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Trends in private land conservation: Increasing complexity, shifting conservation purposes and allowable private land uses

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ABSTRACT

The terrain of private-land conservation dealmaking is shifting. As the area of private land protected for conservation increases, it is time to understand trends in private-land conservation agreements. We examined 269 conservation easements and conducted 73 interviews with land conservation organizations to investigate changes in private-land conservation in the United States. We hypothesized that since 2000, conservation easements have become more complex but less restrictive. Our analysis reveals shifts in what it means for private land to be "conserved." We found that conservation easements have indeed become more complex, with more purposes and terms after 2000 compared to conservation easements recorded before 2000. However, changes in restrictiveness of conservation easements varied by land use. Mining and waste dumping were less likely to be allowed after 2000, but new residences and structures were twice as likely to be allowed. We found a shift toward allowing some bounded timber harvest and grazing and a decline in terms that entirely allow or prohibit these working land uses. Interviews revealed staff perceptions of reasons for these changes. Our analysis suggests that "used" landscapes are increasingly important for conservation but that conserving these properties stretches the limits of simple, perpetual policy tools and requires increasingly complex and contingent agreements.

1. Introduction

Land conservation can prevent development and enhance environmental management and recreation. Conservation easements (CEs) are part of the global trend toward decentralized environmental governance in which nonprofit and government entities negotiate standards and enforce rules (Owley, 2013). Internationally, public agencies and nonprofit organizations have sought ways to augment land protection and are increasingly relying on CEs. As CEs become more important for land conservation, it is helpful to understand how the tool is evolving (Merenlender et al., 2004). Because they are perpetual restrictions on land based on today's understanding and preferences, CEs tend to remain fixed once established with subsequent transactions reflecting organizational learning and changing conservation contexts (Rissman, 2011). Organizations and landowners are learning from experience and responding to changing institutional contexts for conservation, so CEs established in the 1980s and 1990s may be substantially different from those of more recent decades.

We examined 269 conservation easements from six U.S. states to investigate differences between older and more recent CEs and conducted 73 interviews with staff of organizations holding these CEs. The CE and interview data present a compelling story of change within private-land conservation. Scholars and practitioners have noted increasing sophistication of CEs (Boyd et al., 1999). Yet, the trends and contours of these changes have not been examined systemically. Understanding how CEs are changing provides important information to land conservation stakeholders considering how to conserve land.

1.1. Conservation easements

CEs are nonpossessory rights in land with a conservation purpose. The holder of a CE is a government agency, nonprofit land trust, or Native American tribe with a nonpossessory right in another person or entity's real property. Such rights are generally negative, prohibiting the landowner from doing something she would have otherwise been able to do. CEs can also contain

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affirmative rights, giving the CE holder the right to do something the landowner could have otherwise prohibited. Whether negative or affirmative, the goal of the restriction is to yield a conservation benefit (NCCUSL, 2007). CEs vary widely in purposes, restrictions, and the size and landscape context of conserved properties. Common examples of CE terms include prohibitions on development, limitations on activities in wetlands, and rules regarding forestry and agricultural practices.

The CE tool has evolved significantly. Historically, courts did not approve of CEs, disfavoring long-term restrictions on land that made transfers and negotiations regarding land uses more cumbersome. Conservationists grew dissatisfied with the limitations of public land conservation and land-use regulation and began to look for additional mechanisms to protect environmental amenities (King and Fairfax, 2006; Owley, 2006). CEs appeared a logical outgrowth of traditional property agreements like easements and real covenants that restrict a landowner's behavior on her own land or permit a right holder to do something on the land (like trespassing) that the landowner would otherwise have been able to prohibit. CEs needed new legal foundations due to inherent legal conflicts with traditional real estate mechanisms (that limited permissible holders and purposes of servitudes) and the desires of conservationists (Cheever, 1996). Therefore, beginning in earnest in the 1970s and increasing after a 1981 Uniform Act (the UCEA), U.S. states enacted CE statutes validating the use of such agreements and creating foundations for their enforcement. The CE deduction was added to the U.S. federal tax code in 1980, enabling a charitable tax deduction for donated CEs and estate tax benefits. All fifty states, Washington D.C., Puerto Rico, and the Virgin Islands now have CE statutes. Other nations have been following this model, and we now see CE-like structures in the Scotland, Australia, Canada, Kenya, Costa Rica, and Mexico (Di Leva, 2002; Jacobs, 2014; Korngold, 2010; Rissman et al., 2014). There are also proposals for development elsewhere, including England, Wales, Papua New Guinea, and Chile (Root-Bernstein et al., 2013; Stolton et al., 2014; Telesetsky, 2001).

