

# CONSERVATION EASEMENTS IN WYOMING – AN OVERVIEW

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## **I. Definition**

A short definition:

*“Conservation easements are voluntary agreements that protect resources by limiting development of the land.”*

Univ. of Wyo. IENR Pub. B-1158 (2004).

An alternative explanation:

*"Simply put, a conservation easement is a recorded restriction on what you and any future landowner can do with your land. A conservation easement is an agreement . . . . It spells out what activities are prohibited on the property in the future and what activities are permitted on the property in the future. The easement is enforceable against you and any future owner of your land."*

*S. Small, Preserving Family Lands III, at 29 (2002).*

Wyoming law:

*"'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, archeological or cultural aspects of real property."*

W. S. § 34-1-201(b)(i).

## **II. General Characteristics**

A *conservation easement* is a restriction on the use of real property:

- typically created in a contract or deed between landowner and land trust
- landowner gives up certain rights in land
- easement holder has right to perpetually enforce restrictions
- easement protects conservation values (habitat, open-space, scenic views)
- easement usually prohibits most commercial/industrial uses
- landowner may retain rights to agricultural, residential and recreational uses
- conservation easement lands are usually not open to public access

## **III. Easement Legislation in Wyoming**

Uniform Conservation Easement Act (UCEA), W.S. §§34-1-201 through -207:

- adopted in 2005
- based on model legislation, previously adopted in some form in most states
- Montana - 1969; Colorado - 1976; Nebraska - 1981; South Dakota - 1984; Utah - 1985
- associated with Historic Preservation Easement Act. W.S. §§34-1-301 through -304
- allows easements "in gross," not appurtenant to other land. W.S. §34-1-204
- conservation easement may be created, modified in same manner as other easements. W.S. §34-1-202(a)
- interest in minerals not impaired unless mineral owner agrees. W.S. §34-1-202(d)

"Broadly speaking, such statutes reflect the consensus reached by the citizens of those states about the importance of protecting particular lands and the desirability of using conservation easements to do so. This consensus reflects both a willingness to accept and advance land protection as a goal and a willingness and ability to weave conservation easements into the existing real property law of the state." *Gustanski & Squires, Protecting the Land, at 72-73 (2000)*.

#### **IV. Supporting Wyoming Case Law; Perpetuities**

"Restrictions upon the use of land are not favored, will not be extended by implication and, when in doubt, will be construed in favor of the free use of the land." *Hutchinson v. Hill*, 3 P.3d 242, 245 (Wyo. 2000); *Kindler v. Anderson*, 433 P.2d 268, 271 (1967).

In Wyoming, "[a]n 'easement' is an interest in land which entitles the easement holder a limited use or enjoyment over another person's property." *Meuller v. Hoblyn*, 887 P.2d 500, 504 (Wyo. 1994).

"The holder of a negative easement has, by virtue of such an interest, no right to active use; rather the holder can merely insist that the burdened party refrain from certain uses or uses in certain areas." *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 729-30 (Wyo. 1985).

"An agreement restricting the use of land is described in many cases and considered to be a negative easement. . . . [I]ts real effect upon the use, enjoyment and value of the property to which it may be attached is obvious. . . . [S]uch covenant does affect the title, use, and estate . . . . It would appear of particular importance that such restrictive covenants be classified as interests in land without reference to particular terminology because of their increasing importance and use in our modern-day society." *Remilong v. Crolla*, 576 P.2d 461 (Wyo. 1978)

Perpetuity issues. There are none.

- easement deemed perpetual unless instrument provides otherwise. W.S. §34-1-202(c)
- easement must be perpetual for federal tax deduction *IRC §170(h)(2),(h)(5); Reg. 1.170A-14(g)*
- certain interests that vest in the future are void. W.S. §34-1-139
- conservation easements vest immediately and do not violate the "Rule Against Perpetuities" *See Benson, "Perpetuity" What Does it Mean for Conservation Easements and the Wyoming Constitution?*, Univ. of Wyo. IENR Pub. B-1158 (2004)

## **V. Land Trusts/Easement Holders**

The following entities may hold conservation easements in Wyoming (W.S. §34-1-201(b)(ii)):

(A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States but does not include the Wyoming board of land commissioners after the effective date of 2008 House Enrolled Act 15; or

(B) A charitable corporation, charitable association or charitable trust, but only if a primary purpose or power of the charity includes:

- (1) retaining or protecting the natural, scenic or open space values of real property;
- (2) assuring the availability of real property for agricultural, forest, recreational or open space use;
- (3) protecting natural resources;
- (4) maintaining or enhancing air or water quality; or
- (5) preserving the historical, architectural, archeological or cultural aspects of real property.

