

**B12. Addressing Ephemeral Land
Management in a Perpetual
Conservation Easement CLE**

Friday, October 18 | 1:30 p.m. - 3 p.m.

Room 302A

Session Faculty:

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Addressing Ephemeral Land Management

in a perpetual conservation easement

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Natural Habitat



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What Problem Are We Addressing?

- Easements are perpetual. . .and land is always changing.
- More expectations today regarding management "performance."
- Easements are good at saying what you can't do. . . not as good at saying what you should or must do.

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Workshop Agenda

- Explore the Spectrum of Options
- Discuss the Legal Framework
- Use Case Studies to Illustrate Pros-Cons
- **Need your participation!**

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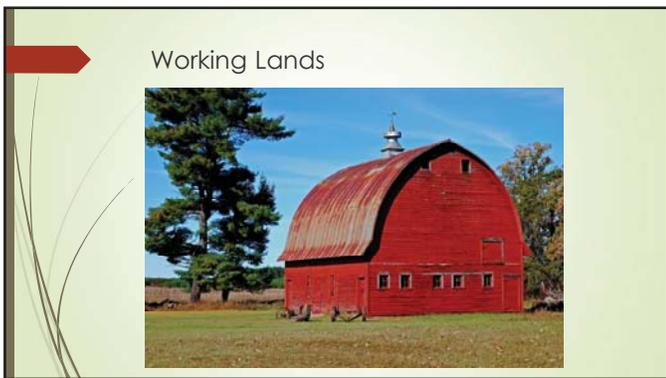
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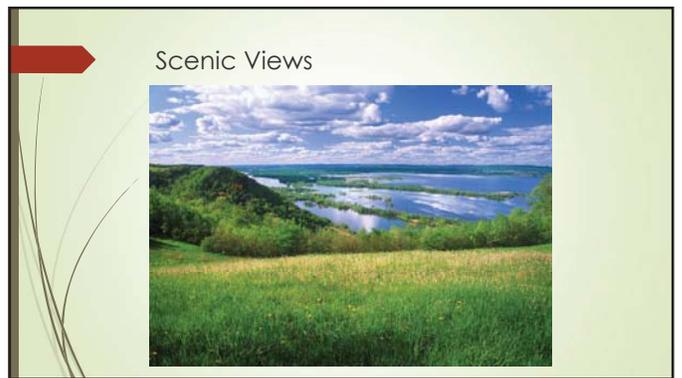
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First, a Few Definitions:

- What is a Reserved Right?
 - Rights or uses reserved to landowner in CE
- What is a Negative Restriction?
 - Prohibitions on use in CE
- What is an Affirmative Right?
 - CE provisions that allow land trust to act independently or if the landowner does not
- What is an Affirmative Obligation?
 - CE provisions that require *landowner or land trust* to act

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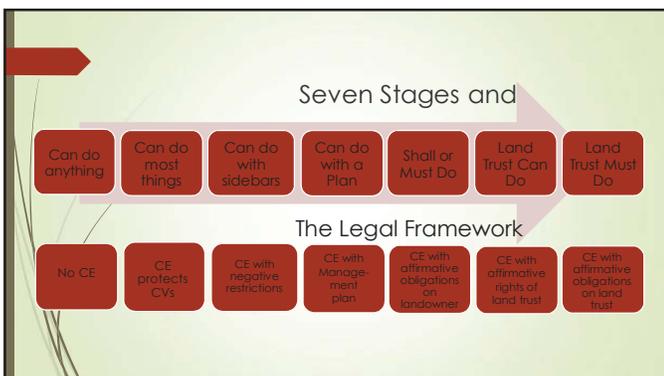


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Definitions, continued

- What is a Management Plan?
 - CE guiding document with details regarding specific uses/management of protected property
 - Ancillary to CE
 - Typically not recorded (but may be)
 - Easier to adapt to changing conditions and management techniques

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1. Can do almost anything

- Easement has very few restrictions on vegetation management or other uses
- Pros: Easy for easement stewardship—no obligations.
- Cons: May not adequately protect the conservation values.

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2. Can do most things

- Landowner retains most rights
- Some limitations on egregious acts
 - Clear cutting
 - Plowing
- Pros: Some protections. Easy for easement stewardship.
- Cons: May not adequately protect the conservation values.

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Can Do with Sidebars—CE with negative restrictions

- Yes reserved rights with limits based on CVs
- Yes negative restrictions based on CVs
- No affirmative obligations
 - E.g.: CE protects agricultural open space consistent with clearly delineated governmental conservation policy; landowner cannot build houses in the pasture
 - E.g.: CE protects scenic open space for land visible from public road; landowner cannot build houses or privacy fencing that would block view
 - E.g.: CE protects relatively natural habitat; landowner prohibited from building improvements in the relatively natural habitat zone

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Can Do Most Things—CE protects CVs

- Yes many retained rights
- No negative restrictions
- No affirmative obligations
 - E.g.: CE protects agricultural open space consistent with clearly delineated governmental conservation policy; landowner can do anything in furtherance of agricultural operations
 - E.g.: CE protects scenic open space for property visible from public road; landowner can do anything, provided that the property remains visible and aesthetically appealing
 - E.g.: CE protects natural habitat; landowner can do anything, provided that habitat stays in a relatively natural condition

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4. Management Guided by a Management Plan

- Easement has fewer management terms within document
- Pros: Can adapt to changes by updating the plan. Can be more in depth.
- Cons: Introduces another document. Is it legally enforceable? What is required vs. recommended?

