

Easements

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A microcosm

Ediger's situation is a microcosm of the anxiety surrounding conservation easements in the agricultural community.

Some farmers want to extinguish development rights to protect the landscape while reducing property values to reduce inheritance taxes, but they're worried about someone forever looking over their shoulder.

"I have no desire to be micro-managed. I have no desire at all," said Ediger, who hopes that Grant Soil & Water Conservation District will agree to hold his easement.

Meanwhile, organizations that are familiar to farmers, such as local soil and water conservation districts, are hesitant to hold conservation easements precisely because they may someday be forced to litigate against future landowners who violate the terms.

"If someone comes around with the right amount of money, they can keep you tied up in court until you holler uncle," Ediger said.

Soil and water conservation districts have a long history of working with growers, so they've established a level of trust that outside organizations often haven't, said Jim Johnson, land use specialist with the Oregon Department of Agriculture.

"They're a local government with an elected board, so they're accountable to a local constituency," he said.

Lucien Gunderman, a farmer near McMinnville, Ore., also wanted to preserve his family's 720-acre property but felt that land trusts — which commonly hold easements — had an environmental agenda in their easement proposals.



Mateusz Perkowski/Capital Press

Lucien Gunderman, a farmer near McMinnville, Ore., speaks about the decision to place a conservation easement on his family's property. While such easements preserve the landscape and reduce inheritance tax burdens, some farmers worry about being saddled with environmental requirements in perpetuity.

"A lot of their stuff, I didn't like the way it was worded," Gunderman said.

For example, he wouldn't be allowed to continue operating a wood stove business on the property, as it was considered a commercial use.

Instead, Gunderman struck a deal with the Yamhill Soil & Water Conservation District under which the easement prohibits subdivisions and most construction while setting limits for logging on the forested portion of the property.

'Perfect fit'

"With the district, it was a perfect fit," he said.

Larry Ojua, the district's manager, said not all properties match the district's goals. He has turned down four easement proposals.

One major consideration is whether the district has the resources to defend the easement. Gunderman, for example, provided the district with \$8,000 for its future administration.

"We look at it selectively," said Ojua. "We're not really prospecting for properties."

Another factor is the prospect of forever ensuring the terms are being met, which must occur on a regular basis, said Tom Salzer, manager of the Clackamas Soil & Water Conservation District, which is looking at the possibility of holding perpetual easements.

"For us, it's the overhead of staff time to do the annual monitoring and reporting," he said. "That's staff time we're not spending serving our core customer base."

'Not for everybody'

Woody Wolfe, a farmer and rancher near Wallowa in northeastern Oregon, shared the same trepidations as Ediger and Gunderman but is now satisfied with his decision to sell an easement to a land trust.

"I can guarantee it's not for everybody," he said. "There has to be a fundamental desire within the person to agree with conservation."

In 2011, Wolfe sold an easement on roughly 200 acres to the Wallowa Land Trust for \$200,000 that allows him to conduct common farming practices on most of the property, though he can't subdivide it, use it for commercial purposes, or build new roads without permission.

About 36 acres of the property are reserved for riparian habitat, which means he can't graze cattle or travel in a motorized vehicle on the land unless it serves an ecological purpose.

Wolfe is all right with the arrangement because a team of specialists overseen by the land trust monitors the 36-

acre parcel and conducts conservation projects on it, which are paid for with grants.

"I'm not responsible for implementing them," he said. "All I have to do is let them manage it."

Conservation work is a key aspect of the Wallowa Land Trust's mission that qualifies it as a charitable organization, said Kathleen Ackley, its executive director.

"There has to be some level of conservation for us to be able to work with a landowner," she said.

Entities that pay for easements — such as USDA's Natural Resources Conservation Service — must also ensure their money is helping the environment, which is why land management plans are often tied to the funding, Ackley said.

"Most easements are going to reference some sort of management plan," she said.

Mutually beneficial

In return, landowners get the benefit of an income tax deduction for the portion of the easement's value they donate, Ackley said. "It's a mutually beneficial strings attached."

