2002.)
[128] Martha Nudel. "Conservation Easements Emerge as Decade's Top Protection Tool." Exchange. Land Trust Alliance, Winter 1999, 6: "Only 18% of land trusts [surveyed] reported in 1998 that they had purchased any conservation easements."
[129] Oregon Atlas. Per capita income (in 1989) in rural cities and counties were below the statewide average.
[130] C.R. Beaton, J.S. Hanson, and T.H. Hibbard. *The Salem Area Urban Growth Boundary: Evaluation of Policy Impacts and Recommendations for the Future*. Salem, OR: Mid-Willamette Valley Council of Governments: 1977 (found that Salem's

Calculating what income could be derived from "working the land" according to conventional standards and regulations (i.e. "income-based approach"); and 2) The value of the land itself derived by comparing similar land sales on the open market ("comparables").[131] Land that is zoned such that it is undevelopable is worth less than the same acreage that could be developed. In this way, resource lands in Oregon are generally worth less than comparable rural lands in other states with less stringent zoning laws.[132]

Polasky, Camm, and Garber-Yonts, in 2001, analyzed the records of most county assessment departments in Oregon to get a spatial representation of land values across the state (*see figure 3.1*).[133] Land values are higher closer to the urban centers of the state, and lower in the rural areas. This shows how the market has responded to farm and forest zoning by valuing resource land at a lower value than rural residential or urban lands.

Figure 3.1 Average Net Present Value (NPV) per acre for Land Oregon



Source: Polasky, Camm, and Garber-Yonts

This is significant for conservation easements in the state because land trusts are unable to entice landowners to donate easements by offering significant tax benefits or by selling an easement worth

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UGB has no effect on land values, only zoning impacted the value of land.) W.E. Whitelaw. "Measuring Effects of the Public Policies on the Price of Urban Land," in *Urban Land Markets: Price Indexes, Supply Measures, and Public Policy Effects*. J.T. Black and J.E. Hoben, eds. Research Report #30. Washington, D.C.: Urban Land Institute. (Argued that UGBs would raise the value of unimproved urban land.) G.J. Knapp. "The Price Effects of an Urban Growth Boundary in Metropolitan Portland, Oregon. *Land Economics* 61(1) (1985): 26-35 (found evidence significant difference of "expected land values" in and outside the UGB; concluded UGB does impact land values.) A.C. Nelson. "Demand, Segmentation, and Timing Effects of an Urban Containment Program on Urban Fringe Land Values." *Urban Studies* 22(3)(1985): 439-443 (found evidence that the UGB in Salem had effects on land values based on buyers' perceptions of how binding the UGB was.)

[131] John Brown, appraiser with Duncan & Brown, Eugene, Oregon. Personal interview, October 25, 2001.

[132] Though, there seems to be little empirical research on how rural lands are valued in Oregon compared to other states.

[133] Stephen Polasky, Jeffrey D. Camm, and Brian Garber-Yonts. "Selecting Biological Reserves Cost-Effectively: An Application to Terrestrial Vertebrate Conservation in Oregon." *Land Economics* 77(1)(2001): 68-78.

much to the landowner. According to some land trust professionals, this is the number one deterrent to landowner participation in easement programs: it is not economically worth their while.[134] For example, an easement that protects farmland from development is worth very little, as easements are valued at the difference between the market value before and after the easement. If the land cannot be developed before the easement, and it restricts any development but leaves the property farmable, then the value of the easement will be very little.

Conclusions

While Oregon's Land Use Goals are not necessarily hostile to conservation easements, the incentives that are utilized by landowners in other states do not always provide Oregon landowners with the financial benefits that make easements an attractive option to protect land. The implementation of Goals 3 and 4 protect resource land with strong zoning designations that require land to be economically productive. The definition of farm and forestland do not necessarily protect wildlife habitat on private land. Goal 5, which portends to offer protection of some of the more critical natural lands in local jurisdictions, is a cumbersome regulatory process that can actually encourage landowners not to manage for habitat for fear of regulatory retribution that limits the uses of their land.

With over 92% of private land zoned for farm or forest use, the state offers little incentives for landowners to voluntarily participate in conservation programs. Underlying the regulations of Goals 3 and 4 is an assumption that landowners steward their land primarily for economic use. Because of this, when conservation easements limit development of resource lands, they are often times are of little financial value to landowners. This is a consequence of the merits of the state's innovative and honored land use program.

If a landowner chooses to restrict most or all of the economic use of their land so as to manage for habitat, they can actually be penalized with additional property tax burdens. Chapter 4 will look at how Oregon's property tax special assessment programs interface with the state's land use policy to further limit the attractiveness of conservation easements for private landowners.

[134] Brad Chalfant, Executive Director of the Deschutes Basin Land Trust in Bend, Oregon. Personal interview, August 8, 2002.

Chapter 4 – Oregon's Property Tax Special Assessment Programs

Oregon has one of the most effective land use systems that protect farm and forestlands from development and other uses incompatible with the state's land use policy. The effectiveness of Oregon's land use program is enhanced by Oregon's property tax policy. The property tax assessment programs help keep farm and forestland (collectively, "resource" land) assessments low, reducing the financial burden on agriculture and forestry owners.

Oregon has four special assessment programs for property taxation: farm, forest, open space, and wildlife habitat conservation management. Each program keeps the property taxes assessed low enough to provide an incentive to landowners to keep the land in its resource use (i.e. farmland, forestland, open space etc), and provide disincentives if they desire to develop lands in more intensive, urban ways. Oregon Revised Statutes define appropriate land uses for each land type participating in these programs, and each program has specific requirements the landowner must meet in order to stay in the relevant program.[135] These requirements ensure that land will continue to be used for its relevant purpose, as long as the landowner desires to stay in the special assessment tax program. This creates an incentive to keep resource land resource land, protecting it from incompatible uses.

One way to understand these special assessment programs is as tax "deferral" programs: a portion of the tax the land is assessed is deferred until it leaves the program, triggering the recapture of back taxes. For example, farmland is generally assessed for property tax purposes at a value lower than its fair market value. However, if the property ever leaves the program, a landowner will be liable for back taxes, for a certain number of years, equal to the difference between the specially assessed value and the value had the property not been in the program. Additionally, the land will from then on be assessed at a higher value since it does not qualify for special assessment. Hence, the property tax is deferred until it is converted to a use incompatible with the state statutes for the specific special assessment program, whereby the county can recapture the tax. Each program has its own requirements for the relevant land type, and imposes its own penalties if land does not meet these requirements.[136]

These property tax programs developed before conservation easements were a factor in private land conservation in Oregon. While easements and the special assessment programs are not incompatible with each other, there seem to exist certain disincentives for land under easement and in two of the special assessment programs: farm and forest deferral. In fact, conservation easements can have unintended and potentially deleterious consequences for farm and forest landowners through inadvertently disqualifying them from the deferral programs, and triggering the repayment of back taxes.

For example, prohibited uses in an easement on unproductive farmland that is specially assessed may prohibit agriculture use so as to protect existing or restored wetlands. The requirements for specially assessed farmland stipulate that the land must be farmed primarily for "obtaining a profit" in

[135] There is the option of "rolling over" from one special assessment to another, which will be discussed later in this chapter.
[136] This is all explained in more detail below.

farming.[137] Therefore, the easement may be counter to these requirements, and could disqualify the land from the program, compelling the landowner to pay back taxes. This is a potentially significant disincentive for conservation easements, given a state where there are all ready little incentives for easements.

This chapter explores the four special assessment programs, their requirements and penalties, and looks at how conservation easements can have an effect on and be effected by them.

I. Farmland Special Assessment

The special assessment programs for farmland began in 1961, as a method to preserve Oregon's farms by creating an incentive-based system to encourage appropriate use of farmland.[138] These programs essentially help to correct some of the "market imperfections" that could result in unnecessary conversions of farmland to incompatible uses (urban, residential, etc.)[139] With the passage of Senate Bill 100 that created Oregon's Land Use System, the Legislative Assembly declared in 1973, that

> *(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.*
> *(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.*
> *(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.*
> *(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.*[140]

Many of the rural land use planning components to the OLUS, including special assessment programs, exist to protect industries and communities that depend upon the resource lands. Farmland protection programs are no different, and in fact typify this intention. This is evident in Oregon's definition of farmland. ORS 308a.056 defines farmland as land currently being employed for "farm use." Farm-use,

> *Means the current employment of land for the primary purpose of obtaining a profit in money by:*
> *(a) Raising, harvesting and selling crops;*
> *(b) Feeding, breeding, managing or selling livestock, poultry, fur-bearing animals or honeybees or the produce thereof;*
> *(c) Dairying and selling dairy products;*
> *(d) Stabling or training equines, including but not limited to providing riding lessons, training clinics and schooling shows;*

[137] ORS 308A.056(1)
[138] Arthur C. Nelson and Gerrit Knapp. *The Regulated Landscape: Lessons on State Land Use Planning from Oregon.* Cambridge, MA: Lincoln Institute of Land Policy, 1992, 132
[139] Nelson and Knapp, 127.
[140] ORS 215.243

(e) Propagating, cultivating, maintaining or harvesting aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission;
(f) On-site construction and maintaining equipment and facilities used for the activities described in this subsection;
(g) Preparing, storing or disposing of, by marketing or otherwise, the products or by-products raised for human or animal use on land described in the section; or
(h) Using land described in this section for any other agricultural or horticultural use or animal husbandry or any combination thereof.[141]

The intent of this definition is to protect working landscapes. This definition is necessary to prevent activities on farmland that could temporarily or permanently prohibit farming (from resorts to subdivisions.) In addition, farmers were some of "the first environmentalists,"[142] and their stewardship of the land is critical for Oregon's landscape. Helping to create an environment conducive to farming is one of the main goals of the special assessment program.

The state policy and regulations governing the farmland special assessment program complements Goal 3, highlighting the fact that property tax policy for farmland is coordinated with land use policy.

Farmland in Oregon that receives special assessment can be zoned one of two ways. It can either been zoned as Exclusive Farm Use (EFU), where the "land is used primarily to make a profit in farming." Any activity on the land must be necessary to further this overall purpose.[143] Land zoned EFU automatically receives special assessment. To qualify, land must be currently used, and have been used in the previous year, exclusively for farm use (see definition above.) Any and all building and conditional use permits must further this exclusive farm use, and it is up to the local assessor to determine if the land continues to meet this requirement. If land is converted from this exclusive use, it could be rezoned and loose its special assessment. More on how land is disqualified from EFU status is described below.

