

WATERSHED PROTECTION AND CONSERVATION EASEMENTS IN ARKANSAS

(Excerpts taken from the 2003 Vermont Law School graduate thesis of Jamie Ewing with permission. All citations have been removed.)

Introduction

The amount of land protected by conservation easements has steadily increased since the early 1990s. However, in Arkansas, the use of conservation easements for land conservation has not been widespread. This thesis presents a primer for Arkansas attorneys and others on the origins and modern use of conservation easements. Attorneys representing landowners must understand this expanding area of law. Property and tax advisors should consider how conservation easements can further the interests of their landowner clients, as well as protect the significant natural resources of the state. Land protection programs across the United States range from a collection of small parcels managed by a local land trust to large, regional and national projects involving several private and public organizations. The conservation efforts of these organizations may be aimed at protecting traditional land uses, such as farming, or sensitive habits and open space at risk from development.

Uniform Conservation Easement Act

In 1981, the Uniform Conservation Easement Act (“UCEA”) was adopted by the National Conference of Commissioners on Uniform State Laws. To date (2003), 20 states have adopted the UCEA. In total, 49 states have adopted some form of conservation easement legislation.

The purpose of the UCEA was not only to provide consistency among state laws, but also to provide legislation that would remove the existing common law barriers to creating conservation easements. The UCEA does not prescribe specific restrictions or affirmative obligations to be found within an easement; rather, those details are left up to the parties to the easement.

The UCEA was not intended to prescribe specific rights, limitations or duties for conservation easements but, rather, to simply “enable [] durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. The Act lists the following purposes for the creation of conservation easements,

- 1). retaining or protecting natural, scenic, or open-space values of real property,
- 2). assuring its availability 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, archaeological, or cultural aspects of real property.

The Act uses similar language to define the “holder” of an easement. A holder may be “charitable corporation, charitable association, or charitable trust” whose purposes or powers are the same as the purposes in the definition of conservation easement. The commentary to the UCEA indicates that “charitable” refers to the common law definition of charity, not the tax status of the organization. Also, a holder may be “a governmental body empowered to hold an interest in real property under the laws of [the] State or the United States.”

The UCEA also recognizes a “third-party right of enforcement” for conservation easements meeting the requirements of the Act. This provision allows a governmental body, charitable corporation, charitable association or charitable trust to enforce the conservation easement even if the organization

is not the holder.

The statute states that “a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” Therefore, all other state laws that do not conflict with the provisions of the UCEA will apply to the creation of conservation easements. Conservation easements are drafted and recorded in the same manner as traditional road and utility easements and other deeded interests in real property.

Perpetuity of Conservation Easements

The UCEA provides that “a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.” The drafters of the Act felt that any risk associated with creating perpetual agreements was offset by the limited scope of interests protected by this statute. The requirement that conservation easements must be perpetual to be valid under the UCEA is consistent with current tax laws providing a charitable deduction for a donation of a conservation easement. Only conservation easements granted in perpetuity will satisfy the requirements for the tax deduction. A conservation easement that is not given in perpetuity will not be considered “exclusively for conservation purposes.” In Arkansas and other states that have adopted the Uniform Conservation Easement Act, conservation easements are perpetual unless noted otherwise in the instrument.

During the life of a conservation easement, situations may arise where the restrictions of the conservation easement will fail, most often due to changed conditions around the property or the inability of a charitable organization to remain as holder. Two judicial doctrines have developed to deal with these circumstances. Under the doctrine of changed conditions, the court may modify or terminate the conservation easement if the restrictions of the easement no longer meet their purpose. Likewise, the court has the ability to transfer the conservation easement to another qualified holder organized for a similar purpose as the original holder if the original holder is no longer able to hold the easement.

Arkansas Conservation Easement Act

In 1983, Arkansas passed the Arkansas Conservation Easement Act (“ACEA”). The Arkansas statute closely follows the language of the UCEA with only a few exceptions. For example, the ACEA defines the governmental bodies that may be a holder of a conservation easement as “[a]ny state agency, county, city of the first class or city of the second class, or incorporated town empowered to hold an interest in real property under the laws of this state or the United States.” Likewise, the Arkansas statute includes other sections that reiterate the power of governmental entities to hold conservation easements and other interests in land for public purposes. The law expressly declares that the ACEA does not invalidate the Arkansas Environmental Quality Act of 1973, which authorizes the Arkansas Natural Heritage Commission to protect a system of natural areas within the state.

The ACEA also recognizes that holders will need to enter the land in order to monitor the property for any violations of the conservation easement. Thus, the Arkansas statute specifically states that “conservation easements...entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance.”

