

THE NATURE CONSERVANCY NATIONAL EASEMENT STUDY:

ISSUES, INSIGHTS AND TIPS FOR PRACTITIONERS

**Land Trust Alliance Rally 2005
October 17, 2005**

**Lynn Lozier, Christine Hall, Peter Kareiva, Gary P. Amaon,
Tosha Comendant, Terra Grandmason, Elizabeth Gray,
Richard Hilsenbeck, Joseph M. Kiesecker, Patrick Naehu,
Adena Rissman, Rebecca Shaw, and Mark Zankel**

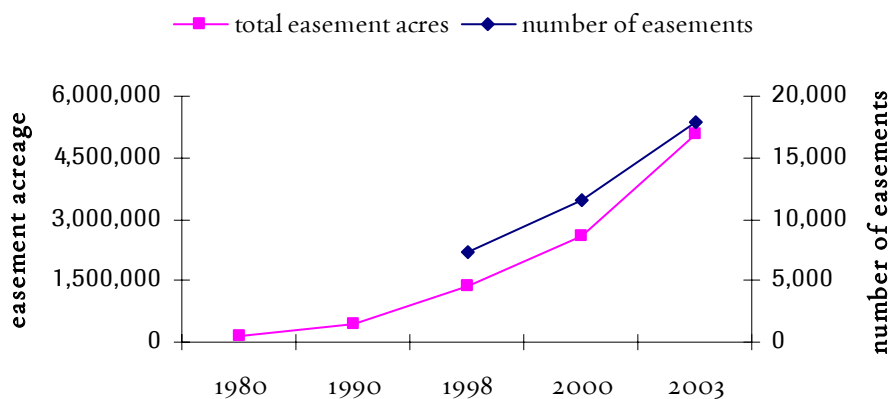
TABLE OF CONTENTS

INTRODUCTION.....	3
METHODS.....	5
VIOLATIONS, ISSUES AND INSIGHTS.....	6
ISSUE: Drafting for the Future is a Continuing Challenge.....	7
<u>Insight: Easement Language Can Be Too Vague or Too Specific.....</u>	<u>7</u>
Tip: Use Existing Flexibility if Needed and Available	
Tip: Look Carefully at a Donor’s Desired Restrictions and Easement Terms	
Tip: Avoid Sticking to “Boiler Plate” - Use Purpose-Based Drafting	
Tip: Link Purpose to Restrictions to Baseline to Monitoring	
<u>Insight: There are Ways to Provide Flexibility and Reduce Future Conflicts.....</u>	<u>9</u>
Tip: Use “Defined Use Areas” to simplify documents and constrain impacts	
Tip: Focus on Outcomes, (“Why do we care?”)	
Tip: Use Objective Criteria	
Tip: Consider a “Choice” Alternative	
ISSUE: Contact With Landowners Is Resource-Intensive and Needs Vary.....	11
<u>Insight: Need for Owner Contact a Factor in Expected and Unexpected Ways..</u>	<u>12</u>
Tip: Give Unfamiliar “First Owners” Extra Attention	
Tip: Identify Situations at Risk and Invest Proportionately.	
Tip: Consider an Annual Meeting Requirement	
Tip: Be Aware That Competent Partners May Not Always Think to Consult First	
<u>Insight: Investments in Structure and Tracking are Essential.....</u>	<u>14</u>
Tip: Create Organization and Documentation Within Operating Units	
Tip: Don’t Overlook Tracking Easement Holder’s Affirmative Obligations	
Tip: Utilize “Triggers” that Identify Land Turnover (sales)	
CONCLUSIONS.....	15
REFERENCES.....	16

INTRODUCTION

The Nature Conservancy has been in the business of land conservation for over fifty years and works in all 50 of the United States and 27 countries. In the US, the Conservancy holds more easements (over 2,100 in spring 2005) covering more area (2.7 million acres) than any other land trust. Use of easements as a conservation tool has expanded greatly in recent years across the land trust community. The Conservancy's use of conservation easements has increased both in the number of easement tracts relative to other protection tools, and in proportion of acres protected (Figure 1). In 2005, the Conservancy undertook an analytical study of its easements described in the Methods below. While other publications will report on trends and the broad range of data produced by the study, this paper is intended to focus on insights, learning and new approaches which may be useful to practitioners directly applying conservation easements today.

a. Local and Regional Land Trusts' Easement Growth
(does not include The Nature Conservancy)