The other way land can receive the special assessment does not depend on the zoning designation of the land *per se*, but rather whether the property meets certain requirements. For instance, land zoned for Rural Residential can receive the same property tax benefits as EFU land if the landowner actively farms the land. To qualify for special assessment, non-EFU zoned landowners must apply to their county assessor by April 1st, and must meet the following standards: [144]

- Land must be currently used, and have been used for the two previous years, exclusively for farm use (defined in ORS 308a.056, and described above); and
- Land must meet an income requirement in three of the last five years
    - Properties six acres or less, the gross income must be at least $650
    - Properties six to 30 acres, gross income must be at least $100 times the number of acres (i.e. for 25 acre farm, but have $2500 in gross income.)
    - Properties over 30 acres, gross income must be at least $3000.
    - Leased properties may have slightly different income requirements.

[141] ORS 308a.056
[142] Oregon Senator Gordon Smith. Quote found at http://www.senate.gov/~gsmith/press/010522.htm (visited December 18, 2002)
[143] Includes houses and other development: ORS 215.213
[144] From ORS 308a.068 and 308a.071

The common requirement for land, regardless of zoning, in the farmland special assessment program is that it is used as farmland, defined above.

A). How Farmland is Assessed

For either EFU lands or non-EFU lands, the assessed value for taxation in the special assessment program is determined using the same method. Lands in the farmland special assessment program are given four different values: real market value (RMV), maximum assessed value (MAV), maximum specially assessed value (MSAV), and specially assessed value (SAV). The land is assessed at the lowest of the four.

RMV, as defined in ORS 308.205, means "the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's length transaction."

MAV, defined in ORS 308.146, was set for all properties, with the passage of Measure 50 by Oregon voters in 1997. Beginning in July of 1997, the MAV is the property's real market value for the tax year 1995-1996, minus 10 percent. For following years, the MAV is the greater of the prior year's assessed value increased by a maximum of three percent or the prior year's MAV.

A property's maximum specially assessed value (MSAV), again created by Measure 50 and codified in ORS 308a.107(3), was established in July of 1997 as the specially assessed value in July of 1995, reduced by 10 percent. For subsequent years, the MSAV is the previous year's MSAV increased by three percent.

The specially assessed value (SAV) is determined to be the lower of the three values above. One of the more interesting rules created through the passage of Measure 50 is that the assessed value (AV, the value of the property for tax assessment purposes) of any property cannot be higher that the real market value (RMV.)[145] In the case of the farmland special assessment program, this means a property's SAV cannot be higher than its RMV. As we will see later in this chapter, this rule has some interesting bearing on farmland with conservation easements.

B). Disqualification

Under certain situations, lands may be disqualified from receiving special property tax assessment. For EFU-zoned lands, they will be disqualified from special assessment if:

- The assessor determines the land is no longer being used as farmland;
- The land is re-zoned from EFU; or
- A non-farm dwelling is established on the land.[146]

For non-EFU lands, the land will be disqualified if:

- Landowner notifies the assessor to be removed from the special assessment program;
- Land is sold or transferred to an ownership making it exempt from property tax;[147]

[145] http://www.co.multnomah.or.us/dss/at/prop_tax.html (visited December 11, 2002)
[146] ORS 308a.113(1)(a)-(c)
[147] Though, ORS 308a.706(c)(B) seems to exempt private nonprofit corporations, if the land is registered as a natural heritage conservation area (as outlined in ORS 273.581.)

- Land is no longer used as farmland;
- Land is platted for subdivision; or
- Land does not meet the income requirements.[148]

If the land is disqualified from the program, it will be reassessed at the lesser of its real market value or the maximum assessed value.[149] In addition, the landowners may have to pay additional "back taxes." As it was mentioned in the first part of the chapter, special assessment programs are deferral programs, where landowners only pay a portion of their tax liability.

For EFU lands, back taxes up to 10 years, five years for non-EFU lands, equaling the difference between the tax paid and the tax the land would have been assessed had it not be in the special assessment program could be charged.[150] These back taxes will be assessed if:

- The land does not "roll over" to another special assessment program;
- The land use is changed to one incompatible to a return to farm-use (i.e. industrial, commercial, residential, or other uses);
- The land receives an approval for a non-farm dwelling or parcel; or
- The land is rezoned to non-EFU and the landowner does not roll over to another special assessment program (non-EFU special assessment, forestland special assessment, or wildlife habitat special assessment.)[151]

C). Consequences for Conservation Easements

Oregon's definition of farmland for special assessment programs can potentially create a disincentive for landowners choosing to place a conservation easement on their farmland.[152] Many conservation easements protect natural and native habitat for wildlife, water quality, and wetlands. Some of these attributes may conflict with Oregon's definition of farmland, as well as the requirements for special assessment.

Currently, a farmer who would like to take his or her land out of production and convert it to a more natural condition by placing a conservation easement extinguishing the right to farm for commercial purposes runs the risk of being disqualified for special assessment. Not only would the landowner be assessed back taxes (10 years for EFU land, five for non-EFU), but also the land would be reassessed at its fair market value, which may be substantially higher than it specially assessed value. These two possible consequences could make it cost-prohibitive for landowners to donate or sell an easement.

Essentially, Oregon's definition of farmland does not recognize a landowner's choice to manage his or her land for wildlife habitat through working with a non-profit land trust. In fact, the law discourages this by requiring the land to be farmed. This is consistent with the intent of the farmland protection programs, which protect the *industry* of farming, rather than a landowner's interest in managing the land according to their stewardship goals.

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[148] ORS 308a.116(a)-(d) and "Assessment of Farmland Not in an Exclusive Farm-Use Zone." Oregon Department of Revenue (found at http://www.dor.state.or.us/InfoC/303-645.html, visited on October 12, 2002.)
[149] ORS 308.146(a)-(b)
[150] ORS 308a.703(3)(a)
[151] ORS 308a.706(a), ORS 308a.703(3)(c)(A), and ORS 308a.706(d)(A)-(F)
[152] For an example of how this has happened, please refer to Appendix F.

There are governmental programs that could achieve the same purpose, without disqualifying the land from special assessment. For example, ORS 308a.056(3)(a) states that "land is currently employed for farm use if the land is: (a) Farmland, the operation or use of which is subject to any farm-related government program." The Natural Resource Conservation Service (NRCS) has a number of federally-funded farm programs provide both perpetual protection through conservation easements as well as financial assistance to landowners who choose to take land out of production and convert it to more natural conditions. The Wetlands Reserve Program is a good example, where a landowner sells a conservation easement (permanent or 30-year easement) for the agricultural value of the land in return for converting productive farmland into wetlands.[153] Since the WRP is funded through the Farm Bill, it is a "farm-related government program," and landowners can enroll in this program without risking their special assessment status. This is not necessarily true for conservation easements with private land trusts.

II. Forestland Special Assessment

Property tax special assessment programs for forestland in Oregon serve a purpose similar to the farmland program. Both forestland zoning designations and the so-called "timber taxes" help protect forestland from inappropriate uses. The Legislative Assembly declared in Goal 4, that it is a policy of the State of Oregon,

> *To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.*[154]

Similar to the State's definition of farmland, under ORS 321.005(5) and (6), forestland "means any land producing…products from harvested timber." More specifically, ORS 321.257(3) defines forestland in western Oregon as "land…(a) which is being held or used for the predominant purpose of growing and harvesting trees of a marketable species and has been designated as forestland, or (b) the highest and best use of which is the growing and harvesting of such trees…"Marketable species means ORS 321.805(1) has a very similar definition for forestland in eastern Oregon. Highest and best use means that given the zoning designation of a particular tract of land, its soil type, slope, etc., the use that results in "highest" value is the land's highest and best use. The economic and commercial use of the land is central to Oregon's land use goals for forestland.

Currently, there are two different types of forest taxes or assessments: one that is paid annually (*ad valorem* property taxes), and one that is paid at the time of harvest ("privilege tax").[155]

A). Ad valorem forest taxes

There are three annual special assessment property tax programs for forestland: the Western Oregon Small Tract Optional Tax (WOSTOT)[156], the Western Oregon Forest Land and Privilege Tax (WOFLAPT)[157], and the Eastern Oregon Forest Land and Privilege Tax (EOFLAPT)[158].

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[153] For more on the WRP, see http://www.nrcs.usda.gov/programs/wrp/.
[154] OAR 660-015-0000(4)
[155] Most information for the following discussion taken from C.G. Landgren and N.E. Elwood. *The Woodland Workbook: Taxes and Assessments on Oregon Forest Land and Timber*. Oregon State University Extension Service, July 1997.
[156] ORS 321.705-321.765

WOSTOT assessment is based on an annual calculation of the forestland's true cash value, exempting the landowner from most taxes paid at the time of harvest ("privilege taxes"). To qualify, land must be in western Oregon, be more than 10 acres and less than 2,000, the timber on the property must be no more than 40 years old on average, and the predominant use on the property is the growing and harvesting of trees. After a property is approved for the program by the Department of Forestry, timber can reach an average of 90 years before it needs to be cut under WOSTOT. A property is assessed at the land's value without the timber. The county assessor determines the assessed value of the property, based on its productivity for growing trees ("site class"). There are five site classes set by the Department of Forestry for western Oregon.

There are three ways WOSTOT properties can be disqualified and removed from special assessment: 1) Owner requests to be removed from the program; 2) The state forester determines the property no longer is eligible; or 3) The average age of the timber exceeds 90 years. If disqualified, and the land does not roll over to another special assessment, the landowner might be liable for back taxes, depending on how the land is reclassified.

The ***WOFLAPT*** (Western Oregon Forest Land and Privilege Tax), more typically referred to as "designated forest land," is the most common special assessment program in western Oregon. The tax assessment is based on 20% value of the land (rather than 100% under WOSTOT), with additional taxes due at the time of harvest (privilege taxes.) To qualify, lands must be in western Oregon, be more than two contiguous acres in size, and be predominantly used for the "growing and harvesting of trees of a marketable species."[159] The land is assessed based on the "forest land values," rather than their real market value. Similar to WOSTOT, the Department of Forestry has eight forestland class productivity ratings they ascribe to applicable lands. The annual property taxes due are based on 20% of the forestland value (again, exempting the value of the timber.) When the timber is harvested, landowners will be subject to relevant privilege tax, described below.

