

Conservation Easements 101

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What is a conservation easement?

In general terms, a conservation easement is a legal agreement between a landowner and an eligible organization that imposes restrictions or affirmative obligations on a property to retain or protect natural or historic resources.

Like traditional easements, a conservation easement is a conveyance of less than the landowner's entire interest in the property, and its terms are binding upon the successors and assigns of the original parties.

Conservation easements are generally voluntary agreements negotiated between a grantor and grantee for consideration or through charitable donation. The grantee, also known as the holder of the easement, typically must be a conservation organization or a government entity.

How prevalent are conservation easements?

The interest in conservation easements arose as part of the environmental movement in the early 1970s. The federal government allowed the donation of a conservation easement to be considered a tax-deductible charitable gift, first temporarily in 1976 and then permanently in 1980 (26 USC §§ 170(f)(3)(B)(iii) and 170(h)). This significant incentive has caused the use of conservation easements to proliferate across the country, with over 100,000 recorded easements protecting over 22 million acres on private and public lands through 2014. National Conservation Easement Database at a Glance (2014), www.conservationeasement.us. However, the use of conservation easements in Oregon has been less robust largely due to the protections afforded to farm and forest lands through the state's land use planning program.

In Oregon, there are over 460 conservation easements, protecting 156,500 acres, according to the Coalition of Oregon Land Trusts (COLT). The federal government holds 252 of these easements, with wetland protection on private lands through the Natural Resources Conservation Service (NRCS) being the predominant easement type. Land trusts hold approximately 189 easements and the remainder is largely held by state and local government agencies.

How is a conservation easement defined in Oregon?

Oregon law authorizes conservation easements under ORS 271.715 to 271.795. In ORS 271.715(1), a *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, ensuring 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.

Conservation easements are in perpetuity unless otherwise stated. ORS 271.725(5).

What is a holder of a conservation easement?

Under ORS 271.715(3), holder of a conservation easement falls into one of three groups:

- (1) select government entities;
- (2) charitable corporations, associations, and trusts having the purpose or power to retain or protect the same conservation values as enumerated in the conservation easement definition cited above.
- (3) Indian tribes, as defined in ORS 97.740.

The government entities that may hold conservation easements are the state, counties, metropolitan service districts, soil and water conservation districts, cities, park and recreation districts, and county service districts providing sewage and storm water services in Clackamas and Washington Counties. ORS 271.715(3)(a).

Interestingly, the statute does not specifically state that the federal government may be a holder of a conservation easement. However, qualifying government entities in ORS 271.715(3)(a) may hold conservation easements “acting alone or in cooperation with any federal or state agency, public corporation or political subdivision.” Moreover, it is presumed that the federal government has authority to hold and enforce conservation easements in Oregon under the doctrine of federal preemption. See *N. Dakota v. United States*, [460 US 300](#), [103 S Ct 1095](#), [75 L Ed 2d 77](#) (1983).

Where are holders eligible to acquire conservation easements?

Eligible government entities “may acquire by purchase, agreement or donation” conservation easements in “any area within their respective jurisdictions.” ORS 271.725(1).

Do you need to provide public notice and a hearing before acquiring a conservation easement?

A private entity holder does not. However, typically government entities in Oregon do require notice and a public hearing. Under ORS 271.735, a government entity considering acquisition of an easement shall hold one or more public hearings to consider the proposed easement and reasons for it and give all interested persons and governmental agencies the right to appear and be heard. The hearing shall be “held in the community where the easement would be located.” ORS 271.735(1). General public notice shall be published at least twice before the hearing in a manner according to the terms in ORS 271.735(2). Notice must be mailed 30 days prior to the hearing to other government bodies “having jurisdiction in the area of the proposed easements.” ORS 271.735(3). These notice and hearing requirements do not apply to conservation easements acquired by the Oregon Parks and Recreation Department Commission, through state Willamette River Greenway and Scenic Waterway legislation, or through metropolitan service district bond measures authorizing the acquisition of open spaces within specific areas. ORS 271.735(4)

Moreover, the governing body of the government entity or the state agency that is acquiring the easement must determine that the acquisition of a conservation easement will be in the “public interest.” ORS 271.725(1).

What rights do holders of conservation easements have?

The main right typically afforded a holder is the ability to monitor and enforce, if need be, the restrictions and terms of the conservation easement against the land owner to protect the conservation values of the encumbered property. Since conservation easements are most often in perpetuity, this monitoring and enforcement right is an ongoing responsibility. Consequently, entities acquiring conservation easements need to have resources in the long-term to meet these obligations.

Conservation easements also can be drafted to allow holders affirmative rights on the protected property, such as the ability to conduct habitat restoration on the property to enhance its conservation values.

