

WHEN FEE TO TRUST ISN'T VIABLE

Conservation Easements as an Efficient Alternative
to Fee to Trust Transactions

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WHEN DOES IT MAKE SENSE TO PURSUE FEE-TO-TRUST TRANSACTIONS?

- Land transactions should be structured to meet the Tribe's goals.
- Seeking to place fee land into trust makes sense when trust status is necessary to achieve the Tribe's objective(s):
 - Gaming
 - Tribal Jurisdiction
 - Freedom from State/Local Taxation
 - Expand (or Restore) Boundaries of the Current Reservation
 - Large-Scale Conservation of Natural/Cultural Resources

WHAT ARE THE LIMITATIONS AND BURDENS OF THE FEE-TO-TRUST PROCESS?

- Transaction Costs
- Public Process
- Politics (Tribal, Federal, State, and Local)
- Delays in Processing and Completing the Transaction
- Uncertainty
- Legal Challenges

WHEN SHOULD A TRIBE CONSIDER ALTERNATIVES TO THE FEE-TO-TRUST PROCESS?

- Smaller parcels or areas of ancestral land located outside of contemporary reservation boundaries
- Limited objectives that don't necessarily require trust status
 - Conservation of natural resources
 - Conservation and protection of cultural resources
 - Access to non-reservation land for cultural practices
- Limited funds for land purchases

WHAT IS A CONSERVATION EASEMENT?

- **Plain Language**: A conservation easement is a restriction in a deed that protects land against future development, exploitation, and degradation.
- **Legalese**: A covenant that runs with the land and requires the current and future owners to use the land only in a manner that is consistent with the conservation values outlined in the easement.
- **Statutory Definition**: A non-possessory 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, archaeological, or cultural aspects of real property.
 - Uniform Conservation Easement Act § 1(1) (1982).

WHAT IS A CONSERVATION EASEMENT?

- “Grantor” is the landowner that agrees to restrictions on use of land or to allow designated uses consistent with the conservation values to be protected.
- “Grantee” or “Holder” is the entity that monitors use and enforces the terms of the conservation easement to ensure the conservation and cultural values are protected in perpetuity.
- California law specifically recognizes the authority of tribes to hold or acquire conservation easements in order to “protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place.” Cal. Civil Code § 815.3 (SB 18).
- SB 18 applies to tribes recognized by the federal government and those not formally recognized by the federal government but included on the list maintained by the California Native American Heritage Commission.

WHAT IS A CONSERVATION EASEMENT?

- 1) Land remains in private ownership.
- 2) Easement remains in effect in perpetuity.
- 3) Can protect a wide range of values:
 - A) Conservation of natural resources
 - B) Protection of wildlife
 - C) Preservation of open-space
 - D) Protection of Tribal ancestral lands, resources, sacred ceremonial areas and resources.
 - E) Historical, archaeological, other public values.
- 4) California Conservation Easement Act: Cal. Civil Code §§ 815-16.
- 5) Tribe can be a grantor or grantee/holder of a conservation easement.

CONSERVATION EASEMENTS: A VIABLE ALTERNATIVE TO FEE-TO-TRUST

- Conservation easements may be a viable alternative to fee-to-trust transactions depending on Tribal goals and objectives.
- Conservation easements are becoming increasingly popular in Indian country as other means of land and cultural site protection lose their efficacy.
- Outside the tribal context, conservation easements were developed principally to restrict uses of land in order to preserve in perpetuity open space, historic resources and the natural environment.
- Conservation easements may both restrict uses of land and affirmatively authorize or permit uses of land consistent with the conservation values they are designed to protect.

WHY WOULD A LANDOWNER GRANT A CONSERVATION EASEMENT?

- First Question: Why would a landowner encumber their own land with these restrictions?
 - 1) Tax Incentives
 - Federal
 - Deduct up to 30% of adjusted gross income for value of donated conservation easement. Value of Property Before – After Donation.
 - Conservation Easement Incentive Act of 2015
 - California
 - Natural Heritage Preservation Tax Credit Act
 - 55% of fair market value of donated property against income
 - 2) Sympathetic to Tribal/Conservation Values

TRIBE AS GRANTEE/HOLDER OF CONSERVATION EASEMENT

- A grantee/holder of a conservation easement is responsible for enforcing the terms of the easement.
 - 1) Monitoring
 - 2) Staff
 - 3) Funding
 - 4) Enforcement actions
 - 5) Interpretation of conservation values

TRIBE AS GRANTEE/HOLDER OF CONSERVATION EASEMENT

- Tribes holding conservation easements on public land presents special legal and policy challenges.
 - There is federal statutory authority for agencies of the United States to grant such easements. For example, any federal agency has authority to grant easements “in, over or on real property of the Government,” provided that the head of the agency determines that the grant will “not be adverse to the interests of the Government.” 40 U.S.C. § 1314(b).
- Tribal easements on federal land for purposes of access to and use of cultural sites are rare, but there is precedent for them:
 - In 1998, the U.S. Department of Commerce granted a conservation easement to the City of Boulder, Colorado, for the purpose of protecting open space, and simultaneously granted an easement in the form of a memorandum of agreement to 15 Indian tribes in order to preserve “certain sacred and special portions of the property for the exercise of the religious and cultural benefits of the Tribes.”
 - In 2000, the Pueblo of Santa Clara in New Mexico obtained an easement on lands of the U.S. Forest Service in order to prevent development along a ridge line that separated the federal land from the Pueblo’s land, which contained important cultural places.

TRIBE AS GRANTOR OF A CONSERVATION EASEMENT

- Indian tribes have granted conservation easements on their land in a variety of circumstances and for varied reasons. They are flexible and creative tools to achieve tribal purposes. Tribes as sovereign landowners have inherent governmental authority to agree voluntarily to restrict certain uses or activities on their land. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (upholding tribal zoning power and land use restrictions to preserve and protect resources in certain areas of the reservation).
- Generation of revenue: In 2004, the Quinault Indian Nation granted a conservation easement to the United States in order to protect habitat for the endangered Marbled Murrelet bird species, in exchange for \$32 million. The easement prohibits development, timber harvest, new roads and grazing. The easement allows tribal members to hunt, fish, trap and camp in the area covered by the easement, provided such uses are consistent with the conservation value of a healthy habitat for the bird species. The Quinault Indian Nation intends to use the funds to acquire non-Indian lands within its reservation.

TRIBE AS GRANTOR OF A CONSERVATION EASEMENT

- Facilitate acquisition of aboriginal lands: Granting a conservation easement restricting certain uses may be consideration for the conveyance of aboriginal lands that had been lost generations ago.
- Facilitate acquisition of sacred sites and culturally significant lands: In 2007, the Passamaquoddy Tribe acquired 5.5 acres of private land containing historic and sacred petroglyphs in exchange for donating a conservation easement on 300 acres of tribal land to a non-Indian land trust that wished to protect coastal land from development. The easement allows tribal members to continue to use the 300 acres for traditional cultural purposes.

CHALLENGES IN NEGOTIATING CONSERVATION EASEMENTS

- Enforcement of the Easement
 - What kind of tribal entity will hold the easement?
 - Sovereign immunity issues
 - Waiver required?
 - Alternative dispute resolution
- Easement Values
 - Reconciling Tribal values with the values of non-Tribal partners
- General v. Specific Uses
- Confidentiality and Privacy Concerns
- Public Access

CONCLUSION

- Conservation easements are an increasingly popular conservation tool and can serve as a useful, creative alternative to burdensome and uncertain fee-to-trust transactions.
- Tribes should carefully consider whether a conservation easement is a good fit for the long-term goals that it has in mind for the land in question.

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