Lands can be disqualified from WOFLAPT for two reasons: 1) The landowner requests to be removed; 2) The local assessor determined that the highest and best use of the land is no longer forestland. If disqualified, and the landowner does not roll into another special assessment program, back taxes of up to five years will be due.

The Eastern Oregon Forest Land and Privilege Tax (***EOFLAPT***) is similar to the WOFLAPT, but rather than eight class ratings, there are none. Land is set at one per-acre in eastern Oregon by the Department of Revenue. Under EOFLAPT, land must be in eastern Oregon, be over two contiguous acres in size, and the highest and best use is for forestland. Land is assessed annually at 20% of its value, and at the time of harvest, a privilege tax is due. Land can be disqualified for the same reasons as under the WOFLAPT.

B). Privilege taxes.

There are three possible privilege taxes due at the time forestland is harvested. Generally, the person (or entity) who owns the timber at the time of harvest is liable for the taxes. The first tax, Forest

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[157] ORS 321.257-321.390
[158] ORS 321.405-321.520 and ORS 321.805-321.825
[159] ORS 321.257(4). Additionally, the highest and best use on the property must be for the growing and harvesting of trees.

Products Harvest Tax (***FPHT***)[160], all forestland owners must pay, regardless of how their land is assessed (including WOSTOT) and regardless of geographic location. This tax is assessed on the amount of timber harvested (calculated by MBF, or thousand board feet of timber), but the first 25 MBF is exempt from taxes.

Lands in the WOFLAPT program must also pay the Western Oregon Privilege Tax (***WOPT***)[161]. The tax is assessed as a percentage of gross sales ("stumpage value") less the logging costs (calculated by the Department of Revenue).

Lands in the EOFLAPT are liable for the Eastern Oregon Privilege Tax (***EOPT***)[162], which is similar to the WOPT. The only difference is that the timber is taxed at a lower rate.

C). Recent changes.

The 1999 State Legislature enacted significant changes to the taxation of timber and forestland with HB 3575. Essentially, by 2003, no privilege taxes will be levied at the time of harvest, and forestland will be taxed at its full value (which will still be less than its real market value.) According to the Department of Revenue, the 2003 Legislative Session may see additional changes to the way forestland is taxed.[163]

D). Consequences for Conservation Easements

Depending on which program forestland is assessed under, there may or may not be conflicts with conservation easements. Unlike the state's definition of agriculture, which requires annual cropping and harvesting of the land, forestland can grow for an indefinite number of years before being cut. Unless land is assessed under WOSTOT, where the timber must be cut before it reaches an average age of 90 years, landowners may choose to never cut their land; the state only requires the possibility of the property to be harvested.[164] Therefore, if a conservation easement completely restricts any and all harvest, a property would most likely be disqualified from any of the forestland special assessment programs. If an easement allows for some management or selective harvest, a property would continue to meet the requirements for forestland special assessment.

III. Open Space Assessment

An interesting and somewhat obtuse special assessment program designates certain lands as open space land. This designation provides property tax benefits similar to farm or forest special assessment. The State Legislature created this open space special assessment program to preserve lands important to the State of Oregon. ORS 308a.303 states,

> *The legislature hereby declares that it is in the best interest of the state to maintain, preserve, conserve and otherwise continue in existence adequate open space lands and the vegetation thereon to assure continued public health by counteracting pollutants and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens. The legislature further declares that it is in the public interest to prevent the forced conversion of open space land to more intensive uses as the result of economic pressures caused by the assessment thereof for purposes of property taxation at values incompatible with*

[160] ORS 321.005-321.185
[161] ORS 321.257-321.322
[162] ORS 321.405-321.520
[163] http://www.dor.state.or.us/taxInfo/timbchange.html (visited December 10, 2002.)
[164] Rita Woodward, Farm and Forest Clerk, Lane County Assessment and Taxation. Personal interview, March 7, 2002.

their preservation as such open space land, and that assessment practices must be so designed as to permit the continued availability of open space lands for these purposes

The program assists landowners with lands that meet the designation of open space through assessing property taxes at a lower rate than it would otherwise see using the land's real market value. ORS 308a.300 defines open space as,

> *(a) Any land area so designated by an official comprehensive land use plan adopted by any city or county; or*
> *(b) Any land area, the preservation of which in its present use would:*
> *(A) Conserve and enhance natural or scenic resources;*
> *(B) Protect air or streams or water supply;*
> *(C) Promote conservation of soils, wetlands, beaches or tidal marshes;*
> *(D) Conserve landscaped areas, such as public or private golf courses, which reduce air pollution and enhance the value of abutting or neighboring property;*
> *(E) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;*
> *(F) Enhance recreation opportunities;*
> *(G) Preserve historic sites;*
> *(H) Promote orderly urban or suburban development; or*
> *(I) Retain in their natural state tracts of land, on such conditions as may be reasonably required by the legislative body granting the open space classification.*

A landowner desiring to place his or her property in open space must go through a rather intensive application process.[165] S/he is required to apply to the local tax assessor and justify how the property meets the definition and requirements of the open space designation, including supporting materials (maps, photographs, natural resource surveys, etc.) that assist the assessor in considering the quality of the land. The application then goes before the appropriate planning commission for approval or denial (usually, the county planning commission.) The commission must weigh both the economic consequences of the designation (loss of buildable land, if inside the UGB, costs of infrastructure to the land if ever developed, loss of property tax revenue, etc.) as well as the natural and scenic values of the property.

The value of land assessed as open space is the real market value of the land, assuming its highest and best use is as open space ("park, sanctuary or golf course" use).[166] Each year, however, the potential tax liability (what the land would otherwise have been assessed) is noted on the land's account with the assessor's office.[167]

Open space land can be disqualified from the program if the landowner gives written notice to the assessor to be removed from the program. Like farm and forest special assessment programs, the land would then be assessed back taxes equal to the potential tax liability noted on the land's assessment account. However, there is no limit to the number of years to this assessment of back taxes.[168] For example, if a property has been enrolled as open space for 20 years, and the landowner would like to

[165] As outlined in ORS 308a.306 and 308a.309.
[166] ORS 308a.315
[167] ORS 308a.312(3)
[168] ORS 308a.315(2)

develop the land, s/he would be assessed back taxes for the entire time the land was enrolled (including interest.) A landowner may rollover into another special assessment program (farm, forest, or wildlife habitat conservation [discussed below]) without receiving this penalty.[169]

A). Consequences for Conservation Easements

There doesn't seem to be many disincentives for landowner enrolled in the open space program when they place a conservation easement on their property. Easements generally protect open space in some fashion, by conserving its natural resource values. Any disincentive would come in the process to obtain open space status. It is more cumbersome than other special assessment programs, and the unlimited amount of back taxes a landowner may be liable for could deter some from participating. However, conservation easements most likely would not conflict with use requirements under the open space program.

IV. Wildlife Habitat Conservation Management Program

Implemented through the Oregon Department of Fish and Wildlife (ODFW) and county governments, the Wildlife Habitat Conservation Management Program (Habitat Program) offers landowners of certain resource lands the opportunity to manage their specially assessed land for wildlife by agreeing to a conservation plan approved by ODFW, without disqualifying them from their tax program. The Habitat Program was initially passed in 1997, and applied only to farm and mixed farm and forest zoned lands.[170] The 1997 Legislature declared, "that the protection and preservation of the wildlife resources of this state ought to be encouraged by recognizing wildlife habitat conservation and enhancement as an allowed land use in areas zoned for exclusive farm use and mixed farm and forest use."[171] The original legislation allowed landowner in approved zones to apply for open space assessment, if they implemented a Conservation Plan.[172]

The Habitat Program was expanded by the 2001 Legislature with the passage of HB 3564.[173] This bill added forestland to the Program, and clarified that lands with a conservation plan approved by ODFW did not necessarily risk losing their special assessment.[174] In addition, HB 3564 seemed to allow landowners to place a conservation easement on their land, which would not necessarily jeopardize their property tax status. ORS 308.743(1) states,

> *Land that is specially assessed under [open space, farmland, riparian habitat exemption, western Oregon foreland and privilege tax, western Oregon small tract option tax, or eastern Oregon forestland special assessments], may not be disqualified from the special assessment or exemption, and may not be subject to additional taxes under ORS 308A.700 to 308A.733, if the property owner has:*
>
> > *(a) Entered into a wildlife habitat conservation and management plan, as described in ORS 215.800 to 215.808, approved by the State Department of Fish and Wildlife; or*
> > *(b) Executed a conservation easement, as defined in ORS 271.715…*

[169] ORS 308a.733
[170] Senate Bill 791
[171] Ibid, § 1.
[172] Ibid, § 4(2)
[173] It was later codified as ORS 215.800 - 215.808, as well as 308a.740 - 308a.743. For the text of the bill, see Appendix D.
[174] ORS 308a.743

However, the statute continues on to require landowners in these special assessment programs, with a conservation easement on their land, to continue to meet the requirements of their assessment program.[175] In effect, HB 3564 did little to remove the disincentives for farm and forest landowners desiring to manage their property for conservation with an easement. The statute allows lands within the Habitat Program to keep their special assessment, it does not allow the same benefits for conservation easements. While it does not preclude landowners from placing an easement on farmland, for example, the land must continue to meet the state's definition of land in farm use, as well as the income requirements described earlier in this chapter.