Among the active land trusts or easement holders in Wyoming are:

- The Nature Conservancy
- Wyoming Stock Growers Agricultural Land Trust
- Wyoming Land Trust
- Jackson Hole Land Trust
- Sheridan Community Land Trust
- Rocky Mountain Elk Foundation
- Wyoming Game and Fish Commission

## **VI. Landowner Benefits**

### **1. Land Preservation.**

- seeing the land preserved in its natural state
- maintaining open spaces, with the freedom to pursue traditional land uses, such as ranching

- preventing future owners from changing the character and primary use of the land
- protecting scenic views, historical areas or wildlife habitat

2. **Income Tax Savings.**

- income tax deduction, for donation of easement or partial value to qualified organization exclusively for conservation purposes
- based on charitable donation rules
- special provisions in 2011 allow for increased deduction, longer carry-forward, extra benefits to farmers/ranchers

3. **Estate Tax Savings.**

- land restrictions may justify lower appraised value for estate tax purposes
- additional estate tax deduction up to 40% of the remaining land value - *American Farm and Ranch Protection Act*

4. **Cash Payments.**

- land trusts may buy conservation easement if funds are available
- sale proceeds may justify restricting land use
- much more available in recent years in Wyoming
- active programs with NRCS Farm and Ranch Protection Program; Wyoming Wildlife and Natural Resources Trust Fund; others

**VII. Brief Tax Overview**

**Income Tax Deduction**

- deduction allowed for "qualified conservation contribution" even though less than the donor's entire ownership interest in the property. *Internal Revenue Code (26 U.S.C.; "IRC") §170(f)(3)(B)(iii); Treasury Regulations ("Reg.") § 1.170A-14(a)*
- deduction based on appraisal of difference in value of property before and after conservation easement created. See, *Johnston v. Comm'r, 1997 WL 643299 (U.S. Tax Ct. 1997)* (re: tax deduction allowed for a conservation easement in Wyoming; trial evidence suggested a diminution in land value of 30% to 60%).

- basic requirements:
  1. Qualified Real Property Interest - including perpetual in duration and legally enforceable. *IRC §170(h)(2)(C); Reg. § 1.170A-14(g)(1)*
  2. Qualified Organization - charitable organization which (i) has commitment to protect conservation purposes, (ii) has the resources to enforce restrictions, (iii) restricts future transfers. *IRC §170(h)(3); Reg. § 1.170A-14(c)*
  3. Conservation Purpose - defined as (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. *IRC §170(h)(4); Reg. § 1.170A-14(d)*

### **Estate and Gift Tax.**

- federal gift tax and estate tax deductions recognized for conveyance of a qualified conservation easement to a charitable organization. *IRC § 2522(d); IRC §§ 2055(f), 2031(c)*
- additional estate tax savings for lands subject to permanent conservation easements under the *American Farm and Ranch Protection Act, IRC §2031(c)*

## **VIII. Monitoring and Enforcement**

### **A. General Practices**

- Land trust agrees to monitor and enforce
- Stewardship donation requested
- Expect annual monitoring visits
- Enforcement letters sent
- Litigation - rare but possible

## B. Recent Case Law

1. *Lamb v. Wyoming Game and Fish Comm'n*, 985 P.2d 433 (Wyo. 1999)
  - Easement case - NOT conservation easement
  - Landowners placed structures and possessions (deck, trailer, satellite dish, metal shed, gardens, water pumps, etc.) within boundaries public access fishing easements granted to Wyoming Game and Fish Commission
  - Wyoming Supreme Court held: holder of the easement has right to prohibit structures and objects within the easement boundary
  
2. *Salzburg v. Dowd*, No. CV-2008-0079, Fourth Judicial District, Johnson County, Wyoming (Stipulated Judgment, 2-10-2010)
  - Landowner donated conservation easement to Johnson County (1993)
  - On request of subsequent landowner, County Commissioners voted to terminate the easement and quitclaimed to new landowner (2002)
  - Citizen sued the landowner and the county for terminating the easement, seeking to have the termination declared invalid (2003)
  - Individual citizen has no standing *Hicks v. Dowd*, 2007 WY 74, 157 P.3d 914 (Wyo. 2007)
  - Wyoming Attorney General filed new lawsuit to declare easement termination invalid (2008)
  - Case settled (2010) - easement remains in effect
  - See Lindstrom, *Hicks v. Dowd: The End of Perpetuity*, 8 Wyo. L. Rev. 25 (2008); McLaughlin & Weeks, *In Defense of Conservation Easements*, 9 Wyo. L. Rev. 1 (2009); Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 Wyo. L. Rev. 397 (2009).
  