Note: Pre-1998 number of easements data unavailable

b. The Nature Conservancy's easement growth

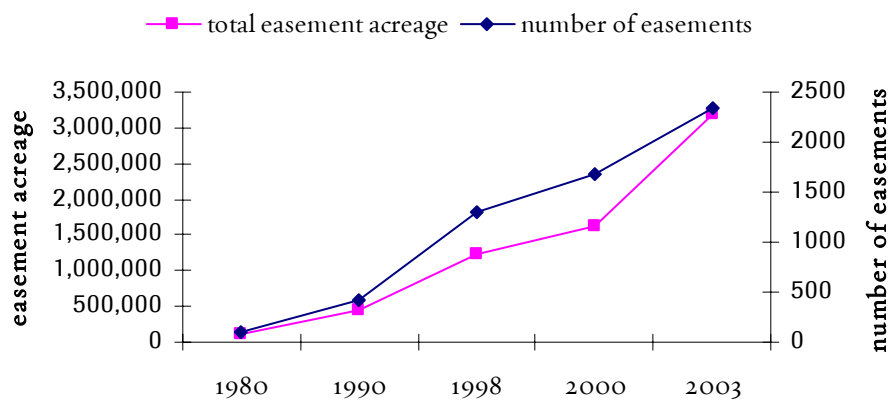


Figure 1.
Growth in Number and Acreage of Conservation Easements: Local and Regional Land Trusts (1.a) and The Nature Conservancy (1.b)

Source:
Land Trust Alliance. 2004. 2003 National Land Trust Census. Accessed online Sept. 2005.
<http://www.lta.org/aboutlt/census.shtml>

Land Trust Alliance. 2001. 2000 National Land Trust Census. Accessed online, June 2002.
<http://www.lta.org/newsroom/census2000.htm>

Bremer, T. 1984. Portrait of a Land Trust. In: R.L. Brenneman and S.M. Bates, eds. *Land Saving Action: A Written Symposium by 29 Experts on Private Land Conservation in the 1980's*. Covelo, CA: Island Press. 262 pp.

The Nature Conservancy, unpublished data.

METHODS

To characterize conservation easements, describe the purposes they were intended to serve, and identify problems that arose in their implementation, we focused our study on a sample of eight states. These states were chosen so that they were scattered across the contiguous 48 states in a way that spanned the range of variation in “conservation context”, and represented a range of attributes for wealth, percent of public versus private land, species diversity, and the extent of the Conservancy’s easement activity. In particular, we sought states that used easements infrequently as a conservation tool, and states that relied heavily on easements. The eight states selected for this study were: California, Florida, Maryland, Michigan, New Hampshire, Texas, Washington, and Wyoming (Table 1).

Table 1.

	CA	FL	MD	MI	NH	TX	WA	WY
TNC easement acreage	218,387	123,907	3,528	156,631	27,792	206,636	5,850	239,316
regional/local LT easement acreage¹	298,472	35,667	174,337	44,243	119,792	119,574	34,077	35,425
# land trusts¹	172	29	46	47	39	32	32	5
population density²	0.35	0.45	0.70	0.19	0.22	0.13	0.14	0.01
2001 gross state product (millions)³	\$1,359	\$491	\$195	\$320	\$47	\$764	\$223	\$20
2003 per capita income (\$)⁴	\$33,749	\$30,446	\$37,331	\$30,439	\$34,702	\$29,372	\$33,332	\$32,808
% land protected⁵	24.2%	13.3%	6.4%	3.8%	7.9%	1.4%	14.7%	9.2%
% species at risk⁶	28.5%	14.3%	3.9%	4.0%	2.8%	10.1%	7.3%	6.8%
total species diversity⁶	6,717	4,368	3,148	3,135	2,327	6,273	3,375	3,184
# federally listed species⁷	304	111	26	21	11	91	40	17

¹ Land Trust Alliance. 2003 National Land Trust Census. Available online:

<http://www.lta.org/aboutlt/census>

² Persons per acre. Calculated as total population 2003 divided by state surface area. U.S. Census Bureau. Annual Population Estimates 2000-2003. Available online: <http://www.census.gov/popest/states/NST-EST2003-ann-est.html>. National Resources Conservation Service. 1997 Summary Report. Available online: http://www.nrcs.usda.gov/technical/NRI/1997/summary_report/table1.html

³ 2001 Gross State Product. Bureau of Economic Analysis, U.S. Department of Commerce, June 2004. Available online: <http://www.bea.gov/region/gsp>

⁴ 2003 Per Capita Income. Bureau of Economic Analysis, U.S. Department of Commerce, June 2004. Available online: <http://www.bea.doc.gov/region/state/local.htm>

⁵ Protected area includes: Land Trust, State Park System, National Parklands, National Monuments, National Rivers, National Lakeshore, National Preserves, National Seashore, National Wildlife Refuge, and National Wilderness Areas.