This seems counter to the Legislative Intent of HB 3564, codified in ORS 308a.740, which states,

> *(1) The Legislative Assembly finds that it is in the interests of the people of this state that certain private lands be managed in a sustainable manner for the purpose of maintaining the long-term ecological, economic and social values that these lands provide.*
> *(2) The Legislative Assembly declares that it is the policy of this state to encourage landowners to manage private lands in a sustainable manner through tax policy, land use planning, education and technical and financial incentives.*
> *(3) The Legislative Assembly further declares that it is the policy of this state not to impose additional taxes on property, commodities or income if a landowner voluntarily foregoes, limits or postpones economic uses of private land for conservation purposes.*
> *(4) As used in this section, "conservation" means the management of land, water and natural resources for the purpose of meeting human and ecological needs in a sustainable manner.*

HB 3564 also allowed county governments the opportunity to opt out of participation in the program, if the county commissioners pass a resolution doing so before January 1st, 2003. As of the writing of this Paper 10 counties have passed resolutions to opt out of the programs[176], and a number of others are intending to do so.[177] If counties do not opt out by this date, they must participate in the Habitat Program and will not have the option of opting out again.[178]

HB 3564 directed the Departments of Agriculture and Forestry to convene a working group to look at state incentives for conservation, and recommend changes to the 72nd Legislature (convening in January of 2003.) Sections 17 and 18 of HB 3564 states:

> *(1)The State Forestry Department and the State Department of Agriculture shall, in consultation with relevant state agencies and other public or private organizations, review state statutes, rules, policies and programs that affect landowner decisions to implement conservation strategies.*
> *(2) The review conducted under subsection (1) of this section shall include:*
> *(a) Establishing a statewide strategy for the implementation and coordination of incentives, regulatory disincentives, expedited permit processes and related taxes.*

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[175] ORS 308a.743(1)(b)(A): "[As long as the land, subject to an easement,] is managed in compliance with the conservation easement or deed restriction; and (B) Continues to meet the requirements for special assessment or exemption. The existence of the conservation easement or deed restriction may not cause the disqualification of the land from special assessment or exemption or preclude the disqualification of the land from special assessment or exemption for some other reason."
[176] Jenne Brubaker, Defenders of Wildlife, personal interview November 4, 2002.
[177] Jim Gangle, Director of Assessment and Taxation, Lane County. Personal Interview May 15, 2002.
[178] ORS 215.808(3)

(b) The development of a stewardship agreement program for rural lands that establishes a baseline management standard for landowners and a voluntary higher standard that provides natural resource benefits and regulatory certainty for landowners.

SECTION 18. (1) The State Forestry Department and the State Department of Agriculture shall report to the Seventy-second Legislative Assembly on recommendations for improvements of incentives and existing regulatory schemes that will encourage landowners and businesses to voluntarily invest in the improvement of natural resources.

(2) The report created pursuant to this section shall include, but not be limited to, recommendations on statutory changes, regulatory relief, expedited permit processes and tax incentives.

This group, the "Conservation Incentives Work Group" (Group), is made up of representatives from the ODA, ODF, ODF&W, OWEB, the Department of Revenue, the Natural Resource Conservation Service, land trusts, the Oregon Farm Bureau, Oregon Cattleman's Association, Oregon Small Woodlot Owners, local governments, county tax assessors, special districts, watershed councils, and the Defenders of Wildlife. The Group met a number of times in 2002 to address these issues, but, as of this writing, had little to offer in the way of suggestions to the State Legislature.

The Group did identify a number of disincentives and problems with existing conservation incentives and the Habitat Program, without offering substantive changes. Some of these findings are summarized below, from the Group's draft report to the 72nd Legislature[179]:

- The Wildlife Habitat Conservation Management Program (Habitat Program) needs clarify which lands are eligible for participation, especially whether eligible lands can be in or outside of an UGB.
- The Habitat Program should be its own special assessment program, to reduce the confusion and complexity placed upon county assessors in administering the Program.
- The state should create a Conservation Income Tax Credit program that would provide up to 50% state credit on any forgone income or out of pocket expenses associated with voluntary conservation efforts.
- The requirements in ORS 308a.743(1)(B)(a) that specially assessed land with conservation easements must continue to meet the requirements of the special assessment program is counter productive to the intent of HB 3564.
- Conservation easements should have their own property tax special assessment category to reduce the disincentives for landowners and ease the confusion for county assessors in administering existing programs for lands with easements.
- The definition of a "holder" of a conservation easement (ORS 271.715(3)(a)) does not include the federal government, which does not allow local governments to recognize conservation easements held by the federal government in determining a property's tax liability.

As noted above, the Group is to report back to the 72nd Legislative Assembly on recommendations to improve conservation options for private landowners. As of this writing, there were very few recommendations the Group came to consensus on. Indeed, of the five bullet points above, the Group only agreed to the first three. These recommendations do little to reduce the disincentives for conservation easements.

[179] Conservation Incentives Work Group. *Report to the Seventy-second Legislative Assembly, Draft*. November 25, 2002.

The individual stakeholders had a difficult time agreeing to proposals that threatened their individual interests. For example, the Oregon Farm Bureau, Special Districts, and the Oregon Cattleman's Association were unable to support additional special assessment programs, out of the concern for both the potential loss of productive farmland and tax revenue for local jurisdictions.[180] Additionally, the Group did not benefit from the participation of a member of the Legislature, thereby limiting the option of any "champion" to support ideas recommended by the Group.

The Conservation Incentives Work Group had a unique opportunity to recommend changes that would have improved the conservation options for private landowners. This process, however, is inherently political, and without political leadership, little was accomplished. Chapter 5 looks as ways the conservation community can build off of the Group's work, as the possibility of removing some of the disincentives discussed in this paper is not lost.

Conclusions

Many states use property tax incentives to encourage resource lands to be productive and undeveloped. Oregon is unique in that the state coordinates property tax policy with land use policy to create a regulatory environment that keeps resource lands relatively free from development. At the same this, this nexus of policies also limits landowners' abilities to place conservation easements on their land to protect and manage for wildlife habitat.

To continue to receive special property tax assessment, landowners in both the farm and forestland programs must meet the requirements of allowing for the economic use of their land for farm or forest use. If a conservation easement limits this use to a certain degree (determined by whatever program the land is in), the landowner may be liable for back taxes.

The Wildlife Habitat Conservation Management Program seems to offer some respite to the current state of affairs. However, most counties are choosing to opt out of participating in the program. For those counties who will continue to participate (or opt back in at a later date), there are little opportunities for landowners with easements to benefit from the state's policy of "not to impose additional taxes" if a landowner voluntary manages his or her land for conservation. The current regulatory and tax barriers to conservation easements seem to conflict with this policy. An opportunity to rectify this situation wasn't taken advantage of during the tenure of the Conservation Incentives Work Group. The disincentives identified by the Group relating to conservation easements will continue to exist, until such a time when the Legislature is able to address this challenges to private land conservation in Oregon.

[180] Personal observation from attending numerous meetings of the Conservation Incentives Work Group in summer and fall of 2002.

Chapter 5 – Recommendations and Conclusions

I. Research Questions

This Terminal Project intended to answer three questions: 1) What implications does the limitation on land values for resource lands have on the use of conservation easements? 2) Do the requirements for the special assessment property tax programs pose barriers for landowners to use conservation easements in Oregon*?* These two questions attempted to address the third, which is 3) Are conservation easements a viable tool to protect private land in Oregon? I'll look at each of these questions in turn, then offer recommendations for land trusts and agencies using conservation easements to protect wildlife habitat in Oregon.

1) What implications does the limitation on land values for resource lands have on the use of conservation easements?

It should be clear from this study that Oregon's protection of farm and forestlands does impact the valuation of land, thereby affecting the value of conservation easements. I did not survey how much land values affect the value of easement, but rather I addressed how resource lands are limited in their use, which directly impacts land values. Goals 3 and 4 are unique in the United States in that they limit the rights on resource lands to essentially extractive and economic uses. Land that can be developed is worth more than land that can't.

By choosing to manage growth in Oregon through zoning regulations, Urban Growth Boundaries, and preserving resource lands for farm and forest use, the state has created a spatial distinction of land values where land farther from urban areas are less per acre than those lands closer to those areas. Rural landowners who desire to be financially compensated by permanently protecting their property with conservation easements, either through purchasing development rights or by the tax benefits from donating an easement, find that easements are not worth much, as the difference between the before and after value of the land is not great.

2) Do the requirements for the special assessment property tax programs pose barriers for landowners to use conservation easements in Oregon?

The short answer to this question is, "yes." However, the extent of these barriers is relatively unknown, as each conservation easement is as different as the lands they protect and the landowners that steward them. Whereas one landowner may desire to limit any or all economic use of his or her land, another may allow such use. Whether land is disqualified from its relative special assessment program depends on what the easement restricts. The fact is that in some cases, landowners can be liable for back taxes and have their land assessed at a value that is cost prohibitive for them. Where this Terminal Project will be useful is its conclusion that landowners may face financial penalties if they restrict uses on their lands enough that they are disqualified from special assessment.

Currently, there are few remedies for landowner who desire to protect their land solely for wildlife habitat with a conservation easement. The two special assessment programs landowners can "roll over" into are not as attractive as they could be. The open space special assessment program is a cumbersome process requiring landowners to obtain county commission acceptance of their land in the program. The second option, the Wildlife Habitat Conservation Management Program, may not be attractive or available for some landowners. The program currently provides another layer of effort for landowners in the form of a Habitat Conservation Management Plan they must complete in addition to

a conservation easement. Moreover, many county governments are choosing not to participate in the program, thereby limiting this option for landowners all together. Depending on what recommendations the Conservation Incentives Work Group makes to the Seventy-second Legislative Assembly (set to convene beginning on January 13, 2002), the Habitat Program may be a more useful option that it is in its current form.

3) Are conservation easements a viable tool to protect private land in Oregon?

With only 0.002% of the state protected with conservation easements,[181] conservation practitioners are just beginning to tap the potential of conservation easements as a complement to Oregon's land use program. While easements are and will be a very useful and effective tool to protect private land by keeping the land on the tax rolls and in the hands of private citizens, conservation easements could be more of a viable tool than they are currently.

Although Oregon's land use policies seem to support both the protection of resource lands from development and the option of landowners to manage their land for conservation, how these policies are implemented limit the attractiveness of the nation's premier protection tool for private landowners. Some of these limitations are identified in this Terminal Project, with the hope that the state will be better able to remove disincentives for landowners with the wish to protect their land in perpetuity.

II. Recommendations

I offer three recommendations on how to improve the attractiveness of conservation easements in Oregon.

1) Create a conservation easement special assessment program

As mentioned in Chapter 4, the Conservation Incentives Work Group discussed the possibility of creating an additional special assessment program for landowners with easements so as to circumvent the restrictive requirements of the farm and forestland programs. While the Group could not agree on this recommendation, I feel it can be an important step to take in Oregon to improve the viability of conservation easements.

