

The Basics of Conservation Easements in Mississippi



According to the National Woodland Owners Survey (Butler et al. 2012), nearly 14 percent of Mississippi respondents indicated the most important reason for owning forestland was passing land to their heirs. Unfortunately, trends in landscape change show that family forests are being broken up into smaller acreages as families seek to divide property equally among heirs, comply with federal and state tax laws, and adapt to constantly changing financial situations. In areas with intense commercial and residential development, forests are parcelled and fragmented, thereby limiting the ability to manage for timber products and restricting enjoyment of ecosystem benefits.

The purpose of this publication is to make Mississippi landowners aware of an option available to them to conserve and protect their property. This option is known as a conservation easement. Conservation easements in Mississippi are used for preserving open space and protecting natural habitats.

Conservation easements are not for all Mississippi landowners. Usually, a conservation easement is a legal instrument that protects the property in perpetuity; it must be respected even if it is deeded to a new owner. Although they can offer flexibility, perpetual easements limit the actions of heirs.

Conservation easements have a language of their own that is linked to tax and legal codes. Words and phrases in bold lettering correspond to a glossary at the end of this publication. The glossary will be convenient for landowners interested in looking further into the conservation easement as a land management tool.

What Is a Conservation Easement?

A **conservation easement** is a voluntary legal instrument that transfers specifically identified property rights from a landowner (also known as the donor or **grantor**) to a qualified entity called an **easement holder** (the **grantee**). The first conservation easement was developed in 1891. However, it was not until the 1930s and 1940s that conservation easements began to be more commonly used when the National Park Service bought parcels of land for the Blue Ridge Parkway and the Natchez Trace. The purpose of the purchases was to provide a scenic right of way. This was the first instance in which a government entity managed land by owning specified rights of the property instead of the property itself (Mulholland 2004).

Today, a landowner can donate or sell an easement to either a private organization or a government agency. Often, the private organization will purchase the easement and subsequently sell it to an agency. If an easement is purchased, payment is negotiated and may be an amount equal to the difference between the fair market values with and without the easement. Both donation and sale of property rights result in tax benefits for the grantor.

The easement holder has responsibility for monitoring and enforcing the restricted property rights outlined in the conservation easement. Restrictions are designed to protect natural, productive, or cultural characteristics of the site for **public benefit**. Federal law notes:

The preservation of an ordinary tract of land would not in and of itself yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit or the preservation of a unique land area for public employment would yield a significant public benefit. For example, the preservation of a vacant downtown lot would not by itself yield a significant public benefit, but the preservation of the downtown lot as a public garden would, absent countervailing factors, yield a significant public benefit. (Treasury Regulation Section 1.170A-14)

Although property law favors full ownership of the property (known as **fee interest**), including the rights and the land, it is often an inefficient method of achieving conservation purposes. For example, a farm may preserve wildlife habitat while still engaging in commercial production. It is not always necessary to convert the farm into a preserve. Even though fee interest may be the best assurance toward conservation, high land prices often make fee interest purchase of land in metropolitan areas prohibitive.

Rights generally retained by the landowner in a conservation easement:

- Continued ownership of the land.
- Right to access the property.
- Retain the land's status as private property. Although the grantee will reserve the right to enter the property to monitor compliance with the agreement, public access rights would have to be specified in the contract.
- Right to sell, mortgage, and pass on land to heirs (although restrictions may remain).
- Specific development rights compatible with conservation purposes.

What Rights Are Restricted?

Restriction of private property rights is a part of daily life in the United States. All property owners are limited by eminent domain and zoning laws, law enforcement, and taxation laws. Conservation

easements focus on restriction of residential or commercial development to ensure the landowner's current use of the property while sustaining the resources the easement is intended to protect. In a conservation easement, the landowner retains fee ownership and other rights as specified in the contract. **Fee (simple) ownership** refers to enjoyment of full ownership of the property, including passing it along in a will to the owner's heirs. Other rights that can be retained include the right to manage resources (e.g., thinning trees for silvicultural purposes, herbaceous weed control, constructing logging access roads), produce crops and livestock, make capital improvements, or participate in recreational activities. Because every property and landowner situation is unique, the landowner and the easement holder negotiate the types of rights to restrict.

Typical restrictions/requirements include:

- No or limited subdivision.
- Limit on development or additional building, although a landowner may reserve several home sites for present and future use.
- No commercial or industrial uses other than ranching, farming, timber harvesting, and cottage industry.
- No or limited separation of water rights from the property.

What Is the Legal Basis for Conservation Easements?

Conservation easements are recognized under federal law by Internal Revenue Code Section 170(h) and Treasury Regulation Section 1.170A-14, and state law Mississippi Statute 89-19-1 known as the "Mississippi Conservation Easement Act of 1986." In Mississippi, conservation easements must be conveyed to the state attorney general and the Department of Wildlife, Fisheries, and Parks in order to qualify for protection under the statute.

Because tax benefits of conservations easements tend to be most significant at the federal level, the Internal Revenue Code Section 170(h) is often cited as the primary basis for conservation easement provisions.

According to Internal Revenue Code Section 170(h), a qualified conservation contribution (i.e., a charitable contribution) is an interest in real property, has a conservation purpose, and is donated to a qualified charitable organization.

Charitable contributions must meet at least one of the **conservation purposes** outlined in Internal Revenue Code Section 170(d):

- The preservation of land areas for outdoor recreation by, or the education of, the general public.
- The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.
- The preservation of certain open space (including farmland and forestland).
- The preservation of a historically important land area or a certified historic structure.