Where in Oregon can conservation easements be effectively used?

Oregon's land use planning program, which helps contain urbanization in growth boundaries and protect agricultural and forest lands in rural areas, may reduce the use of conservation easements in the state. Since resource lands receive protections from development through the land use planning program, the need to use conservation easements to control urban sprawl and protect farmland is less prevalent compared to other states where such restrictions are not present. However, conservation easements have their place in Oregon and can be utilized more often with increased public and practitioner awareness.

Particularly, this author has seen the effective use of conservation easements to protect portions of under-performing resource land that could be retired to benefit the environment, such as wetlands and riparian corridors, but otherwise cannot be acquired in fee by a conservation organization due to lack of access or lot size requirements. This is especially true in situations where private lands are adjacent to protected conservation areas and only an undeveloped portion of a landowner's property is needed as an addition to the conservation area. It may be inefficient and costly to purchase entire properties in this instance, and conservation easements provide a flexible conservation tool for landowners and conservation entities alike. Moreover, landowners can, for example, sell or donate most of their rights to that portion of the property in furtherance of conservation, but still retain important rights of private ownership, such as the ability to recreate on the property and exclude the general public.

Conservation easements can be used to fill in the gaps in the existing state land use planning program, which is riddled with exceptions. For example, conservation easements could be used to protect farmland from aggregate mining, wind turbines, golf courses, destination resorts, and Measure 49 home sites that otherwise might be allowed under the current laws and planning rules. Moreover, land use and other environmental laws may be temporary and can be weakened or repealed over time. Conservation easements provide the permanent protections that legislation and rulemaking cannot guarantee.

Working-land easements, which are gaining in popularity in Oregon and elsewhere, are encumbrances that allow farm and forest operations to continue on resource lands, but in a manner that is more sustainable or less intensive than allowed under traditional industry practices; for example, reducing the timber harvest levels below what is permitted under current law in order to protect forest land for watershed management, wildlife habitat, or carbon sequestration. Urban lands currently used for farming that have development rights may present another opportunity to conserve land for agricultural protection, particularly given the current interest in community supported agriculture and the local food movement.

Conservation easements are also an important tool for government entities in Oregon to use on properties that it helps fund the acquisition of but does not hold title to. This allows the government to protect the public's conservation investment in the property in perpetuity while allowing a third party, such as a land trust, to hold title and be responsible for the day-to-day management of the property, which saves taxpayer money.

How do you value a conservation easement?

Determining the value of a conservation easement is often an important factor for landowners in deciding whether to grant an easement on their land to a land trust or government entity. If a useable property right, such as those mentioned above, is being relinquished through an easement, this is a right that can be appraised. If it can be appraised, then it has value that either can be purchased by or donated to a qualified holder. If it can be bought or donated, then the use of conservation easements will be more prevalent. Consequently, understanding the existing zoning laws and permitted uses on a property and what property rights are being relinquished in an easement document are key points to any discussion about the valuation of an easement. It is also important to employ an appraiser experienced with conservation easements if an appraisal is needed to substantiate a valuation for purchase or donation.

The fair market value of a conservation easement is typically determined by calculating the difference between the fair market value of the property as a whole before it is encumbered with the easement and the fair market value of the property after the granting of the easement (i.e., the *before and after* test). Since in most cases a substantial record of sales prices of comparable easements do not exist, the *before and after* method is the best and most accepted approach appraisers use in valuing conservation easements.

Note that a *before and after* valuation must consider not only the current use of the property, but an objective assessment of how immediate or remote the likelihood is that the property, absent the easement, would in fact be developed. Furthermore, there may be instances where the grant of a conservation easement may have no material effect on the value of the property or may enhance, rather than reduce, the value of the property.

Conclusion

Conservation easements can be an effective tool to further land conservation and historic preservation in the State of Oregon. The state enabling statute provides landowners and conservation entities the opportunity to craft creative agreements that complement the protections afforded by Oregon's existing land use planning system and environmental regulations, while keeping the land in private ownership.

Land trusts and government entities in certain instances can pay for these rights, thus giving landowners a financial motivation to voluntarily protect their lands from future development. The potential federal tax benefit to a landowner who donates a conservation easement to a qualified holder is another powerful incentive. The Land Trust Alliance, which sponsors conferences taught by professionals involved with land conservation across the country, is also a good resource to keep abreast of this ever-evolving and complex subject.

As practitioners continue to become educated on the subject, conservation easements will play an increasingly important role in the protection of working lands, water quality, scenic vistas, historic lands, and wildlife habitats in the beautiful State of Oregon.