Such a special assessment program could be available to landowners whose lands are currently in farm or forest special assessment. The conservation special assessment program would offer landowners the opportunity to roll over into it, thereby keeping their special assessment status and not having to pay back property taxes if the land is managed in accord with the conservation easement. County assessors could require land trusts to submit letters during their annual monitoring of their properties to confirm the landowner is complying with the easement. This would help assessors administer the program, as it is not something they currently have the capacity to so adequately.

This new program would impact government revenues from property taxes very little, if at all, given that eligible lands would all ready be specially assessed. Counties and special districts could lose the potential for back taxes owed under the current regime, and this can be addressed if a new special assessment program for conservation easements is ever considered.

[181] 13,597 acres protected in Oregon with easements (Land Trust Alliance survey, 2000), out of over 62 million acres in the state equals 0.002%.

2) Conservation Income Tax Credit

The Conservation Incentives Work Group will most likely, as of this writing, recommend this program to the upcoming Legislative Assembly. This tax credit would allow landowners who voluntarily participate in a conservation program (including a conservation easement) to apply for a tax credit up to 50% of the income foregone or the out-of-pocket expenses incurred in association with the conservation activity. Though this new program adds a layer of incentive for landowners, and does nothing to rectify existing disincentives discussed in this Terminal Project.

3) Redefine who is a "qualified holder" in ORS 271.715

ORS 271.715(3)(a) currently excludes the federal government from being an eligible holder of a conservation easement in Oregon. This can be a significant disincentive for landowners, as evidenced by Appendix F. As the federal government many times has sizeable funds for land or easement acquisition, and as conservation easements become the preferable method to protect private land, Oregon should redefine its definition of a qualified holder to increase the opportunities for landowners.

The Uniform Conservation Easement Act offers a comprehensive definition for public entities as holders. Section 1(2)(i) defines a holder as "a governmental body empowered to hold an interest in real property under the laws of this State or the United States." This would resolve the problems created with Oregon's current definition.

4) Develop a statewide conservation strategy

A much larger question that is beyond this Terminal Project is, "how do conservation easements fit with a statewide conservation strategy?" One of the challenges for land trusts that encounter disincentives such as the kind discussed herein is that there is no guiding framework or strategy that encourages the use of conservation easements to protect private land. The only state agency with funding to acquire conservation easement, the Oregon Watershed Enhancement Board, has yet to fund an easement as of this writing.

The process to develop state conservation strategy would be a time to discuss and determine a role for conservation easements in protecting wildlife habitat. Currently, conservation easements are used in anonymity relative to any coordinated statewide conservation effort. Land trusts are working together and with other conservation agencies to protect the highest priority areas. But without a state-sanctioned strategy, these efforts operate in a vacuum and with little support.

III. Role for Land Trusts

Implementing the four recommendations above would be no small feat. It would take a significant amount of resources, vision, patience, and political will. The entities most concerned with improving conservation incentives in the state are small, local land trusts, often with only a few staff members and meager budgets.

I do not intend to recommend that land trusts take time and energy away from their pressing missions to advocate for the removal of existing disincentives. Partnering with as many public and private agencies is crucial in achieving any of the above recommendations. Some of the larger conservation organizations in the state (The Nature Conservancy and The Trust for Public Land, for instance) have more resources to coordinate and lobby for changes in state policy. Local land trusts can offer the urgency for change as well as a connection to landowners who experience some of these disincentives.

I see two outcomes of this Terminal Project that would help conservation in Oregon. The first involves changes in state policy to create better incentives for landowners desiring to place conservation easements on their lands. This can be a monumental task, and I see little role for land trusts in this environment. Many land trusts choose not to lobby at all, but deal directly, honestly, and effectively with landowners within the current regulatory framework.

This, then, is the second improvement: by recognizing the limitations posed by Oregon's land use environment, land trusts will be better able to work within the existing framework. One of the more interesting conclusions I came to with my research is that few land trusts or public representatives (including local assessors and elected officials) understand the inherent limitations Oregon's land use program pose for conservation easements. Indeed, the idea for this Terminal Project came to me after a landowner described his ordeal with the Department of Assessment and Taxation in Lane County after he donated a conservation easement to the Bureau of Land Management (see Appendix F.) Many people are not aware of the implications awaiting landowners who choose to place conservation easements on their land. The Terminal Project, then, may help land trusts navigate through the existing limitations to do their work better informed and educated.

IV.Future Research Needs

The conclusions of this Terminal Project are mostly anecdotal, supported with research rather than data. There are a few areas where, given more time and resources, additional information would have been very useful. It would be interesting to expand the discussion of land values to include both theory and practice, especially concerning conservation easements. There is little quantifiable evidence in Oregon that land use values do pose a barrier to conservation easements. It is understood that easements are generally worth less in Oregon, and yet there hasn't been a study to prove the validity of this perception. Many conservation practitioners believe and sense that the biggest barrier to conservation easements is the underlying land values, and supporting or refuting this with more research would be very helpful. Surveying land prices, values of conservation easements, and landowners who have chosen not to place conservation easements on their land would provide very interesting evidence related to my conclusions.

Additionally, a survey of landowners who have both chosen to place conservation easements on their land and those who have not (meaning they know about them, but decided not to participate) would offer a wealth of information that would be relevant not only to this subject matter, but also for any subsequent action at the state level to implement some of the recommendations herein. Although, land trusts and conservation groups are, rightly so, timid about exposing their clients (landowners) to study and attention. However, it would be worth looking into.

V. Final Thought

Hindsight is the only perfect science, and I now realize much of the data gaps in my research. Though, this Project is intended to survey the landscape, so to speak, and identify areas of potential incongruity for conservation easements. I believe it has done this, and I hope that it will help inform any efforts to make conservation easements the wonderful tool they can be to protect special lands in Oregon.

Appendix A – IRS Code: §170(h)

(h) Qualified conservation contribution

(1) In general

For purposes of subsection (f)(3)(B)(iii), the term ''qualified conservation contribution'' means a contribution -

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) Qualified real property interest

For purposes of this subsection, the term ''qualified real property interest'' means any of the following interests in real property:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) Qualified organization

For purposes of paragraph (1), the term ''qualified organization'' means an organization which -

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 501(c)(3) and -

(i) meets the requirements of section 509(a)(2), or

(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined

(A) In general

For purposes of this subsection, the term ''conservation purpose'' means -

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is -

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

(B) Certified historic structure

For purposes of subparagraph (A)(iv), the term ''certified historic structure'' means any building, structure, or land area which -

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district. A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.

(5) Exclusively for conservation purposes

For purposes of this subsection -

(A) Conservation purpose must be protected

A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

(B) No surface mining permitted

(i) In general

Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

(ii) Special rule

With respect to any contribution of property in which the ownership of the surface estate and mineral interests were separated before June 13, 1976, and remain so separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

(6) Qualified mineral interest

For purposes of this subsection, the term ''qualified mineral interest'' means -

(A) subsurface oil, gas, or other minerals, and

(B) the right to access to such minerals.

Appendix B – Oregon Revised Statutes ORS 271.715-271.795:
CONSERVATION AND HIGHWAY SCENIC PRESERVATION EASEMENTS

271.715 Definitions for ORS 271.715 to 271.795. As used in ORS 271.715 to 271.795, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Highway scenic preservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open space values of property.

(3) "Holder" means:

(a) The state or any county, metropolitan service district, city or park and recreation district acting alone or in cooperation with any federal or state agency, public corporation or political subdivision; or

(b) A charitable corporation, charitable association, charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(4) "Third-party right of enforcement" means a right provided in a conservation easement or highway scenic preservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder. [1983 c.642 s.1; 1985 c.160 s.1; 1997 c.249 s.78; 1999 c.208 s.1]

271.720 [1967 c.318 s.2; 1975 c.511 s.1; 1981 c.787 s.40; repealed by 1983 c.642 s.11]

271.725 Acquisition and creation of conservation or highway scenic preservation easement.

(1) The state, any county, metropolitan service district, city or park and recreation district may acquire by purchase, agreement or donation, but not by exercise of the power of eminent domain, unless specifically authorized by law, conservation easements in any area within their respective jurisdictions wherever and to the extent that a state agency or the governing body of the county, metropolitan service district, city or park and recreation district determines that the acquisition will be in the public interest.

(2) Except as otherwise provided in ORS 271.715 to 271.795, a conservation easement or highway scenic preservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(3) The state, any county, metropolitan service district, city or park and recreation district may acquire by purchase, agreement or donation, but not by exercise of the power of eminent domain unless specifically authorized by law, highway scenic preservation easements in land within 100

yards of state, county or city highway rights of way. These easements may be acquired only in lands that possess significant scenic value in themselves and contribute to the overall scenic beauty of the highway.

(4) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement or highway scenic preservation easement before its acceptance by the holder and recordation of the acceptance.

(5) Except as provided in ORS 271.755 (2) a conservation easement or highway scenic preservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(6) An interest in real property in existence at the time a conservation easement or highway scenic preservation easement is created is not impaired by it unless the owner of the interest is a party to or consents to the conservation easement or highway scenic preservation easement. [1983 c.642 s.2; 1985 c.160 s.2; 1997 c.249 s.79; 1999 c.208 s.2]

271.730 [1967 c.318 s.3; 1981 c.787 s.41; repealed by 1983 c.642 s.11]

271.735 Hearing; notice.

(1) Before the acquisition of a conservation easement or highway scenic preservation easement, the state agency, county, metropolitan service district, city, or park and recreation district considering acquisition of such an easement shall hold one or more public hearings on the proposal and the reasons therefor. The hearings shall be held in the community where the easement would be located and all interested persons, including representatives of other governmental agencies, shall have the right to appear and a reasonable opportunity to be heard.

(2) Notice of the hearing shall be published at least twice, once not less than 12 days and once not less than five days, prior to the hearing in a newspaper of general circulation in the community. The notice may also be published by broadcasting or telecasting generally in the community.

(3) At least 30 days prior to the hearing, the state agency shall mail notice of the hearing to the governing body of each county, city and other governmental agency having jurisdiction in the area of the proposed easements.