Tax Incentives for Landowners

A little known provision of the Internal Revenue Code (“IRC”) provided significant impetus for the growth of land conservation in the last two decades of the twentieth century. The savings can be significant and the income tax deduction is one of the most important issues related to a donation of a

conservation easement.

Section 170(h) allows a taxpayer to deduct the value of a qualified conservation easement from his annual income taxes, but the deduction is only available for a “qualified conservation contribution.” The IRC defines “qualified conservation contribution” as “a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.” Qualified real property interests must fall into one of three categories. The first “qualified real property interest” is “the entire interest of the donor other than a qualified mineral interest.” Thus, a donation of the entire fee simple interest in certain real property for conservation purposes will be eligible for the deduction. The second type of donation eligible for a deduction is the donation of a remainder interest in real property. Many organizations, such as the Nature Conservancy urge donors to include remainder interests for conservation purposes in their estate planning. However, due to the complexity of the law and the goals of the thesis, the author focused on deductions for conservation easements, the third category of qualified real property interests. Importantly, this provision of the tax code requires that the conservation easements be perpetual to qualify for the deduction. This provision was included in 1980 amendments to the IRC and the Uniform Conservation Easement Act was drafted to reflect this requirement. Likewise, under the Arkansas Conservation Easement Act, conservation easements are perpetual unless provided otherwise by the parties.

In addition to meeting the definition of “qualified real property interest,” the donation must also be given to a “qualified organization.” A qualified organization will be one that is qualified as a recipient of other tax-deductible charitable contributions or meets the requirements of section 501(c)(3) of the IRC. Land trusts are often created as 501(c)(3) organizations with the purposes of promoting land conservation at local and regional levels. A 501(c)(3) organization cannot achieve tax-exempt status if the organization serves a private, rather than public, interest. If the IRS determines that a land conservation transaction has resulted in a private benefit or inurement, not only could the deduction be disallowed and penalties levied, but the organization may also lose their tax-exempt status.

CONSERVATION EASEMENTS ARE IMPORTANT FOR WATERSHEDS IN ARKANSAS

The free-running rivers of America serve as the veins of our continent. They supply potable water, carry vital nutrients toward estuaries, and function as life corridors for aquatic and terrestrial species, linking otherwise isolated habitats upstream and down. They nourish the bottom lands with new, ever richer stores of fertile material, and carve, shape, and build the physical environment around them. Like the circulatory system of the human body, our river systems provide their services at no cost to the beneficiaries, ensuring in this case the ecological health and durable beauty of the American landscape.

-W. Kent Olson, *River Preservation as a Positive Social Act*

Water may be our nation's most abundant natural resource. Rivers and streams in Arkansas are used for recreation, wildlife habitat, water supplies for drinking, and agricultural uses, particularly irrigation. Many watersheds in Arkansas, such as the Buffalo River in the Ozark Mountains, are relatively undeveloped and support pristine rivers and streams. However, many other watersheds face increasing pressures from development and traditional land uses.

Conservation easements alone cannot prevent further deterioration of water quality in the United States and this thesis is not meant to suggest such. Significant actions at all levels of government are needed to enact broad changes in water pollution laws and land use policies. However, under most federal and state water pollution control laws, the emphasis is on restoring and preserving the most impaired waters

not easements protecting rivers and streams with high water quality. Thus, funding through state and federal government is often not available to protect higher quality streams that may face imminent threats from land use changes, such as residential development and road building.

The number of land trusts in Arkansas is very small; however, organizations that may accept conservation easements protecting watersheds and water quality do not have to label themselves as land trusts. Established watershed groups can add conservation easements as a tool to protect the watershed, alongside education and streambank restoration programs. For example, the Bayou Bartholomew Alliance in southeast Arkansas is working with riparian landowners to protect this unique bayou that runs through urban and rural landscapes. A program lead by the Buffalo River Stewardship Foundation seeks to protect the tributaries and watershed of the first National River in the United States.

Watersheds, Water Quality and Land Use

To understand how conservation easements can be used to facilitate watershed protection, one must first understand the relation of land uses in a watershed to the water quality of the water body supported by that watershed. A watershed is defined as “a region or area bounded peripherally by a water parting and draining ultimately to a particular watercourse or body of water;” thus, “[a] watershed encompasses not only the water resource, such as a stream, river, lake, estuary, wetland, aquifer, or coastal zone, but all the land that drains into that resource.” Based on this definition, ecologists recognize that the water quality of a particular water resource does not depend exclusively on direct inputs into the water, but also on indirect inputs from land uses in the watershed. Professor Robert Adler lists three factors that support the need to address water quality issues on a watershed basis:

- 1.) the basic nature of aquatic systems, including the interaction between land and water resources, the links between water quantity and quality, the connections between groundwater and surface water, and the heterogeneity (variability) of aquatic ecosystems;
- 2.) The ongoing decline of aquatic species and ecosystems despite the implementation of point source pollution control programs and other “engineered” solutions; and
- 3.) the nature of the principal remaining sources of impairment, including habitat alteration and loss, polluted runoff (nonpoint source pollution), and declining instream flows, none of which are addressed well by existing source-specific programs.