⁶ NatureServe Central Databases, accessed April 2002

⁷ U.S. Fish and Wildlife Service. Threatened and Endangered Species System. Available online: <http://www.fws.gov/endangered/wildlife.html>

Because more easements have been established within the last 5-10 years than during earlier periods, a strictly random sample from our eight states would not have included many easements prior to 1995. For that reason, we stratified our sampling within each state by time period, drawing 10-11 easements (or fewer, if fewer were available) acquired within each of two time periods: 1985-1994 and 1995-2004 (Table x). The total number of easements held by the Conservancy in study states ranged between 9 (WA) and 137 (WY), with as few as 0 in any ten year period (for 1985-1994 in WA) and as many as 98 in a ten-year period (98 between 1995 and 2004 in WY). In total, our random sample included 119 easements, with a sampling intensity that ranged from 15% (20 out of 137 for WY) to 91% (10 out of 11 for MD).

To characterize each of the sampled easements, we used a survey that drew on the expertise of conservation staff directly familiar with the easement, monitoring records, and original easement documents (the survey questions will be available online from the Conservancy). The survey asked questions about the conservation context of each easement, its intended purposes, the purpose and frequency of monitoring, the status of conservation targets on the easement, and whether there were any ecological or legal problems known to the staff. Survey design, proofing data entry, and interpretation of survey answers was conducted by a team of eight conservation practitioners, one from each state: Gary Amaon, Edwards Plateau Ecoregional Manager in Texas, Elizabeth Gray, Director of Conservation Science in Washington, Tina Hall, Director of Conservation Programs in Michigan, Richard Hilsenbeck, Associate Director of Protection in Florida, Joe Kiesecker, Senior Ecologist in Wyoming, Lynn Lozier, ConservationTrack Program Director in California, Patrick Naehu, Nanjemoy Project Director in Maryland and Mark Zankel, Director of Conservation Programs in New Hampshire. This study team represents a collective 85 years of TNC experience.

Further, in order to more fully explore issues related to easement effectiveness, compliance and violation, each survey lead asked 3-4 accomplished practitioners in his or her state to provide information on current or previous problem or violated easements from their own experience. This non-random portion of the study drew upon the collective memory of 34 people who had an average of over 14 years of professional engagement with conservation easements.

VIOLATIONS, ISSUES AND INSIGHTS

Ten of the easements in the random sample reported a current violation of some kind. Of those, two were considered significant, and eight were classed as *de minimus* - having no lasting effect on the conservation values and no financial benefit to the property owner. This small sample did not find statistically significant relationships between the occurrence of violations and easement features and conditions. However, issues of drafting and owner relations surfaced repeatedly and we looked at them closely as possible contributing factors to easements identified as not performing as intended. To develop to the ideas reflected here, in addition to the random sample, we drew on examples of current or previous problems contributed by the experienced practitioners within the study states. Finally, some “tips” for new or improved practices, approaches

or considerations came from other programs inside and outside of the Conservancy. Examples drawn from beyond the study states and outside of the Conservancy are always identified as such in what follows.

ISSUE: Drafting for the future is a continuing challenge

Every land trust of any tenure deals with issues of terms in existing easements that are less than ideal. Terms can be archaic, incomplete, too vague, and even too specific. Some situations may require that the Operating Unit (OU) seriously consider entering into negotiations to amend a problem easement. We hope that new and refined approaches described in the “tips” that follow may be helpful in drafting new easements, and will help us to avoid finding ourselves in these situations in the future.

INSIGHT: Easement Language Can Be Too Vague or Too Specific

Easement language can be vague or even silent on important issues. Our study determined that many older easements, while they may restrict future structures, are often silent on the subject of subdivision. For example, all but one of the six Florida easements in the study before 1995 was silent on the subject of subdivision, functionally leaving it unrestricted. However later, from 1996-2004, only one of ten easements in the study did not include and define subdivision restrictions.

