

Conservation Easements and Global Climate Change

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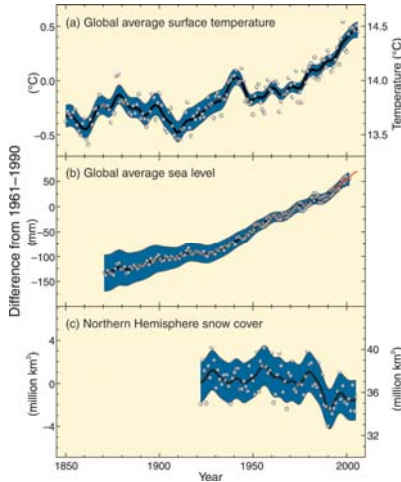


Conservation Easement: A nonpossessory interest of a holder in a real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agriculture, forest, recreational 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. Unif. Conserv. Easement Act § 1(1) (1981).



Changing Conservation Easements with the Changing Climate

Conservation Easements and Carbon Credits



Likely Impacts of Global Warming are Severe.

Land conservation is necessary to combat the ills of climate change and environmental degradation. The warming of the climate system is unequivocal. The Intergovernmental Panel on Climate Change (IPCC) recently released an updated report regarding the existence and impacts of global climate change. The report noted that the “resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g., flooding, drought, wildfire, insects, ocean acidification) and other global climate change drivers (e.g., land use change, pollution, fragmentation of natural systems, overexploitation of resources).”

HOW DO WE CALCULATE THE CREDIT?

Calculation of Carbon Credits

- **Additionality Concerns:** In calculating carbon credit, it is important to confine our credits to projects that would not have been already occurring in the absence of carbon credits. The goal of a carbon credit system (whether part of cap and trade or some other system) is to increase the amount of sequestration. Strong argument that conservation easements are not dependant on carbon credits.
- **Time Line:** Would/Should we require perpetuity? How long must the carbon be sequestered to be calculated?



WHO SHOULD GET THE CREDIT?

How do we handle distribution of carbon credits? The availability of carbon credits may increase landowner participation, but land trusts may also seek to assert a proprietary right in any carbon credits. Not clear how we would deal with this for already existing agreements that fail to address the issue.

- Underlying Landowner: possible impacts on tax assessment
- Conservation Easement Holder: possible impacts on valuing the organization’s holdings.
- Parties Structuring the Agreement: For exacted conservation easements and other agreements, one might contend that the developer or permitting agency should get the benefit of any carbon credit.

WHAT HAPPENS TO THE TAX BREAK?

Tax Breaks and Carbon Credits

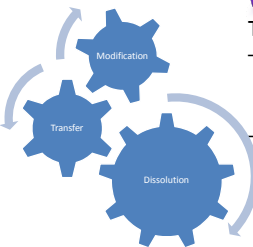
- One of the attractions of conservation easements for landowner/donors is the charitable and estate tax breaks. If the landowner retains the carbon credit, should tax credits be reduced? Does it matter how speculative the various calculations are?
- Where a land trust (conservation easement holder) receives the carbon credit, should the charitable donation calculation increase to include the value of the carbon credit?

Traditional Easement Law

- Section 2(a) of the UCEA explains that conservation easements may be “released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” Several states have adopted this language outright.
- Holder and the burdened landowner may make private agreements about the land outside of courts and beyond public review, including releasing the landowner from any obligations or burdens.

Examples

- **Nebraska**—release with approval from the governing body that approved the conservation easement where the conservation easement “no longer substantially achieves the conservation or preservation purpose for which it was created.”
- **Virginia**—courts may modify or terminate conservation easements “in accordance with principles of law and equity.”
- **Louisiana**—conservation easements may be terminated in the same manner as other servitudes created by contract.
- **Colorado**—explicitly allows dissolution by merger + a catch-all of “any other lawful method of terminating, releasing, extinguishing or abandoning easements.”
- **Illinois**—holder may release
- **Tennessee**—may only be dissolved by merger.



Doctrine of Changed Conditions

Conditions or circumstances have changed so significantly since the agreement was first made that it would be unfair for a court to enforce the agreement in its current form.

Climate-induced changes could shift habitats, ecosystems, and affect our land use decisions. On one hand, we may seek to dissolve conservation easements and put the land to other uses. Perhaps conservation efforts would be better focused elsewhere or the land in question becomes more appropriate for other purposes. In such cases, conservationists may invoke the doctrine of changed conditions in an attempt to get out from under their current obligations. On the other hand, conservation easement holders may wish to continue protecting the land and will have to argue against application of the doctrine as justification for dissolving the conservation easement.

The standard to show that conditions have changed is generally high. To determine whether conditions have changed significantly enough to merit terminating a servitude, one must examine the language of the agreement and how it articulates its purposes. One show that the conditions have changed to the extent they must frustrate the purpose of the conservation easement. RESTATEMENT OF PROPERTY § 564 (comment c).



Cy Pres

Some scholars (Nancy McLaughlin chief among them) have argued that this traditional trust law concept should apply in the conservation easement context. This doctrine could be invoked to bring a conservation easement’s previous goals in line with present day realities where global climate change disrupts the state conservation purposes. A court could use the cy pres doctrine to continue to protect the landscape despite potentially dramatic changes to it.

Speculative Conservation Easements

Consider using conservation easements to protect land that will become valuable. Some areas that we might currently identify as marginal could become significant as climate change effects ecosystems.

Queries:

- How would we structure conservation easements when we are not yet certain of their ecosystem value?
- How would we evaluate such conservation easements for tax purposes. The present day calculation may greatly undervalue such land protection.