The growth in CEs in the U.S. has been driven by the growth of the land trust movement and the infusion of public funding from ballot initiatives and the U.S. Farm Bill. The number of land trusts has grown at an incredible rate. In 1950, there were only 53 land trusts, and in 2011 there were over 1700 (McLaughlin, 2004; Chang, 2011). The 2010 Land Trust Alliance's Census tallied the total hectares of CEs held by land trusts at over 19 million (Chang, 2011). In 2000, there were only 9.3 million hectares held by state, local, and national land trusts. This number does not include the millions of additional hectares held by government agencies.

The land trust movement and the use of CEs matured between the 1980s and 2010s. The Land Trust Alliance first published *The Conservation Easement Handbook* in 1988 and the *Standards and Practices Guidebook* in 1993. Farm Bill funding became available for land-trust-held CEs in 2002 (Alliance, 2013). By the early 2000s, CEs were subject to heightened academic, media, and governmental scrutiny. Senate Finance Committee and IRS investigations began in 2003, resulting in hundreds of CE audits. The Land Trust Accreditation Commission was created in 2006 to set national organizational standards.

We expected to see two trends in CE terms: increasing complexity and declining restrictiveness of private land use. Our research group has experience working with CEs as attorneys, academic researchers, and board members of land trusts. This experience suggests that CEs are getting longer and more complicated. At the same time, however, CEs appear to be allowing more development and landowner uses of the conserved property. We conducted a survey of CE documents and interviews with CE holders to test our hypotheses and quantify these trends, comparing CEs created before and after 2000.

Hypothesis 1. Conservation easements have increased in complexity

We expected to find that CEs increased in complexity, with newer CEs including more purposes and terms. Contract theory, diffusion of innovation, and organizational learning suggest an increase in complexity over time (Argyres et al., 2007; Gray, 1973; Vanneste and Puranam, 2008). CEs evolved in conjunction with changes in state and federal law, funder requirements, and increased public scrutiny. As land trusts and government agencies mature and CE use increases, holders are more likely to be repeat participants. With this experience and the growth in the number of attorneys working with CEs, we expect organizations to anticipate more potentialities and negotiate for more terms, seeking to maximize the likelihood of achieving their conservation goals. We also expect that donated CEs might be less complex than purchased or partially-purchased CEs (Rissman, 2010). CEs are also more likely to be part of mitigation for development or habitat destruction in which the expectation for defined rules and duties is higher (Owley, 2011). Larger properties may also require greater complexity in CE terms.

An increase in complexity of conservation easements would be consistent with trends seen in other types of contractual documents. Attorneys often seek to improve contract completeness by adding contingency planning or by increasing contract details (Argyres et al., 2007; Crocker and Reynolds, 1993). As parties to contracts learn about potential outcomes through personal experience, court cases, and news reports, they add contract language regarding such events. Though characterized as deed restrictions, CEs are similar to contracts, are often referred to as contracts (Tegene et al., 1999), and courts use contract rules when interpreting them (Haines, 2012).

Innovative terms may also have diffused through conservation organizations. Diffusion of innovation occurs where there is "communication of a new idea in a social system over time" (Gray, 1973). Increased levels of interaction though social media likely magnify this effect. For example, increased use of model CEs, publications like the *Conservation Easement Handbook* or the Land Trust Alliance's *Standards and Practices*, or discussions on the Land Trust Alliance listservs enable drafters to easily adopt terms and techniques used by others. It is also possible that there is a bandwagon effect (Asch, 1955) for CE terms. That is, the probability of any holder adopting a particular term increases with the proportion of holders who has already done so (Colman, 2012).

Organizational learning theory supports the hypothesis of increasing complexity. Organizational learning is a change in an organization's practices based on experience (Argote, 2013). As land trusts enter into more CEs, staff members change and improve their CEs based on their earlier transactions and in reaction to conflicts that have arisen with landowners. Repeated interactions enable drafters to capture more contingencies. Changes are more frequently driven by actual experiences rather than increased ability to predict potential future occurrences (Mayer and Argyres, 2004). It is impossible to foresee all contingencies, and staff identify important terms that were left out of prior CEs. For example, if land trusts have problems with landowners dumping trash, they are likely to add provisions on waste dumping to future CEs. Incorporating new CE terms guards against organizational forgetting and may leave terms in subsequent CEs long after individual staff members have forgotten why the terms first appeared (Argote, 1999).

Hypothesis 2. Conservation easements have decreased in restrictiveness