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3. Can do with Limitations Outlined in Easement: "Sidebars"

- Easement begins to list out more restrictions or sidebars
 - Can't plow buffers
 - No planting of invasive species
- Pros: Further protects conservation values.
- Cons: Can you list all the potential actions? What about when circumstances change?

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Can Do—Uses Guided by Management Plan

- Yes reserved rights
- Yes negative restrictions based on CVs, but details shift to plan
- No affirmative obligations
 - E.g.: CE protects agricultural open space consistent with clearly delineated governmental conservation policy; landowner cannot build houses in the pasture; agricultural operations guided by management plan
 - E.g.: CE protects working forest open space; landowner cannot build houses in forest; harvest size, yield, frequency, location, overall scope guided by management plan
 - E.g.: CE protects natural habitat; landowner cannot build houses in habitat; protection, enhancement, restoration and other uses guided by resource management plan

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5. Landowner must manage in a particular manner

- Easement requires landowners to take action
 - Must burn prairie
 - Must conduct organic farming
 - Must cut vegetation for the views
- Pros: Stronger public benefits. Landowner takes on burdens, not land trust or public.
- Cons: Stretches comfort of landowners. Legally troubling. How do you enforce?

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Land Trust May Do—Affirmative Rights But Not Obligations

- Yes reserved rights
- Yes negative restrictions based on CVs
- Yes affirmative rights, but not obligations on Land Trust
 - E.g.: CE protects agricultural open space consistent with clearly delineated governmental conservation policy; landowner cannot build houses in the pasture; landowner must keep water attached to property; landowner must conduct ag. operations; land trust can step in to represent water rights
 - E.g.: CE protects scenic open space for land visible from public road; landowner must keep all vegetation from obstructing public's view of property; land trust can step in and bush-hog
 - E.g.: CE protects natural habitat; landowner cannot build houses in habitat; landowner must keep prairie habitat intact and remove weeds; land trust can step in and remove weeds

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Landowner Shall or Must Do—CE with Affirmative Obligations

- Yes reserved rights
- Yes negative restrictions based on CVs
- Yes affirmative obligations on Landowner to act based on CVs
 - E.g.: CE protects agricultural open space consistent with clearly delineated governmental conservation policy; landowner cannot build houses in the pasture; landowner must keep water attached to property; landowner must engage in ag.
 - E.g.: CE protects scenic open space for land visible from public road; landowner must keep all vegetation from obstructing public's view of property
 - E.g.: CE protects natural habitat; landowner cannot build houses in habitat; landowner must keep prairie habitat intact and remove invasive weeds

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7. Land Trust Retains Management Obligations

- Easement gives land trust obligations to manage
- Pros: Ultimate control.
- Cons: Confusion over whose land is it? Does land trust have resources? What if land trust fails?

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6. Land Trust Retains Affirmative Rights (but not obligations)

- Easement gives land trust right to manage independently or if landowner fails to do so.
- Pros: Gives land trust control.
- Cons: Gives land trust control. Landowner may punt obligations. Stretches comfort of landowner and notion of private lands.

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Land Trust Shall Do—Affirmative Obligations

- Yes reserved rights
- Yes negative restrictions based on CVs
- Yes affirmative obligations on Land Trust
 - E.g.: CE protects agricultural open space consistent with clearly delineated governmental conservation policy; landowner cannot build houses in the pasture; landowner must keep water attached to property; land trust must step in to represent water rights or conduct ag.
 - E.g.: CE protects scenic open space for land visible from public road; landowner must keep all vegetation from obstructing public's view of property; land trust must step in and bush-hog
 - E.g.: CE protects natural habitat; landowner cannot build houses in habitat; landowner must keep prairie habitat intact and remove weeds; land trust must step in and remove weeds

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Most common affirmative obligations

- Vegetation—keep as prairie, pasture, meadow, open land, native grasses, weed free, mow
- Water—keep attached to land in support of CVs
- Minerals—Surface Use Agreement negotiation includes land trust
- Agriculture Value—land trust right to conduct ag. operations or intervene in purchases, rights of first offer or refusal, rights to appraise at agricultural value or impose max. resale value

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Agricultural Land Trust



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Easement Drafting with Affirmative Rights

- Affirmative rights reserved to land trust as property interest owner for:
 - Access to property to monitor, inspect, enforce obligations or violations
 - Condemnation/eminent domain proceedings
 - Third-party violations or trespass enforcement
 - Mineral extraction negotiations (including Surface Use Agreements)
 - Water and water rights protection processes
- Natural disasters—level of restoration required?
- Right or Obligation to Enforce Affirmative Right—reserve the right, not the obligation?