The use of conservation easements in a watershed protection program can address each of these factors.

In the United States, aquatic ecosystems are among the most imperiled habitat types on our landscape. “Many more aquatic species are threatened and endangered than their terrestrial cousins: 73% of mussels, 65% of crayfishes, 34% of fishes, and 28% of amphibians are jeopardized, compared to 13% of mammals, 11% of birds, and 14% of reptiles.” In the 30 years since the passage of the Clean Water Act, no aquatic species has been removed from the endangered species list as the result of successful recovery efforts, while ten species have become extinct.

While significant steps have been taken to address point source, or “end of the pipe” pollution, significant damage to aquatic ecosystems continues. Habitat loss and degradation has reduced natural wetlands and riparian habitats to less than half of pre-settlement acreage. Likewise, “polluted runoff is the largest source of water pollution in the United States and a major source of physical and hydrological impairment and habitat loss.” Both habitat degradation and polluted runoff can primarily be contributed to the land uses within a watershed. Protecting land from destructive uses through conservation easements can prevent unwanted degradation and pollution....Conservation easements can help a willing landowner protect the land from uses that would otherwise increase the amount of nonpoint source pollution, or polluted runoff, entering the watershed.

Watershed Protection Success Stories

Throughout the United States, land protection through conservation easements is becoming an effective watershed protection strategy. Regional land trusts and coalitions involving many nonprofit organizations, as well as governmental entities have established programs to protect priority lands within a watershed in order to protect the water quality of the region. The following paragraphs mention just a few of those projects.

Projects around the United States: A Maine project combining land acquisition and conservation easements will protect 25,000 acres and 210 miles of shoreline of the Machias River and tributaries. The state of Maryland and the United States Department of Agriculture designed a \$200 million incentive program to protect forested riparian zones in the Chesapeake Bay watershed. New York City has protected the nation's largest municipal drinking water supply by protecting farmland in upstate New York through easements.

Trust for Public Land has also documented four case studies where conservation easements, in concert with land acquisition and governmental action, have protected essential watersheds. In each of the studies, local officials involved with the protection efforts noted that voluntary programs, including the purchase or acceptance of conservation easements, provided an alternative to regulation that appealed to the public. In Austin, Texas, the City and local organizations worked to develop a 15,000 Drinking Water Protection Zone to protect the Barton Springs segment of the Edwards Aquifer, which provides drinking water for nearly 1.5 million people in Austin and San Antonio. A large part of the Austin program has focused on land acquisition; however, funds for future land purchases have been raised through the sale of acquired lands to buyers willing to accept the lands with strict conservation easements. Likewise, drinking water from Mountain Island Lake in North Carolina, a reservoir along the Catawaba River, is threatened by urban development and nutrient loading from municipal sewage systems. The key to protection of this resource is cooperation among the cities and counties within the watershed and the land protection efforts of the Initiative for Mountain Island Lake.

The estuarine ecosystem of Barnegat Bay in New Jersey has been protected by waterway buffers created through the use of conservation easements. By 2000, Trust for Public Land had protected over 5,500 acres within the watershed. Florida's Indian River Lagoon watershed is an estuarine ecosystem that includes two of the fastest growing cities in the United States. Manipulations in the hydrology of the system coupled with increased pollution from upland development within the watershed have damaged the ecosystem to the point that it no longer functions as it should. Governmental land protection has been the primary vehicle within the Indian River Lagoon watershed. For example, Brevard County has protected 15,000 through a Environmentally Endangered Lands program.

ACE Basin, South Carolina: Over 80,460 acres of land have been protected in the Ashepoo, Combahee, and Edisto River ("ACE Basin") watersheds in coastal South Carolina. The success of the land protection efforts in the ACE Basin "can largely be attributed to the deep land ethic of landowners and conservation organizations that reflects a reverence for the history of the landscape, compounded by a growing concern with increasing development pressures along a fragile and beautiful coast."