In another example, one New Hampshire easement intended in part to protect nesting birds by protecting significant habitats, including a large hayfield maintained through annual mowing. The nesting period for grassland birds in this area extends until late July. The terms of the easement fail to include restrictions that would delay mowing long enough to provide for nesting birds to fledge their young, and are therefore too vague to accomplish with certainty the protection of nesting grassland birds

As states and local municipalities adopt fire abatement requirements, some older easements can end up with restrictions that are at odds with the fire abatement regulations. In one example outside of the study, Conservancy easements along a riparian corridor do not allow removal of vegetation around structures and dictate driveway construction that is narrow with no turnarounds. The state is now urging all home owners to have a "non-vegetation" area around their homes to reduce wild fire hazards. Local fire departments have been hesitant to travel down narrow driveway with no loops or turn-arounds. Following the new state and local fire recommendations means the landowner would likely violate the easement.

Tip: Use Existing Flexibility if Available and Needed

In the riparian example of too much restriction on vegetation removal and driveway configuration for fire hazard, staff had the choice of either amending over 23 easements or reaching a working understanding among all the easements holders and the Conservancy. Fortunately, staff determined that TNC had some latitude in this area under the existing “safety clause” in the easement restrictions. The Conservancy held a community meeting of all the homeowners, the State Department of Natural Resources,

and local fire department, to talk about what was reasonable for cutting around homes and driveway configuration. While the fire department preferred a driveway wide enough to allow two trucks to pass each other, a compromise was made by allowing a loop to be put into the driveways. Instead of amending all the easements, the Conservancy was able to allow the vegetation cutting around the homes and larger driveways (to allow loops) based on interpretation of cutting vegetation that was allowed under the "safety clause" in the restrictions. All landowners were given documentation confirming the new interpretation of the easement and clearly defining – and limiting – the flexibility it provided.

Tip: Look Carefully at a Donor's Desired Restrictions and Easement Terms

Another way that easement terms can be too restrictive can occur in the case of donated easements where it may be tempting to include conditions in the easement which are of particular concern to the donor. Where these contribute to the conservation purposes of the easement, this is appropriate and desirable. However, staff should resist the impulse to have the easement document “control from beyond the grave” with restrictions that could prove problematic.

Staff from one state in the study noted that they hold an easement that includes language, at the donor's request, which specifically limits the number, type and reproductive status of the house pets kept by the residents on the land. Easement language actually noted that the donor had been unable to control others' domestic pets upsetting wildlife in the wetland of which the easement was a part. For this reason he requested, and the Conservancy subsequently included in the easement, a restriction of pets on his property to “*two spayed or neutered dogs or cats*”. The easement even gives the Conservancy the “*right to reduce the number of dogs and/or cats from two per residence to one per residence... if the domestic pets have an identifiable negative effect on the wildlife and natural values of*” the property.

Other examples from Conservancy easements include noise decibel restrictions, and prohibition of "fossil fuel engines". Each OU in the Conservancy must determine what is practicable, and most important, enforceable, wording for easements and the question of monitoring and enforcement must always be kept in mind. Is the chapter prepared to monitor the sexual status of pets, sound decibel levels, the type of motors, equipment, etc that a landowner may use? Are they prepared to document and enforce these terms if they are violated?

Tip: Avoid Sticking to “Boiler Plate” Language – Use Purpose-Based Drafting

If the purpose(s) of the easement is either too vague or too descriptive, it will create problems for drafting easement terms and designing monitoring. This is a risk if they are just copied "boiler plate" from another easement, and are not crafted for the easement at hand. For example, a purpose of “*...retained forever substantially undisturbed in its forest, wetland, wildlife habitat, open space conditions and scenic values, and to prevent any use of the Protected Property that will significantly impair or interfere with the Conservation Values of the Protected Property (“Purpose”)*” without further elaboration may be a bit vague. On the other hand a purpose that “*...protect in perpetuity the*

Conservation Values of the Protected Property as a Working Forest, including native flora and fauna and the ecological processes that support them, diverse forest types and conditions, soil productivity, biological diversity, water quality, wetlands, riparian and aquatic habitats, and scenic values;" may be bit too specific. How can an OU hope to document or enforce "forest habitat" - what does that mean to a staff person, what does that mean to the landowner? On the flip side, is the OU prepared to monitor and document an easement that states its purpose is to protect "soil productivity?"