(4) This section does not apply to conservation easements or highway scenic preservation easements acquired pursuant to ORS 390.121, 390.310 to 390.338 and 390.805 to 390.925 or acquired pursuant to a metropolitan service district bond measure authorizing the acquisition of open spaces within specific areas. [1983 c.642 s.9; 1985 c.160 s.3; 1989 c.904 s.29; 1999 c.208 s.3]

271.740 [1967 c.318 s.4; 1981 c.787 s.42; repealed by 1983 c.642 s.11]

271.745 Validity of conservation or highway scenic preservation easement. A conservation easement or highway scenic preservation easement is valid even though:

(1) It is not appurtenant to an interest in real property;

(2) It can be or has been assigned to another holder;

(3) It is not of a character that has been recognized traditionally at common law;

(4) It imposes a negative burden;

(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) The benefit does not touch or concern real property; or

(7) There is no privity of estate or of contract. [1983 c.642 s.4; 1985 c.160 s.4]

271.750 [1967 c.318 s.5; 1975 c.511 s.2; 1981 c.787 s.43; repealed by 1983 c.642 s.11]

271.755 Action affecting conservation or highway scenic preservation easement; standing to bring action.

(1) An action affecting a conservation easement or highway scenic preservation easement may be brought by:

(a) An owner of an interest in real property burdened by the easement;

(b) A holder of the easement;

(c) A person having a third-party right of enforcement; or

(d) A person authorized by other law.

(2) ORS 271.715 to 271.795 do not affect the power of a court to modify or terminate a conservation easement or highway scenic preservation easement in accordance with the principles of law and equity. [1983 c.642 s.3; 1985 c.160 s.5; 1997 c.249 s.80]

271.765 Applicability.

(1) ORS 271.715 to 271.795 apply to any interest created after October 15, 1983, that complies with ORS 271.715 to 271.795, whether designated as a conservation easement or highway scenic preservation easement, or as a covenant, equitable servitude, restriction, easement, or otherwise.

(2) ORS 271.715 to 271.795 apply to any interest created before October 15, 1983, if it would have been enforceable had it been created after October 15, 1983, unless retroactive application contravenes the Constitution or laws of this state or the United States.

(3) ORS 271.715 to 271.795 do not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state. [1983 c.642 s.5; 1985 c.160 s.7; 1997 c.249 s.81]

271.775 Rules governing conservation and highway scenic preservation easements. The board or officer administering a state agency or the governing body of any county, metropolitan service district, city or park and recreation district may make and enforce reasonable rules, regulations, orders or ordinances governing the care, use and management of its conservation easements and highway scenic preservation easements. [1983 c.642 s.7; 1985 c.160 s.8; 1999 c.208 s.4]

271.785 Taxation of property subject to conservation or highway scenic preservation easement. For the purpose of taxation, real property that is subject to a conservation easement or a highway scenic preservation easement shall be assessed on the basis of the real market value of the property less any reduction in value caused by the conservation easement or a highway scenic preservation easement. Such an easement shall be exempt from assessment and taxation the same as any other property owned by the holder. [1983 c.642 s.8; 1985 c.160 s.6; 1991 c.459 s.371]

271.795 Construction of Act. ORS 271.715 to 271.795 shall be applied and construed to effectuate the general purpose to make uniform the laws with respect to the subject of ORS 271.715 to 271.795 among states enacting it. [1983 c.642 s.6; 1997 c.249 s.82]

Appendix C – Restatement notes

§ 1.1 Servitude defined:

(1) A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land.
    (a) Running with land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs.
    (b) A right that runs with land is called a "benefit" and the interest in land with which it runs may be called the "benefited" or "dominant" estate.
    (c) An obligation that runs with land is called a "burden" and the interest in land with which it runs mahy be called the "burdened" or "servient" estate.

"Servitudes may be used for any purpose that is not illegal or against public policy." (page 9, Sect. 1.1)

"Passing automatically means that if the land benefited or burdened by a servitude changes hands, either voluntarily or involuntarily, the servitude goes with it until terminated." (page 9, Sect. 1.1)

Section 1.4 states that the terms "real covenant" and "equitable servitude" have been dropped in common legal vernacular.

§ 1.5 Appurtenant, In Gross defined:

(1) "Appurtenant" means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land. The right to enjoyment of an easement or profit, or to receive the performance of a covenant that can be held only by the owner or occupier of a particular unit or parcel, is an appurtenant benefit. A burden that obligates the owner or occupier of a particular unit or parcel in that person's capacity as owner or occupier is an appurtenant burden.
(2) "In gross" means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.

§ 1.6 Conservation Servitude and Conservation Organization defined:

(1) A conservation servitude is a servitude created for conservation or preservation purposes. Conservation purposes include retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land or agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply. Preservation purposes include preserving the historical, architectural, archaeological, or cultural aspects of real property.
(2) A "conservation organization" is a charitable corporation, charitable association, or charitable trust whose purposes or powers include conservation or preservation purposes.

Comments (page 36):
a) Historical note and rationale. Traditional servitudes doctrines raised potential difficulties for the creation of conservation and preservation servitudes. The primary problem was caused by the rule prohibiting equitable enforcement of restrictive-covenant benefits held in gross [as opposed to appurtenant.] Since most conservation and preservation servitudes are granted to governmental

bodies, land trusts, or other charitable entities that engage in conservation or preservation activities, the benefit will usually be in gross. To avoid the rule prohibiting benefits in gross, the parties could either acquire a parcel to which the benefit could be appurtenant, or substitute a negative easement, which presumably allowed a benefit in gross [to run with the land.] (Though, at common law, only a few purposes for negative easements were allowed. See Dana and Ramsey.) However, common-law precedents cast doubt on the validity of negative easements for previously unrecognized purposes, and on the transferability of the easement benefit.

The uncertainty and difficulties imposed by the common law of servitudes led to the widespread enactment of [state] statutes. The Uniform Conservation Easement Act was promulgated in 1981. In 1999, only three states lacked such a statute.[182] These statutes validate conservation and preservation servitudes without regard to common-law rules, but limit their coverage to servitudes held by governmental bodies and charitable organizations (including corporations, associations, and trusts) whose purposes include conservation or historic preservation. With the elimination of restrictions on creation and transferability of benefits in gross in this Restatement (§§ 2.6, 4.6), there is no longer any impediment to the creation of servitudes for conservation or preservation purposes. However, such servitudes are here separately defined **(page 37)** because special considerations apply to their interpretation and enforcement.

In modern servitude law, landowners are free to grant conservation servitudes to private individuals and noncharitable entities, as well as to governmental bodies and conservation organizations. Although privately held conservation servitudes may warrant some of the special considerations accorded those held by conservation organizations, the public interest in their continued effectiveness is not likely to be as strong as in servitudes held by public or charitable entities, and the expectation of the parties who create them may be closer to those attending the creation of other servitudes. Special rules governing the modification, termination, and enforcement of conservation servitudes held by governmental bodes and conservation organizations are stated in §§ 7.11 and 8.5. Privately held conservation servitudes are subject to the same rules on modifications and termination because of changed conditions (7.10) and enforcement (8.3) as other servitudes.

Statutory Note (page 39) "…none of those traditional requirements [appurtenant, assignable to another holder, imposes either a negative burden or affirmative obligation, benefits do not touch and concern real property, and no privity of contract] is an impediment to [the] creation or enforcement of a servitude under this Restatement [see Sections 2 and 3.]"

(page 60) "Because of uncertainties in traditional servitudes law over the validity of covenant benefits in gross and the assignability of easements in gross, statutes were enacted in all but three states authorizing the creation of servitudes for conservation and preservation purposes to be held by governmental bodies or charitable organization with conservation or preservation powers or purposes."

Chapter 2: Creation of Servitudes

(page 49) "The primary function of the law is to ascertain and give effect to the intent of the parties, not to force them into arbitrary transaction forms. If they meet minimal formal requirements, their

[182] Oklahoma, North Dakota, and Wyoming.

expressed intent is effective to create a servitude, unless the transaction violates a constitutional, statutory, or public-policy norm."

(page 50) Traditional doctrines such as "horizontal privity, prohibited creation of benefits in gross, and required notices have been discarded [in this Restatement] because their principal functions have been taken over by other doctrines in modern law. These requirements were developed in England before there was an adequate land-records system, and they all tended to assure that successors would have notice of servitudes burdening land they purchased. They are all redundant in the United States, where recording acts universally serve that function."

"Under this Restatement, uncertainties over the validity and assignability of benefits in gross have been removed (see 2.6, Creation of Benefits In Gross and Third-Part Beneficiaries, and 4.6, Transferability of Servitude Benefits), thus permitting creation of valid conservation servitudes without reliance on these statutes."

Section 2.2: Intention of servitude very important. Can be expressed or implied. "No particular form of expression is required." (page 62)

Section 2.4: Horizontal Privity is not Required to Create a Servitude. No privity relationship between the parties is necessary to create a servitude. (page 96)

"By the end of the 19th century, English law had taken the position that only negative covenant burdens would run with the land in equity [no matter who owns the land]. As a result, affirmative covenant burdens ran with the land only if they were created in leases." (page 96)

"In American law, the horizontal-privity requirement serves no function beyond insuring that most covenants intended to run with the land will be created in conveyances…Application of the horizontal-privity requirement prevents enforcement at law of covenants entered into between neighbors and between other parties who do not transfer or share some other interest in the land." (page 97)

Section 2.6: Creation of Benefits In Gross and Third-Party Beneficiaries

(1) The benefit of a servitude may be created to be held in gross, or an appurtenance to another interest in property, as defined in 1.5
(2) The benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

"Under the rule stated in this section, benefits of affirmative and negative covenants, as well as of easements and profits, can be held in gross. Benefits in gross are useful in a variety of transactions in which burdens running with land are desired, and are permitted whether the servitude is a covenants, an easement, or a profit. To the extent that benefits in gross cause greater problems than appurtenant benefits in locating the persons who are able to negotiate modification or termination of the servitudes, those problems are dealt with by doctrines governing modification and termination of servitudes, rather than by the ancient method of prohibiting their creation." (page 104)

Section 3.1: Validity of Servitudes: General Rule

A servitude created as provided in Chapter 2 is valid unless it is illegal or unconstitutional or violates public policy.

Servitudes that are invalid because they violate public policy include, but are not limited to:
(1) A servitude that is arbitrary, spiteful, or capricious;
(2) A servitude that unreasonably burdens a fundamental constitutional right;
(3) A servitude that imposes an unreasonable restraint on alienation under 3.4 or 3.5;
(4) A servitude that imposes an unreasonable restraint on trade or competition under 3.6; and
(5) A servitude that is unconscionable under 3.7.