3. *Desert Foothills Land Trust, Inc. v. Olsen*, 1 CA-CV 03-0644 (Ariz. Ct. App., 7-29-2004)
  - Neighboring landowners attempted to widen a road adjacent to a conservation easement to facilitate residential development
  - Held: land trust holding the conservation easement had standing to contest road construction outside the easement area which might harm the conservation easement area

4. *Granara v. Stetson Kindred of America, Inc.*, Docket No. 10 MISC 429752 (Mass. Land Ct. 8-12-2010)
  - neighbors objected to moving historic house onto land protected by conservation easement
  - Held: neighbors have no standing; only holder of conservation easement can enforce it
  
5. *Zagrans v. Elek*, 2009 Ohio 2942 (Ohio Ct. App. 2009)
  - neighbors of land with conservation easement challenged an easement amendment that substituted additional land into the easement area, in place of other land removed
  - Held: neighbors have no standing as they are not parties to the easement
  
6. *Gresczyk v. Landis*, 2006 Conn. Super. Lexis 1593 (2006)
  - After conservation easement was sold to the state, limiting land use to agricultural uses, landowners attempted to develop a golf course
  - Held: golf course is not an agricultural operation and is not allowed
  
7. *Weston Forest & Trail Ass'n. v. Fishman*, 849 N.E.2d 916 (Mass. App. Ct., 2006)
  - Although conservation easement prohibited construction of any buildings, landowner constructed a barn
  - Ordered: barn to be removed
  
8. *Duffy v. Milder*, 2006 R.I. Lexis 48 (2006)
  - Landowners granted an open space easement on 2.7 acres, prohibiting development but allowing grazing of horses
  - The landowners installed equestrian structures including fences and jumps for equestrian activities
  - Held: easement permitted only grazing, not additional equestrian uses and structures



9. *United States v. Blackman*, 613 SE2d 442 (Va 2005), aff'd 2007 U.S. App. LEXIS 12572 (4<sup>th</sup> Cir. 2007)
  - Landowners granted a conservation and historic preservation easement on a Virginia farm, then began renovating historic house without approval of the easement holder
  - Held: easement was valid and enforceable; renovation work enjoined
  - Landowner held in criminal contempt for continuing renovation
  
10. *Ephrata Area School District v. County of Lancaster*, 938 A.2d 264 (Pa 2007)
  - School district sought road right-of-way across land encumbered by a conservation easement held by the county
  - Held: approval of county required because road right-of-way crosses conservation easement land
  
11. *Fenster v. Tiburon Town Council*, 2006 Cal. App. Lexis 3097 (4-14-2006)
  - Landowners dedicated land to town for recreational and open space uses
  - Town library attempted to expand its building onto protected land
  - Held: use of the land for a public library was consistent with the land restrictions because the library use is a recreational use
  
12. *Stitzel v. State of Maryland*, 6 A.3d 935 (Md. App. 2010)
  - Landowners sold a conservation easement, prohibiting any subdivision of the land
  - Landowners then sold a small parcel, separating it from the preserved land, not informing the buyer of the easement
  - Held: the sale of the separate parcel is void
  
13. *Parker v. Grand River Partners, Inc.*, Docket No. 2008-CV-245 (Ohio Ct. Common Pleas, 6-15-2009)
  - Conservation easement specified a building envelope in which a residence and accessory structures could be built, and allowed for agricultural and associated activities outside the building envelope
  - Landowners sought to build a barn outside the building envelope
  - Held: barn is not permitted outside of building envelope

14. *Turner v. Comm'r*, 126 T.C. No. 16 (5-16-2006)

- Landowner developed a subdivision on land adjacent to Mount Vernon, receiving approval for 30 lots (likely the maximum number of lots that could be developed outside the flood plain)
- The landowner signed a conservation easement limiting development to 30 residential lots, then claimed a tax deduction for the difference in value between a conceptual 62 lot subdivision and the actual 30 lot subdivision
- Tax court held: easement did not meet the open space conservation purpose test because it did not preserve land in its natural state
- Tax court assessed negligence penalty against landowner

**CONCLUSION**

A conservation easement is a useful tool for preserving open space and protecting land with significant conservation values. Landowners across Wyoming have created conservation easements, over the past 30 years. More are recorded every year in Wyoming. The courts have held in many cases that the restrictions of the easements will be enforced. Conservation easements have become an important part of Wyoming property law and land use.

*This paper is not prepared for the purpose of giving legal advice and does not constitute legal advice. It includes legal references, concepts and ideas, intended to provide a general overview of the topic and to assist with discussion of the topic. It may not be relied upon as legal advice by any person. All persons should rely on the advice of their individual attorneys and other personal advisors in implementing any legal plan.*