Making sure that the full range of the easement's purposes are clearly identified and included in the document is especially important when an easement property is part of a larger conservation project extending beyond its borders. While property owners cannot be held accountable for conditions that occur off-site of their lands, many easements are being crafted to contribute to the protection of resources on adjacent and nearby properties. Thus, the geography of an easement's purposes may extend beyond its boundaries. Many easements in the survey identified off-site resources for which the easement served as a buffer or corridor area. It is likely that these functions will become even more important in the future, given expectations of climate change and other influences. Easements which reinforce adjacent protection efforts and provide functions beyond the resources on-site can continue to offer meaningful conservation contributions even if some of the on-site targets should be lost or displaced. Further, should this happen and those broader purposes are not stated in the document, the easement could be successfully challenged in court (Thompson 2004). For these reasons, easement purposes should be written to reference these functions as well.

Tip: Link Purpose to Restrictions to Baseline to Monitoring

Careful thought about the purpose of an easement is needed during the drafting process. As noted, some purposes may be more general than others. However, once a purpose is determined, cross checks should be performed to insure the purposes are covered in the restrictions section. Are the purposes documented in the Baseline document? Are the purposes documented in the monitoring? Will the monitoring be set up to determine that the purposes are being met? By creating a direct connection from the stated purpose of the easement to the restrictions and the data collected in the baseline, an easement will be more tightly linked. (For some ways to do this, see the tips which follow on defining outcomes and using objective criteria.)

INSIGHT: There are Ways to Provide Flexibility *and* Reduce Future Conflicts

Tip: "Defined Use Areas" Can Simplify Documents and Constrain Impacts

Overly restrictive language can have hidden risks in monitoring and enforcement obligations. It can also seriously restrict needed flexibility in the future. For this reason the study noted a trend toward localizing impacts vs. permitting them geographically more generally. For example, where an earlier easement might have provided for a defined number of new structures but not indicated where they would go, or even necessarily restricted their sizes, more modern easements tend toward defined "use areas" or zones". This is an improvement in easement design.

“Base of Operations Zones” were defined in some easements, where structures and other improvements needed in support of permitted uses like ranching could be constructed. Similarly an existing “Ranch Headquarters Area” might be described, mapped and endowed with greater latitude in what may happen there than in other parts of the property. “Residential Use Areas” which permitted enumerated structures and facilities including residences, domestic gardens, tennis courts, garages etc., were also defined. Generally these areas were drawn on exhibits included in the easement, and some were actually surveyed and legally described. In a few cases an easement provided for such an area or areas to be defined later but restricted their size in acres or square feet, noted places they could not be located, (such as within so many feet of a riparian area or other sensitive feature), and often required the Conservancy's pre-approval.

Tip: Focus On Outcomes – Ask “Why Do We Care?”

One of the strongest things we can do to avoid easement terms that are not overly restrictive, or do not provide for flexibility and new technologies, is to focus on outcomes. Tying easement terms to its conservation purposes and the needs of its biodiversity targets is key. While most easements are clear about the conservation purposes, these are often necessarily broad. If landowners are accountable for the *outcomes* of their actions, (and if those outcomes can be objectively measured), then they are motivated to look for ways to make things work that meet both their needs and those of the resource. Several new easements are much more explicit about this.

For example, efforts by the City of Austin, Texas, to protect aquifers, natural communities and domestic water supplies are focused upon reducing surface alteration and soil and water degradation. In this case, in addition to restrictions on specific activities that can cause these problems, the impacts of new structures is managed quantitatively. The concept is to either limit impervious cover (buildings, roads, etc.) to a percentage of the total acreage of the tract or to limit impervious cover to a maximum square footage.

Tip: Use Objective Criteria

In order to focus on outcomes, it is essential that everyone agree on the way in which they will be measured. Aerial cover, can be measured with modest precision remotely from photography. In other cases, there may be professional standards for quantifying outcomes. This is an approach that is used in California grasslands to measure Residual Dry Matter (RDM), material left standing for its wildlife value before the beginning of the next growing season. Residual Dry Matter is a widely recognized grazing standard, developed to improve range productivity and prevent soil erosion (Hormay and Fausett 1942, Bently and Talbot 1951). In California’s Mediterranean climate of warm wet winters and long dry summers, the growing season begins with the first rains in early November. It continues until the rains stop and the soil dries the following May. Residual Dry Matter is measured in pounds per acre of material remaining in October, just before the cycle begins again.