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Agricultural Land Trust

■ SCENARIO

- Land Trust primary mission = working lands
- Holds easement on 10,000-acre working ranch
- Mixed production with cattle, hay, and cultivated lands
- County has strong agricultural preservation policies
- Bargain sale w/federal \$ involved



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Case Studies

- Agricultural Land Trust
- Scenic Land Trust
- Natural Habitat Land Trust

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Agricultural Land Trust

Fundamental Issues:

- How to create appropriate sidebars?
- What is in an agricultural land easement plan?
- What about performance standards? (Organic, BMPs, etc.)

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Agricultural Land Trust

QUESTIONS:

- What obligations does the land trust have to impose to ensure it stays in productive ag.?
- What if the landowner just wants it to "return to nature"?
- What if the easement requires weed control?
- What if the easement requires organic farming practices?
- Are landowners required to irrigate?
- Is land trust ready to become the farmer?

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Scenic Lands

Issues:

- What if vegetation blocks views?
- What if vegetation contributes to views?

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Scenic Land Trust



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Scenic Land Trust



QUESTIONS:

- What obligations does the land trust have to impose to ensure a view stays "open"?
- What if the landowner is 90 and doesn't have ability to cut vegetation?
- What if the scenic qualities described on the property aren't so scenic anymore (blow down/fire)?

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Scenic Land Trust



SCENARIO:

- Land trust mission = scenic, rural beauty
- 200-acre hobby farm and woodlands
- Borders a designated scenic byway
- View is across property as well as on property
- Very popular photo spot = The money shot

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Natural Habitat Land Trust



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Natural Habitat Land Trust

■ **SCENARIO:**

- Land trust mission = Nature habitats
- 500-acre prairie and wetland property
- Funded for the grassland habitats, especially for migratory birds
- Wetland restoration w/control structures
- Easement is a "no-build"



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Enforcement Considerations Overall

- Uniform Conservation Easement Act enables affirmative obligations—check state enabling act (CRS 38-30.5-102 obligation to perform act)
- Management plans
 - Separately enforceable agreement from CE?
 - Incorporate by reference? (Butler v. IRS—state law determines)
 - Record with CE? Record separately? Don't record?
 - Approval of plan equals assent, relinquish enforcement rights later?
- Instead of affirmative obligation or plan, enforce violation and manage restoration?
- Enforcement of affirmative obligations
 - Can landowner enforce affirmative obligation against land trust?
 - Can landowner challenge easement validity for failure of land trust's affirmative obligations?
 - Can a third party enforce an affirmative obligation against land trust for failure to enforce?

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Natural Habitat Land Trust

Fundamental Issues:

- Successional Landscapes vs. Disturbance Landscapes (e.g.: Prairie)
- Invasive Species
- Requirement to maintain control structures
- Climate Change and Natural Disasters

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Enforcement, cont.

- TerraFirma does NOT insure affirmative obligations, so will not cover such CLAUSES, but will cover the CE:
 - Excluded: Affirmative rights in a conservation easement, covenants or trail easement such as a right of first refusal, option to purchase, mowing rights or active land management except as undertaken in defense or enforcement of a conservation easement, deed covenant or trail easement (this exclusion does not apply to land owned in fee by a land trust or to the affirmative right of public access for recreation or education contained in a conservation easement, trail easement or deed covenant)

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Natural Habitat Land Trust

■ **QUESTIONS:**

- What obligations does the land trust have to impose to ensure a specific management regime?
- What if the landowner is 90 and doesn't have ability to manage the prairie?
- Do you tie easement to a management plan?
- What if noxious weeds threaten entire system?
- What if the control structure (dam) fails?

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Cases

- *Mesa County Land Conservancy v. Allen*, 2012 COA 95 (Ct. App. Colo. 2012) (water rights separated from CE property)
- *Field v. Costa*, 2008 VT 75 (ROFR for VLT, landowners fight)
- *Big Meadows Grazing Assn v. United States*, 344 F.3d 940 (9th Cir. 2003) (NRCS management plan cost and agreement)
- *Telzrow v. United States*, No. 15-1359C, 2016 U.S. Claims LEXIS 660 (U.S. Ct. Fed. Claims May 26, 2016) (NRCS management plan mechanic's lien)
- *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of America*, 73 A.D. 3d 1257, 900 N.Y.S.2d 494 (N.Y. App. Div. 2010) (access by public over private road)

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Cites

- Stewardship Curriculum: <https://tlc.lta.org/courses/determining-stewardship-costs-and-raising-and-maintaining-dedicated-funds/p/sr-affirmative-obligations>
- Case Law Updates: <https://tlc.lta.org/clearinghouse/documents/34237>
- Affirmative Obligations in CD Meeting 2016: <https://tlc.lta.org/clearinghouse/documents/39914>
- Terraforma policy: https://terraforma.org/how_it_works

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Contacts

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Thank you!

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