Section 3.2: Touch and Concern Doctrine Superceded
Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude. Whether a servitude is valid is determined under the general rule stated in 3.1 and the particular rules stated in 3.4 through 3.7.

This section shifts the burden of proof of invalidity from Grantee (to prove benefited property touches and concerns burdened property) to s/he claiming invalidity. "The appropriate inquiry is whether the servitude arrangement violates public policy and the burden is on the person claiming invalidity to establish that the arrangement is one that should not be allowed to run with the land." (411)

Section 3.3: Rule Against Perpetuities Inapplicable
The rule against perpetuities does not apply to servitudes or powers to create servitudes.

Section 3.4: Direct Restraints on Alienation
A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint.

Section 3.5: Indirect Restraints on Alienation and Irrational Servitudes
(1) An otherwise valid servitude is valid even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property, or by otherwise reducing the value of the property.
(2) A servitude that lacks a rational justification is invalid.

Appendix D – HB 3564: Wildlife Habitat Conservation Management Program

71st OREGON LEGISLATIVE ASSEMBLY--2001 Regular Session

NOTE: Matter within { + braces and plus signs + } in an amended section is new. Matter within { - braces and minus signs - } is existing law to be omitted. New sections are within { + braces and plus signs + } .

LC 2969

House Bill 3564

Sponsored by Representative SCHRADER

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Requires counties to allow establishment of wildlife habitat conservation and management plans. Defines conservation. Directs State Fish and Wildlife Commission to develop rules specifying form and content of plans. Creates Flexible Incentives Account. Directs Oregon Watershed Enhancement Board to use account to assist landowners in implementing conservation strategies. Directs Division of State Lands to review statutes, rules, policies and programs that affect landowner decisions to implement conservation strategies and report to legislature. Allows State Department of Agriculture and State Department of Fish and Wildlife to enter stewardship agreements.

A BILL FOR AN ACT

Relating to conservation; creating new provisions; amending ORS 215.802, 215.806 and 541.380; and appropriating money.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 215.802 is amended to read:

215.802.

(1) Notwithstanding ORS 215.213, 215.283 and 215.284, but subject to ORS 215.804, a county { - may - } { + shall + } allow the establishment of wildlife habitat conservation and management plans in any area that is zoned for exclusive farm use or mixed farm and forest use.

(2) As used in ORS 215.800 to 215.808:

{ + (a) 'Conservation' means the management of land, water and natural resources for the purpose of meeting human and ecological needs in a sustainable manner. + }

{ - (a) - } { + (b) + } 'Cooperating agency' means the State Department of Fish and Wildlife, the United States Fish and Wildlife Service, the United States Natural Resources Conservation Service, the Oregon State University Extension Service or other persons with wildlife conservation and management training considered appropriate for the preparation of a

conservation and management plan, as established by rules of the State Department of Fish and Wildlife.

{ - (b) - } { + (c) + } 'Department' means the State Department of Fish and Wildlife.

{ - (c) - } { + (d) + } 'Lot' has the meaning given that term in ORS 92.010.

{ - (d) - } { + (e) + } 'Parcel' has the meaning given that term in ORS 215.010 (1).

{ - (e) - } { + (f) + } 'Wildlife habitat conservation and management plan' or 'plan' means a plan developed by a cooperating agency and landowner that specifies the conservation and management practices, including farm and forest uses consistent with the overall intent of the plan, that will be conducted to preserve, enhance and improve wildlife habitat on an affected lot or parcel.

SECTION 2. ORS 215.806 is amended to read:

215.806.

(1)

{ + (a) + } The State { - Department of - } Fish and Wildlife { + Commission + } shall adopt rules specifying the form and content of a wildlife habitat conservation and management plan.

{ + (b) + } The rules { + adopted pursuant to this section + } shall

{ + :(A) + } Specify the conservation and management practices that are appropriate to preserve, enhance and improve wildlife common to the diverse regions of this state.

{ + (B) Specify that wildlife habitat conservation and management plans may include those efforts that improve water quality, protect and restore fish and wildlife habitats, recover threatened or endangered species, enhance stream flows and maintain or restore long-term ecological health, diversity and productivity on a broad geographic scale.

(C) Allow conservation easements held by private land trusts or Indian tribes through a stewardship agreement with local, state or federal governments, government approved conservation plans or conservation designations established through specific legislative action or deed restrictions imposed by private landowners to qualify as wildlife habitat conservation and management plans.

(c) + } Accepted farm and forest practices may be allowed as an integral part of the wildlife { + habitat + } conservation and management practices specified in an approved plan.

{ + (d) The lease or sale of in-stream water rights shall be allowed as an integral part of the wildlife habitat conservation and management practices specified in an approved plan. + }

(2) The rules shall be reviewed annually by the department and revised when considered necessary or appropriate by the department.

SECTION 3.

{ + (1) There is created a Flexible Incentives Account in the State Treasury, separate and distinct from the General Fund. Interest earned by the fund shall be credited to the fund. The moneys in the fund are continuously appropriated to the Oregon Watershed Enhancement Board for the purposes specified in this section.

(2) The Oregon Watershed Enhancement Board shall use the account to assist landowners in the implementation of strategies intended to protect and restore native species of fish, wildlife and plants and to maintain long-term ecological health, diversity and productivity in a manner consistent with statewide, regional or local conservation plans. The board shall seek to fund those strategies that offer the greatest public benefit at the lowest cost.

(3) The account shall consist of all moneys appropriated to it by the Legislative Assembly and moneys provided to the board by federal, state, regional or local governments for the purposes specified in this section. The board may accept private moneys in the form of gifts, grants and bequests for deposit into the account. + }

SECTION 4. { + Section 3 of this 2001 Act is added to and made a part of ORS 541.351 to 541.415. + }

SECTION 5. ORS 541.380 is amended to read: 541.380.

(1) In accordance with the applicable provisions of ORS 183.310 to 183.550, the Oregon Watershed Enhancement Board shall adopt rules and standards to carry out the watershed enhancement program.

(2) The rules and standards adopted by the board under subsection (1) of this section shall include, but need not be limited to:

(a) Grant application requirements and review and selection criteria for projects to receive assistance or funding from the board { + , including funding from the Flexible Incentives Account established under section 3 of this 2001 Act + }.

(b) Criteria for distributing to those entities specified in ORS 541.375 those funds appropriated to the board for funding projects. The criteria shall include a process for periodic review of the distribution by the joint legislative committee created pursuant to ORS 171.551.

(c) Conditions for approval by the board for implementation of a project including but not limited to:

(A) Provisions satisfactory to the board for inspection and evaluation of the implementation of a project including all necessary agreements to allow the board and employees of any cooperating agency providing staff services for the board access to the project area;

(B) Provisions satisfactory to the board for controlling the expenditure of and accounting for any funds granted by the board for implementation of the project;

(C) An agreement that those initiating the project will submit all pertinent information and research gained from the project to the board for inclusion in the centralized repository established by the board; and

(D) Provisions for the continued maintenance of the portion of the riparian area or associated uplands enhanced by the project.

SECTION 6.

{ + (1) The Division of State Lands shall, in consultation with relevant state agencies and other organizations public or private, review state statutes, rules, policies and programs that affect landowner decisions to implement conservation strategies.

(2) The division shall report to the Seventy-second Legislative Assembly on recommendations for improvements to the existing regulatory scheme that would provide incentives to landowners and businesses seeking to develop long-term conservation plans consistent with statewide, regional or local conservation plans.

(3) The report created pursuant to this section shall include, but not be limited to, recommendations on statutory changes, regulatory relief, expedited permitting and tax incentives. + }

SECTION 7.

{ + (1) As used in this section, 'stewardship agreement' means an agreement voluntarily entered into and signed by a landowner, or representative of the landowner, and the State Department of Agriculture, that sets forth the terms under which the landowner will self-regulate to meet the

purposes of conservation and environmental statutes and regulations that may govern actions of the landowner.

(2) The State Department of Agriculture may enter into stewardship agreements with landowners of agricultural lands who, through the agreements, provide substantial conservation, as defined in ORS 215.802.

(3) The objectives of stewardship agreements are to provide responsible and knowledgeable landowners with an opportunity to plan conservation strategies with reduced oversight and regulation from the department and to provide an incentive for landowners to provide for enhancement and restoration of fish and wildlife habitat, water quality and other forest resources.

(4) The department shall adopt procedures and criteria for stewardship agreements. Generally, those procedures shall require that:

(a) Each participating landowner prepare a stewardship plan that includes a description of the lands covered by the agreement and provides:

(A) Plans for the restoration and enhancement of forest resources;

(B) Restoration or enhancement of upstream and downstream fish passage;

(C) Enhancement of upland or fish habitat;

(D) Retention or planting of trees adjacent to streams;

(E) Restoration of habitat for threatened and endangered species or other wildlife habitat;

(F) Enhanced protection of salmonid production areas;

(G) That certain lands remain unimproved; or

(H) Improved water quality or quantity.

(b) Each landowner subject to a stewardship agreement demonstrate a clear capability to carry out the provisions of the agreement.

(c) The department conduct periodic audits on lands under the stewardship agreement at intervals of no more than three years to determine whether the plan is being implemented and whether the agreement should be continued, revised or discontinued.

(d) The stewardship agreement contain requirements that the landowner perform activities or reserve land in a manner not required by any statute or regulation.

(e) The landowner receives a quantifiable benefit for entering into the agreement. + }

SECTION 8.

{ + (1) As used in this section, 'stewardship agreement' means an agreement voluntarily entered into and signed by a landowner, or representative of the landowner, and the State Department of Fish and Wildlife that sets forth the terms under which the landowner will self-regulate to meet the purposes of conservation and environmental statutes and regulations that may govern actions of the landowner.

(2) The State Department Fish and Wildlife may enter into stewardship agreements with landowners of nonagricultural lands who, through the agreements, provide substantial conservation, as defined in ORS 215.802.

(3) The objectives of stewardship agreements are to provide responsible and knowledgeable landowners with an opportunity to plan conservation strategies with reduced oversight and regulation from the department and to provide an incentive for landowners to provide for enhancement and restoration of fish and wildlife habitat, water quality and other forest resources.