Substantive ecology and natural history insight may be needed to make these quantitative and explicit requirements sensible. For instance, biodiversity targets differ in their preferred grass height. In the xeric central valley, San Joaquin Kit fox like extremely short grass with good visibility for predators. The RDM prescription for them can be as low as 400lbs/acre. Elsewhere RDM values of 800 to 1,000lbs/acre are more appropriate for sustaining soil productivity and preventing erosion. Ground nesting birds can benefit from even higher values. (Alternatively, for ground birds, the season of grazing with start dates can be used.) Measurable easement terms can be written to meet the ecological needs of specific targets. Good visual tools are available to communicate these standards to landowners (Guenther 1998, 2000).

Tip: Consider a “Choice” Alternative

Working forest easements are some of the most complicated and prescriptive of easements. Forestry easements often dictate buffer areas, cutting zones, clear cut sizes, and many other features that are challenging and labor intensive to monitor. An interesting innovation recently used in Michigan, and in a similar way in California, specifically allows forest certification as an alternative to the prescriptive doctrine of the easement. In particular, the Michigan easement lists several paragraphs of prescriptive requirement details in its forest management section. The easement then states that the landowner can follow these prescriptions or become certified under Forest Stewardship Certification (FSC). If the landowner is FSC certified they do not have to follow the exact prescriptions in the easement. The assumption is that FSC certification will force strong, conservation-minded practices on the landowner, which are then regularly audited by a third-party organization. The easement also has specific wording as to what happens if FSC disbands, becomes weaker or stronger. This scenario has additional advantages in that it offers a possible way to ease monitoring, as monitoring in the future could be a combination of the third-party certification audit (required by FSC and paid for by the landowner) and specific Conservancy methods.

ISSUE: Contact with Landowners is Resource-Intensive and Needs Vary

Staying in touch with owners whose land is subject to a conservation easement can be the most powerful thing that an organization can do to ensure the protection of the resource and prevent/minimize future problems. New Conservancy policy requires that the regular compliance monitoring of its easement holdings now be done to a common standard. Generally this includes an annual site visit, with a monitoring template and photography to document it. The monitor is charged with determining on this visit if changes have taken place that are inconsistent with the easement terms. In addition, easements in project areas typically have more frequent staff contact or oversight.

A good working relationship with the property owner is an important by-product of the easement compliance monitoring activity. However, annual visits may not include a face-to-face meeting with the owner if that person lives off-site. Further, changes can happen quickly and landowners may take adverse actions inadvertently or out of convenience without “checking in”. Finally, ownership changes can be missed and a lot can happen on the ground in a year’s time. Certain situations surfaced in our study that suggest some

circumstances may be at greater risk of a violation than others. These may justify increased scrutiny and a bigger investment in the owner relationship.

INSIGHT: Need for Owner Contact a factor in expected *and* unexpected ways

Several of the easement violations in the study might have been avoided with more regular contact with the landowner. Requirements for notice, and/or Conservancy pre-approval were the easement terms most frequently violated in our random sample. In many cases, adverse consequences were negligible. In others, they were significant, and could have been avoided had the pre-consultation called for in the easement actually taken place. Problems like these are especially unfortunate because they create problems in the relationship with the landowner that may linger, but were avoidable.

Tip: Give “Unfamiliar” First owners Extra Attention

Increased risk of violation following generational change has been well documented (Danskin 2000). With the original landowner passing on/or selling, commitment to easement purposes on the part of the subsequent landowner cannot be assumed. Our study states did turn up one current example of “second generation” issues where the donor’s children are actively resistant to the easement. In addition, two of the study sample’s minor violations occurred on lands held by unrelated second owners. These people had purchased the property from the owners who had held the land when the easement was established.

While generational change or owner change are widely recognized risks, a less appreciated but related risk concerns the first owner who is unfamiliar with the property *prior to the drafting and execution of the easement*. Technically, these would be “first generation” owners. However, because they are not familiar with the land or its capacity and uses, they may have unrealistic expectations, or agree to conditions they may subsequently regret. This was the case in two examples from our study. In both cases, greater investment in the owner relationship in drafting and subsequently as they got started on the land, could have avoided some of the future problems.

