

Conservation Easement Nuts and Bolts



DESIGNING EASEMENTS FOR PERPETUITY

Paul Majkut



IRS Requirements



- **Perpetual**
- **Held by a “qualified conservation organization”**
- **Serve a valid “conservation purpose”**
 - Preservation of land areas for outdoor recreation by, or the education of, the general public
 - Protection of relatively natural habitats of fish, wildlife, plants, or similar ecosystems
 - Preservation of open space (including farmland or forest land) and/or
 - The preservation of a historically important land area or certified historic structure
- **Value of Conservation Easement must be determined by a “qualified appraisal”**

Qualified Conservation Organization



- A governmental unit or an IRC 501(c)(3) public charity
- Commitment to protect the conservation purposes of the donation
 - Established monitoring program
- Resources to enforce the conservation restrictions

Accreditation



- **Voluntary program established by Land Trust Alliance in 2008**
- **Verifies applicant compliance with Land Trust Standards and Practices**
- **Goal is to have 350 accredited land trust by 2016 and 500 over time, representing 90 percent of conserved land in America**

Tax Benefits of Conservation Easements



- **Income** – The donation of a conservation easement, or the bargain sale of an easement may be treated as a charitable gift, making the value of the easement tax deductible.
 - Enhanced tax incentives for agricultural easement donors.
- **Estate** – By transferring development rights, a conservation easement reduces the value of the land, potentially providing a significant reduction in the estate tax burden.
 - In addition, if the land is subject to a qualifying conservation easement and meets certain additional requirements, an additional 40% of the land's restricted value may be excluded from the taxable value of the estate, up to \$500,000

Easement Drafting



- **Draft from the Ground Up**
 - Baseline documentation
- **Determine whether to prioritize conservation purposes**
- **Avoid restrictions that cannot be monitored and enforced**

Easements and water rights



- **Baseline inventory**
 - Identifies source of water, uses, priority, POD and POU, season of use, rate and duty, duration and required instream flows
- **Land Management Plan**
 - Assures future agricultural use will not diminish or impair the Conservation Values of the property, including water rights
- **Options**
 - Continue water right
 - Instream lease for full or split season – up to 5 yrs, renewals OK;
 - Permanent or time-limited instream transfer (over 5 yrs)
 - ✦ No irrigation, dry land crops OK
- **Coordination with the Freshwater Trust or the Deschutes River Conservancy is strongly advised.**
 - Funding may be available

Monitoring, Stewardship and Preventative Maintenance



- **Baseline Report**
- **Monitoring** - The easement holder monitors the property on a regular basis, typically once a year
- **Stewardship** – The easement may create affirmative obligations for the easement holder to provide stewardship, such as weed control or fence maintenance
 - ✦ May be done in partnership with the landowner.
- **Enforcement** – Easement holder is responsible for enforcing the restrictions set forth in the easement document in perpetuity.

Easement Violations



- Land owner violations are rare. Most major violations are by subsequent landowners.
- Legal expenses to defend an easement can be substantial
- Terra Firma
- Reserve Fund