The ACE Basin covers 350,000 acres near Charleston, South Carolina. This region contains St. Helena Sound estuary, "one of the largest remaining undeveloped forest and wetland ecosystems along the Atlantic coast," as well as "exceptional habitat diversity, including 91,000 acres of salt, brackish, and freshwater tidal and nontidal marshes; 26,000 acres of estuarine impoundments; over 50,000 acres of bottom land and hardwood forests; and extensive forested uplands." Plant and animal life is equally

diverse in the ACE Basin, totaling over 1,500 species. Some 500 species of birds use the region for wintering, breeding or migration.

The ACE Basin is threatened by increased development pressures, which is compounded by inconsistent land use planning by the counties that have jurisdiction over the region. Strong watershed protection efforts in one county are offset by the political climate of another, that rejects governmental intervention in local land use decisions. Traditional land uses, such as agriculture and forestry, pose additional threats to the ACE Basin. With a significant portion of the region in active timber productive, changing timber markets may increase the amount of intensive logging in the region.

The ACE Basin is primarily comprised of undisturbed natural habitat and “defined by a limited amount of fertile land surrounded by tidally influenced creeks and waterways, with enough distance from the ocean to achieve freshwater habitats.” By the 1860s, over 26,000 acres of forests were converted to rice cultivation and, today, exist as diked impoundments managed to attract wintering waterfowl. Despite the collapse of the rice market in coastal South Carolina, the land in the ACE Basin has remained in the same large ownership blocks of the late seventeenth century.

The ownership patterns of the ACE Basin contributed to the success of land protection efforts and perhaps cannot be duplicated in other states. However, equally important was the land ethic of the landowners and the willingness to participate in voluntary protection efforts. “[O]pportunities for voluntary land conservation through conservation easements” was fostered by “[a] connection to the heritage that defines the South [and] perpetuates a stewardship ethic and an obligation to retain these connections for future generations.” Many landowners in the ACE Basin associated governmental intervention with the loss of their traditional agricultural lifestyle and were interested in creating legally binding agreements without the pressure of regulation.

Another key component in the success of ACE Basin land protection efforts is the partnerships created for the acquisition of land and conservation easements. In 1986, the ACE Basin was identified in the North American Waterfowl Management Plan and a task force was later formed to coordinate efforts to preserve the overall biological diversity of industry, Ducks Unlimited, The Nature Conservancy, the U.S. Fish and Wildlife Service, and South Carolina Department of Natural Resources.

By 1999, over 48,000 acres of land within the ACE Basin had been protected by conservation easements. Using various land conservation tools, the task force has protected over 130,000 acres in the basin. The task force, or coalition, approach to land protection has worked well in South Carolina for several reasons. First, “[t]ask forces provide an informal opportunity for participating members to analyze watershed resources, threats, and land ownership characteristics; evaluate and prioritize land protection strategies; and implement conservation.” Second, the coalition in the ACE Basin presented a variety of national, regional, and local organizations that could serve many different types of landowners. Third, organizations in the task force “often serve as secondary holders to easements designed by the other organizations.” This strengthens the overall easement enforcement and land protection efforts in the basin.

The Strawberry River, Arkansas: Water quality protection through conservation easements is also increasing in Arkansas. In 1999, the Arkansas Chapter of The Nature Conservancy (“the Conservancy”) began efforts to protect the Strawberry River. The Strawberry River in Arkansas is a high quality stream in the Ozark Mountains region of the state and represents “one of the greatest concentrations of aquatic biodiversity in North America.” The river is home to 108 fish and 39 freshwater mussel species, many of those endemic to the Ozarks. The Strawberry River Orange Throat Darter is endemic to the Strawberry River.

Sedimentation from eroding stream banks and agricultural runoff was identified as the major source of pollution in Strawberry River watershed. Agricultural practices, including overgrazing of pastures and cattle allowed to graze up to the river's edge and even enter the stream, had increased the amount of sediment entering the water body. Increased sedimentation is particularly detrimental to freshwater mussels. Improving agricultural practices within the watershed has become an integral part of the Conservancy's protection efforts.

Since 2000, the Conservancy has purchased 1457 acres in the Strawberry River watershed, including seven miles of frontage on the river. The land protected by the Conservancy includes bluffs, forest, pasture and buffer areas along the river. On property that it owns, the Conservancy has established a demonstration ranch to promote ecologically sensitive grazing practices within the watershed. In addition to traditional land protection options, such as purchase and easement, the Conservancy is working with local landowners to implement these grazing practices through technical assistance and cost-sharing.