Tip: Identify Situations At Risk and Invest Proportionately

In one case of an unfamiliar first owner, the easement was created as a part of property division associated with a divorce. The wife wished to continue in ranching but had not managed the ranch herself. In order to be able to afford the ranch as her separate property, an easement was sold to the Conservancy. In an effort to move quickly, some ranch management terms were drafted based on the wife's requests which were consistent with the Conservancy’s conservation outcomes, but not essential. As she became an active manager of the land, she experienced those restrictions as an impediment. In addition, some easement terms have been inadvertently violated, due largely to the inexperience of the landowner.

In another case, a large ranch was purchased by the Conservancy for later conservation buyer sale out. The Conservancy drafted a conservation easement for the property and refined it when a buyer was identified. In retrospect it is clear that, despite the

appearance that the buyer had secured locally knowledgeable advice, expectations regarding what he could do and how he could use the land turned out to be inconsistent with the agreed upon easement terms. While the new owner was an experienced business person, he found it very hard to accept that the intensive cattle stocking activities he wished to pursue on the property were now constrained by the easement. His lack of direct experience in the ranching industry, and with the property in particular, proved to be a problem.

Tip: Consider an Annual Meeting Requirement

Often working lands easements include a requirement that the landowner participate in an annual meeting with the easement holder (Bristow 1999). This provides a formal way to provide the attention to detail required by more technical or "active" easements on lands where there is significant commercial or similar activity. The intent of this meeting is to review what has been done on the land in the past year, such as timbering, and to affirm that the easement holder has a full grasp of the management taking place. The meeting is also an opportunity to learn what is planned for the coming year on the property. This allows the easement holder to scrutinize things that *may* happen and point out activities that may jeopardize the easement. Including easement terms which require the landowner's participation in such a formal annual meeting is more resource intensive than less formal "checking-in" as a part of regular monitoring. However, where activity levels are high this more proactive approach can be justified for its value in preventing problems *before* they take place.

Tip: Be Aware That Competent Partners May Not Always Think to Consult First

Not all owners of land under The Conservancy's conservation easements are private individuals: Private owners also include other national conservation organizations. Public owners include respected educational and research institutions as well as park and recreational agencies of local, state or broader focus. Some of these owners have significant experience and credentials in managing sensitive biological resources. This level of expertise is highly desirable in a landowner and these are among the Conservancy's most productive relationships. Regardless of experience, however, these lands are still subject to their easement restrictions.

Terms of easements with institutional landowners whose missions overlap with TNC's tend to be more flexible than others written to permit compatible commercial uses. Still, for a variety of reasons, these easements do include restrictions which may not be obvious conditions required by the resource. Often flexibility is present, but requires consultation with TNC and advance approval. The survey included one easement over land held by a county park where structures in excess of those permitted by the easement (but needed for protection of the surrounding natural area) were constructed without the required pre-consultation and written approval from TNC. Such approval would have been given, but the need for it was overlooked by the landowner. Two other similar cases of historic violations of this kind were identified by the practitioners interviewed as a part of the survey.

INSIGHT: Investments in Structure and Tracking are Essential

Tip: Create Organization and Documentation Within Operating Units

New Standard Operating Procedures within the Conservancy require that each OU identify a qualified person or team who will be primarily responsible for monitoring easements. This same person or team should also address how they will communicate with landowners. The easement team should have written documentation on how each specific easement landowner in their state should be communicated with and how many times in a year they need to be contacted. While even landowners who don't live near the property should have at least one personal or "real-time" meeting before or after the monitoring, additional contact may include: letter or visit indicating results of monitoring; newsletter that goes out to all Conservancy easement holders; "member" type meeting of easement holders, and other forms of contact such as holiday mailings, mailing an "Annual Report on Easement Monitoring" etc. Some chapters go the "extra mile" by using registered and/or return receipt mail in all postal contact with easement landowners.

While volunteers may be used to assist in monitoring, the relationship with the landowners should involve a consistent, permanent staff person. Nothing is more valuable than at least one in-person contact per year to determine what the landowner plans to do on the property, clarify any underlying questions on the easement, or to talk about joint management that may be implemented. A surprising number of *de minimus* violations, and some significant violations, happened because the landowners did not check with the Conservancy for input or pre-approval prior to undertaking otherwise permitted actions. Without the Conservancy's advance review and input, a few of them required significant investments to make them right.