(4) The department shall adopt procedures and criteria for stewardship agreements. Generally, those procedures shall require that:

(a) Each participating landowner prepare a stewardship plan that includes a description of the lands covered by the agreement and provides:

(A) Plans for the restoration and enhancement of forest resources;
(B) Restoration or enhancement of upstream and downstream fish passage;
(C) Enhancement of upland or fish habitat;
(D) Retention or planting of trees adjacent to streams;
(E) Restoration of habitat for threatened and endangered species or other wildlife habitat;
(F) Enhanced protection of salmonid production areas;
(G) That certain lands remain unimproved; or
(H) Improved water quality or quantity.

(b) Each landowner subject to a stewardship agreement demonstrate a clear capability to carry out the provisions of the agreement.

(c) The department conduct periodic audits on lands under the stewardship agreement at intervals of no more than three years to determine whether the plan is being implemented and whether the agreement should be continued, revised or discontinued.

(d) The stewardship agreement contain requirements that the landowner perform activities or reserve land in a manner not required by any statute or regulation.

(e) The landowner receives a quantifiable benefit for entering into the agreement. + }

Appendix E – How a Conservation Easement Can Be Used to Protect Family Lands

Below, a fictitious example based in Oregon is provided to help understand how conservation easements can be used to help landowners protect their land, as well as details land trusts must secure to ensure their effectiveness.

An elderly couple is completing their estate planning as they approach their waning years. With all of their assets properly bestowed in their wills, they are planning to leave their 750-acre farm and forest to their six children. However, they are concerned about the fate of their property, as all of their children live by different ethics and lifestyles than they. While the children are interested in keeping the land in the family, the couple is afraid that the heirs will not want to "deal" with the land, and might end up selling it to the highest bidder. Additionally, the estate taxes on the property may be a significant burden on the heirs, and may require the children (or even the surviving spouse) to sell the land. The couple wants see their land preserved, while keeping it in the family.

A local land trust offers their services to help counsel the couple on their options. The property has a stream running through the forest that provides important habitat for salmon, and their farm has been recognized by their county as a "Century Farm;" the husband's grandfather homesteaded on the land in the 1860s. The land is important both for historic value and habitat for native species.

The land trust explains how an easement can meet their goals for their land, as well as how both the landowners and the heirs can reap financial benefits from a donated conservation easement. The IRS allows for a donated easement (meeting certain requirements) to be equated with a charitable contribution.[183] Therefore, the landowners can see a tax deduction of the value of the easement that could ease some of their capital gain taxes they are seeing as they sell other properties they own. The heirs will benefit from a reduction in any estate taxes they will see, as the value of the land is diminished by the easement. This scenario appeals to both the landowners and their children.

The land trust offers to hold a conservation easement on the property. They explain that an easement is a deed restriction that protects the land in perpetuity, and can codify the couple's stewardship ethic in as much as they would like. Whoever owns the land in the future will need to abide by the restrictions the couple decides will be in the easement. The easement can cover the entire 750 acres, or be crafted to cover a portion of the property if they would like.

The 750 acres, while contiguous, are broken into four buildable lots under current zoning laws: the current housesite, and three lots created by the stream and a county road crossing the land and each other. Under current zoning laws, three additional houses could be built. If the family so chooses, the easement can help ensure that whatever the laws are in coming years, the land would not be able to be subdivided or developed.

The land trust explains to the family that, in order to fulfill its obligations to ensure the easement protects the land forever, it needs to secure a "stewardship endowment" that will provide the financial resources necessary to monitor the condition of the property in relation to the easement. Easements are

[183] IRC 170(h). See Appendix A for text.

only as good as they are enforceable, and if and when a landowner in years to come attempts to cheat the easement in some fashion, the land trust must have the ability to enforce the restrictions in the easement. This amount of the endowment is directly proportional to the number of rights left out of the easement. For example, the more impacts landowners can have on the land (selling timber commercially, for example), the higher the endowment.

The couple agrees to donate a conservation easement over the entire 750 acres, as well as endowing its perpetual protection. They would like the easement to extinguish the buildable lots and thereby any chance of developing the land, as well as protect the most critical wildlife habitat. It easement will also protect the forest (200 acres) from clear-cut logging, but allows for select thinning for management and income. The farmland is protected from "incompatible" uses, unless those uses are to restore native wildlife habitat. Their children agree this is the best scenario, since it will reduce the amount of estate tax burden they will inherit as well as see to it that if they do end up selling the farm, their parents' wishes will be protected. Additionally, because the easement allows for the continued use of the property as a farm, their special property tax assessment value is not in jeopardy.[184]

The family and the land trust negotiate the terms of the easement over the next six months. When they come to agreement on the document, the family hires an appraiser and gets it appraised. Soon after the appraisal is done, the land trust completes its report on the "baseline" of the property. This is a snapshot of the property at the time of the easement, used to evaluate changes over time and help determine whether a violation has occurred or not during its annual monitoring of the land. Two months after the appraisal comes in, the landowners sign the conservation easement and the land trust records it with the county.

In years to come, the land trust will keep up a relationship with the landowners (both current and future) to help them understand the terms of the easement. Additionally, the land trust will complete annual monitoring reports describing the status of the property, filing them in its office, in accordance with IRC 170(h)(5)(A) and the corresponding Treasury Regulations (§ 1.170A-14). Once the easement is signed, the real work of the land trust begins. They are obligated and expected to enforce the document, and it must be drafted in enforceable language, given the legal environment in which it operates.

While the details may vary, this is a common example of how conservation easements are used to protect lands across the United States. Each conservation easement is as unique as each property and each landowner. With competent land trusts, committed landowners, and a supportive regulatory system, conservation easements will continue to provide lasting protection for families' stewardship legacies.

[184] For an example of how an easement can jeopardize a special assessment designation, see Appendix F.

Appendix F – Real World Example

The following example shows how complex assessing property with conservation easements can be for local tax assessors and landowners. It also shows the problems Oregon statutes can create by not recognizing the federal government as a qualified holder of a conservation easement. It is unclear why legislators decided to limit the definition of a governmental holder, but leaving out the federal government potentially can have a significant impact on the attractiveness of conservation easements in the state.

A recent case in Lane County, Oregon, illustrates a few consequences of both statutory language in ORS 271.715(3)(a) and the requirements for farmland special property tax assessment.[185] A landowner donated a conservation easement to the U.S. Bureau of Land Management on 22 acres of EFU zoned land in November of 1999. The easement was part of a larger wetland protection program in west part of Eugene, Oregon that involved the City of Eugene, The Nature Conservancy, the BLM, and others (West Eugene Wetlands Partnership). The landowner took a federal tax deduction from the donation, and expected to see his property taxes reduced due to the severe restrictions the easement placed on his property.

The easement represented roughly 90% of the fair market value of the property, and restricted any development and commercial activity (including any agriculture.) When his property tax bill arrived, he was dismayed to see that his taxes were not reduced. Through long conversations (and an appeal process) with Lane County's Department of Assessment and Taxation and the Oregon Department of Revenue, he learned that, for the purposes of local property tax assessment, Lane County could not recognize the conservation easement held by the BLM because the federal government is not listed as a qualified holder under ORS 271.715 (see Appendix B for text of statute.)

One solution to this situation was for the BLM to "co-hold" the easement with a qualified entity. ORS 271.715 allows the federal government to hold easements while "working…in cooperation" with a public agency listed as a holder. If the easement was amended to add a second Grantee (who would co-hold the easement with the BLM), the county could recognize the easement as valid.

While an appropriate organization was sought to co-hold the document, the landowner appealed the property tax assessment again. This time the property tax board ruled in the landowner's favor. The board found that because the BLM was working under formal agreement with the City of Eugene to partner in the West Eugene Wetlands Partnership, the agency met the "working…in cooperation" requirement of the statute. So, the assessor must recognize the easement.

However, this caused a new problem for the landowner. The county assessor determined that, because the easement restricts all agriculture production, the property did not meet the requirements for the farmland property tax special assessment program. As discussed in Chapter 4, land in EFU zones that are disqualified for special assessment program will be liable for up to 10 years back taxes if the land is incompatible with a return to farming. Since the easement does allow farming activities, the assessor determined the land cannot ever be farmed, and so the landowner was liable for back taxes.

[185] Information for the following example taken from personal interviews with Joyce Kehoe of the Lane County Property Tax division (July 8, 2002), Bruce Tindall of the Oregon Department of Revenue (July 22, 2002), and Richard Briggs (landowner, November 18, 2002)

State law says that landowners can "roll over" into other special assessment programs without being penalized. In this case, the landowner is currently enrolling in the open space special assessment program, described in Chapter 4. If successful, he will avoid having to pay additional property taxes, and will keep the special assessment value for his land.

This whole situation is interesting for many reasons. First, the fact that Oregon does not recognize the federal government as a qualified holder does nothing to jeopardize the legality of the easement. The easement is still valid, and subsequent landowners will have to abide by its provisions. What the statute does do is not allow landowners the benefit of having the easement recognized by county assessors. This, in some situations, could result in higher property taxes if the value of the property with the easement in place is significantly lower than the land's previously assessed value.

Another interesting aspect of this example is the confusion assessors face when appraising conservation easements on properties enrolled in special assessment programs. ORS 271.785 (Taxation of property subject to conservation or highway scenic preservation easement) states that assessors must recognize any reduction in value an easement causes a property when assessing it for tax purposes. This statute states,

> *For the purpose of taxation, real property that is subject to a conservation easement or a highway scenic preservation easement shall be assessed on the basis of the real market value of the property less any reduction in value caused by the conservation easement or a highway scenic preservation easement. Such an easement shall be exempt from assessment and taxation the same as any other property owned by the holder.*

This is more interesting when one looks at how Measure 50, passed by Oregon voters in 1997, restructured how property taxes are assessed. One of the components of this new system is the rule that the Assessed Value (AV, the value of the property for tax assessment purposes) of any property cannot be higher that the Real Market Value (RMV.) The RMV "is typically the price [a] property would sell for in a transaction between a willing buyer and a willing seller on January 1, the assessment date for the tax year."[186] Even though Lane County determined it couldn't recognize the easement for tax purposes, Measure 50 poses a dilemma: the state cannot recognize a conservation easement held solely by the federal government for the purposes of state laws and local tax assessment, and yet must recognize the easement in its assessment of a property's Real Market Value.

The above example shows the complexity and cumbersome nature of how our current property tax system interacts with conservation easements.

[186] http://www.co.multnomah.or.us/dss/at/prop_tax.html (visited on November 17, 2002.)