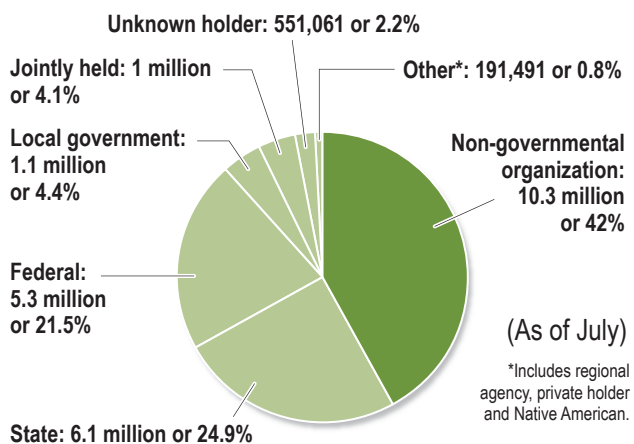
The Oregon Watershed Enhancement Board, a government agency funded with state lottery dollars, is constitutionally mandated to use those funds for projects that conserve wildlife habitat and water quality, said Meta Loftsgaarden, its executive director.

"We have an obligation to meet that bar," she said.

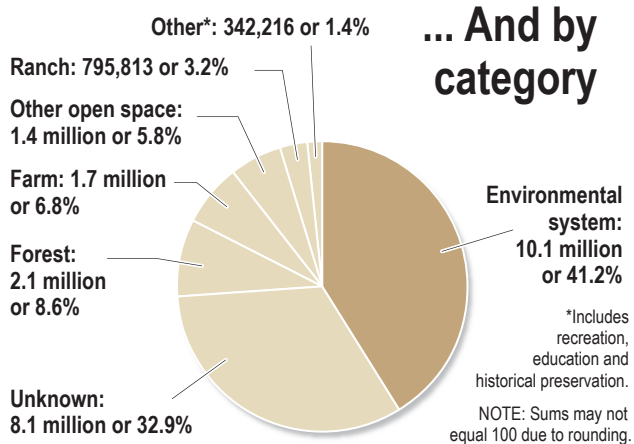
For the same reason, the agency must perform its own

Easement acres by holder ...

(More than 24 million U.S. acres have been placed in easements.)



... And by category



Source: National Conservation Easement Database

Alan Kenaga/Capital Press

periodic monitoring of conservation easements — in addition to the easement holder's monitoring — and advise landowners when they fall short of complying with its terms.

Loftsgaarden said this dual monitoring may cause landowners to ask, "Why are you coming back here?"

Before 2012, when OWEB overhauled its regulations to make the easement program more transparent and accountable, the answer to that question often wasn't communicated clearly enough, she said.

"It's a permanent investment of public dollars, so the agency has to continue to track them," she said.

OWEB is also devising an "Oregon Agricultural Heritage Program" that would emphasize protecting actively farmed properties.

The program would not be funded with OWEB's lottery dollars, so it wouldn't have to focus on habitat and water quality issues, Loftsgaarden said. It's possible the Oregon Legislature will be asked to fund the program separately to prioritize agriculture.

"It can't come into the door unless it's a working land," she said.

A big advantage of having a conservation easement funded by OWEB is that the agency can rely on attorneys from the Oregon Department of Justice to enforce its terms.

So far, the agency hasn't had to take legal action, but the potential for such cases causes a lot of consternation among easement holders, even though they're relatively rare.

"When it does occur, it can take up a lot of your resources," said Johnson of ODA.

Oregon law restricts landowners from partitioning property within "exclusive farm use" zones into parcels smaller than 80 acres for farmland and 160 acres for ranchland.

However, even such relatively large parcels can undermine a region's agricultural

character if they're not actively farmed, Johnson said.

"They may be marginally farming but it's really just a large rural estate," he said.

'Money battles'

The fear is that someone with lots of money — a brash and litigious billionaire, perhaps — will be willing to outspend an easement holder in court to violate an easement.

"I've got more money than you, so what are you going to do?" said Fritz Paulus, an attorney specializing in conservation easements. "It sometimes turns into these money battles."

Easements must be written to have "teeth" by requiring landowners to pay the holder's attorney fees if they lose a case, Paulus said. However, winning a judgment in court isn't the same thing as cash.

"Can you collect on that? It's a whole other issue," he said.

To deal with the problem of looming litigation, the Land Trust Alliance, which represents land trusts, founded the TerraFirma risk retention group.

Land trusts pay premiums into the program, pooling their money for the eventual cost of a lawsuit that must be filed to defend an easement.

TerraFirma handled 79 claims in 2015, up from 57 claims in 2014 and 38 claims in 2013, when the program was created.

"It usually involves a change in ownership, and someone who has not bought into the concept of a conservation easement," said Russ Shay, public policy director for the Land Trust Alliance.

Having such insurance can help discourage landowners from violating easements, since they know it will entail a legal battle, he said.

As government entities, soil and water conservation districts can't take part in TerraFirma, but Shay advises they set aside money for litigation for the same reason.

"Being prepared is half the battle," he said.

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