In 2003, the Conservancy accepted a conservation easement on about 355 acres adjacent to lands already purchased for the Strawberry River Preserve. The land is almost equally divided between forest and pasture. The easement allows for some cattle grazing and forest management. A management plan for the property was jointly developed between the landowner and the Conservancy. The success of this easement acquisition is due in no small part to a landowner that was interested in promoting conservation in Arkansas and hope that the success of the Strawberry River project will encourage other landowners to consider donating an easement.

Watershed Protection in the Easement Document

As mentioned in the above discussions of the Uniform Conservation Easement Act and the income tax deductions available for a donation of an easement, easements must meet certain requirements. The requirements that the easement must protect certain conservation values and be pursuant to state policies can be addressed in the easement document itself.

First, as a legal description of the property is included in the easement document, so should a description of the conservation values protected by the easement be included. Legal descriptions are often attached as appendices to the easement and the conservation values may be appended in a similar manner. However, the easement is a legal document intended protect certain conservation values and it is useful to briefly list the values in the text of the document. Thus, any court interpreting the easement can determine if a specific action has violated the easement or if conditions have changed to the point that the conservation values are no longer protected by the easement. A more detailed description of the conservation values could be added to the Baseline Documentation that is referenced and incorporated in the easement.

Second, as many conservation values as apply to the property should be described and protected by the easement. As an example, this author has emphasized the use of conservation easements to protect water quality, but the one property may also protect endangered species, open space, or prime farmland. Not only should each of these values be listed in the easement, but if the primary purpose of an easement is to protect water quality, the recitation of conservation values should include a description of the watershed that is being protected and how conservation of the particular property achieves such protection. For instance, a conservation easement is given on agricultural land in the Strawberry River watershed. The conservation values section of the easement would describe the importance of protecting this property in relation to protecting the water quality of the Strawberry River, as well as other conservation values that may be present.

Third, the conservation values identified in the easement should contain a listing of any governmental policies that support the protection of water quality in the locality. In Arkansas, it may be difficult to find published local and regional policies, however state and federal policies from several different sources are available. In regards to watershed protection, first look to see if the watercourse has received any special designations, such as a Wild and Scenic river or an Extraordinary Resource Water at the state level. The Arkansas Watershed Planning Guide published by the Arkansas Department of Environmental Quality offers a list of Extraordinary Resource Water designations in the state, as well as a description of water quality standards for the different ecoregions of the state.

For the purposes of the easement document, it is not necessary that the governmental policies be enacted laws or local ordinances. A policy or purpose statement from a planning document, such as the Watershed Planning Guide, will be acceptable. The following are examples of state policies in Arkansas regarding the protection and restoration of watersheds and aquatic ecosystems:

Ark Code Ann. §15-23-302:

(a) It is declared that certain rivers in the State of Arkansas possess outstanding natural, scenic, educational, geological, recreational, historical, fish and wildlife, scientific, and cultural values of great present and future benefit to the people...

(b) It is declared as the policy of the State of Arkansas that a balance be established between the alterations of man and the protection of natural beauty along certain rivers of this state.

Ark. Code Ann. §15-20-302:

To the end that the environment and resources of the State of Arkansas shall be used and preserved for the welfare of all people, it is the policy of the State of Arkansas to:(A) Preserve, manage, and enhance the lands, waters, and air of the state with full recognition that this generation is a trustee of the environment for succeeding generations....

Conclusions

It is difficult to imagine a resource more essential to a sustainable economy and to a sustainable, healthy human community than fresh water. Humans cannot live for more than several days without water, shorter than for any source of sustenance other than fresh air. Water is essential to grow, raise, or support in the natural environment every source of food used by human populations, from wild fish and game to livestock and to all forms of plant food, whether cultivated or collected. Without adequate supplies of water we could not rely on trees and other plants for building materials, natural fabrics, paper, and other goods. Natural water cycles play a role in maintaining the relatively stable weather patterns relied on for a sustainable economy and lifestyle, and protect communities from flooding, drought, and other impacts of more volatile climates. Fresh water is also essential to natural communities, the ecological foundation on which sustainable human economies are built.

Arkansas, the “Natural State” is abundant with natural resources and the opportunities for land conservation and watershed protection using conservation easements are numerous. While meeting the needs of landowners, conservation easements can provide lasting protection to the resources of the state. As the use of conservation easements increases in the state, landowners will become more aware of the tax benefits associated with conservation easements and the opportunity to protect natural lands for future generations. Likewise, the voluntary nature of conservation easements will appeal to

local landowners that may be wary of governmental intervention in land use decisions. Landowners interested in donating a conservation easement will first approach their local attorney with questions about this land transaction. To best serve the needs of their clients, attorneys representing landowners must become aware of the law of conservation easements.

Unpublished work © 2003 Jamie Ewing