Tip: Don't Overlook Tracking Easement Holder's Affirmative Obligations

It is not only the landowner who has the capacity to be out of compliance with easement terms if the Conservancy assumes affirmative obligations. On one easement in the study, the document specifically obligated the Conservancy to undertake restoration actions on a fixed time-table. These activities were much delayed due to new levels of review and approval for wetland restoration so that the process is behind schedule and terms are now out of compliance – a technical violation. In some cases donor-desired outcomes have driven Conservancy commitments which have required tracking and run the risk of future violation by the Conservancy if investments exceed expectations or result in delayed action. Whenever possible activities such as this are better crafted as rights rather than obligations to allow the Conservancy the flexibility it may need.

Tip: Utilize "Triggers" that Identify Land Turnover (Sales)

Clearly, connecting quickly with a new owner is key to defining expectations and developing a constructive long-term relationship. However, even when land trusts recognize the importance of connecting with new owners, learning in a timely manner that a property has changed hands can be challenging. Some easements direct the

landowners to inform the Conservancy if the property is sold, (and some even before), however these provisions are often not complied with and the Conservancy may have little recourse if they are not. Another option is to take advantage of an escrow process to ensure that the easement holder is informed.

Transfer fees have been used to fund stewardship activities and there has been significant discussion about their advantages and disadvantages (Andes 2003). In California, the Conservancy, and the California Rangeland Trust (CRT) have employed fees to compensate the easement holder for the costs of bringing a new owner up to speed. These provisions also have the benefit of ensuring that a third party is responsible for getting notice to the Conservancy at the time that the sale closes. Basically these provisions call for a *payment to be made to the easement holder* on subsequent sales of the easement-encumbered property, as a part of the closing, *when the sale is to a party outside of the family of the current owners*. CRT uses .05% of the purchase price for properties valued at less than \$5 million. The Conservancy in California recently used the same percentage for a property which would likely sell for about \$1.5 million subject to TNC's easement. While these amounts are half or less of those discussed in the literature, simply requiring a payment has the advantage that it brings to the attention of the seller the fact that someone else has an interest in the property – if they've managed to overlook it up until that point.

Several land trusts in Ontario, Canada have closing language that allows a similar trigger. When land sells with an easement, a small "tax" goes to the land trust. This does several things: (1) the assumption is that the more the land changes hands the more expensive it may be to monitor thus each land sale adds funds to the land trust's endowment; (2) the buyer and seller see the "land trust tax" on the closing documents and it triggers especially the new buyer to question what that is, thus learning about the easement, if not already known; and (3) the land trust knows the land is changing hands by receiving the revenue of the tax.

CONCLUSION

Conservation easements are a dynamic and evolving tool for achieving and sustaining conservation. They have the added challenge that, once established, they constitute a permanent constraint on living, variable ecological resources in the context of changing human communities. Given that, it is incumbent on the Conservancy to track our success, learn from our problems, contribute to creative, flexible and dynamic solutions, and most of all to share that learning. Recognizing that even minor easement violations have consequences - in documentation, resolution, and the relationship with the property owners - we hope that the issues, insights and tips surfaced in the study will be useful to practitioners actively drafting and managing conservation easements across The Nature Conservancy and beyond.

REFERENCES

- Andes, J. 2003. Transfer Fees- Financial Boon or Legal Bust? *Exchange* **22(2)**: (22-24).
- Bentley, J. R. and M. W. Talbot 1951. Efficient use of annual plants on Cattle ranges in the California foothills. USDA Circ. 870. 52p.
- Bristow, P. 1999. "Great" Easements, Great Expectations: The Challenges and Rewards of Stewarding Large-Scale Conservation Easements. *Exchange* **18(4)**: (5-7).
- Danskin, M. 2000. Conservation Easement Violations: Results from a Study of Land Trusts. *Exchange* **19(1)**: (5-9).
- Guenther, K.S. 1998. *Residual Dry Matter (RDM) Photo Guide* ©Keith Guenther, Wildland Solutions. <http://www.wildlandsolutions.com/>
- Guenther, K.S., G. E. Guenther, and P.S. Redick. 2000. Expected-Use GIS Maps. *Rangelands* **22(2)**: (18-20).
- Hormay, A.L. and A. Fausett. 1942. Standards for judging the degree of forage utilization on California annual-type ranges. CA Forest and Range Experiment Station Technical Note 21.
- Thompson, B. H. 2004. "The trouble with time: Influencing the conservation choices of future generations." *Natural Resources Journal* **44(2)**: 601-620.