To address the sharp rise in conservation easements across the country, the Uniform Conservation Easement Act (UCEA) was drafted in 1981 by the National Conference of Commissioners on Uniform State Laws, a nongovernmental body that provides model legislation for states. The UCEA is a binding template that states can modify in drafting their conservation easement legislation. The Mississippi Conservation Easement Act of 1986 closely reflects the UCEA.

According to the Uniform Conservation Easement Act, only two kinds of entities can hold easements as qualified organizations. These entities are **charitable organizations** with the purpose of holding interests in land for conservation or historic preservation, or governmental bodies empowered to hold an interest in **real property**.

In addition, the laws define two key types of conservation easements. The first is known as a **perpetual easement**. Treasury Regulation Section 1.170A-14 defines such an easement as:

A restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude).

Grantors receive federal tax benefits for donating or selling conservation easements only if they are perpetual.

The second type of easement specifies the number of years the contract is allowed to restrict the rights of the landowner. Such easements usually seek to restore water, soil, and wildlife quality, and are managed by state and federal agencies. The Farm Bill, updated periodically, authorizes federal cost-share conservation easement and rental programs. Landowners who are interested in these programs should contact their county Farm Service Agency office to learn more about the different benefits and restrictions of each program and to see if they qualify. In addition, each program has an associated fact sheet available through the Natural Resources Conservation Service (NRCS) website (<http://www.nrcs.usda.gov>).

Can a Conservation Easement be Annulled?

In some cases, a conservation easement can be amended (revised) if the grantor and the easement holder agree to the revised terms and the conservation purpose is not affected. In other cases, the easement holder decides the purposes for conservation as stated in the contract become impossible or impractical as the property changes due to human or non-human factors. As a result, the easement can be **extinguished** by judicial proceeding. Extinguishment requires very special circumstances and the easement holder can recoup proceeds from the landowner in proportion to the easement's value in order to acquire another property for use "in a manner consistent with the conservation purposes of the original contribution" (Treasury Regulation Section 1.170A-14; see also Mississippi Code Section 89-19-1 through 15).

How Do I Choose a Land Trust?

A **land trust** is an organization whose purpose is to preserve land or historic structures. Land trusts can be local or nonlocal, and have varying conservation objectives and geographic coverage areas. Almost 2,000 land trusts control 47 million acres of land throughout the United States with nearly nine million acres in conservation easements.

It is important that a landowner thoroughly research all potential land trusts before committing to a contract. Some things to do include reading through the background of the organization, checking for current status and any complaints at the Secretary of State's office, and interviewing other grantees. The following are some questions a landowner should ask before donating an easement to a land trust.

- How is the relationship between the land trust and other landowners who have donated easements to the organization?
- Does the land trust have the financial resources to handle its responsibilities over the long-term?
- Are my conservation objectives compatible with those of the land trust?
- What are the activities I am willing to have restricted now and in the future?
- What are the activities that I am unwilling to have restricted?
- Will the easement be transferred to another organization or government entity?

Some of the Mississippi land trusts include:

Organization*	Area of Work
Mississippi Land Trust	Statewide
North Mississippi Land Trust	DeSoto, Lafayette, Lee, Marshall, Tate Counties
Land Trust for the Mississippi Coastal Plain	George, Hancock, Harrison, Pearl River, Jackson, Stone Counties
East Mississippi Foothills Land Trust	Neshoba, Kemper, Lauderdale, Newton, Clarke Counties
Civil War Preservation Trust	Statewide
The Nature Conservancy, Mississippi Chapter	Statewide

* Registered with the Mississippi Secretary of State as of August 2012 (http://www.likewise.sos.ms.gov/securities_and_charities_securities_search.aspx).

How Is the Value Calculated?

A real estate appraiser must determine the value of the conservation easement. Sometimes, the easement holder contracts with the appraiser. The valuation is completed no earlier than 60 days before the easement is donated and submitted with the donor's tax return. The appraisal typically occurs using the **before and after method** of valuation.

In this method, the highest and best use is determined by evaluating the continuation of existing uses and alternative uses such as subdivision, redevelopment, expansion, or renovation. Then, the appraiser determines the highest and best use by comparing easement restrictions to existing zoning regulations. A **fair market value** is applied to the determined highest and best use based on nearby properties with similar uses. An easement's value tends to be greatest in areas with intense development pressure and for contracts that prohibit any development.

What Are the Benefits of Conservation Easements?

In addition to contributing public benefits, there are several benefits to the individual landowner for placing land in a conservation easement. One major benefit can include the improved management of natural resources on the property. For example, in addition to an appraiser, the easement holder can help a landowner contact natural resource professionals, such as a forester or wildlife biologist, for consultation. In addition, obtaining a conservation easement can facilitate the development of a natural resources management plan.

Many government-sponsored easements such as the Wetland Reserve Program require a management plan. Such a plan is a roadmap for sustainable management of natural resources outlining the landowner's objectives, management activities (e.g., invasive species treatment), projected costs, and a timeline for activities. Most importantly, a plan can reduce the chances of making costly mistakes that may take years to overcome.

Economic benefits of conservation easements include direct payments, tax relief, and reduction of estate taxes when passing land to heirs. Federal and state tax relief may be the most common benefit to landowners with qualifying conservation easements. It is very important that a landowner interested in a conservation easement consult a qualified tax professional to determine if an easement is suited to his or her financial situation.

Donating a conservation easement reflects federal income tax benefits of other charitable contributions. A landowner may be able to deduct up to the full value of the conservation easement from his or her adjusted gross income, up to 30 percent of his or her adjusted gross income in the year of the gift. If the donation

exceeds this amount, the excess balance of the donation may be deducted during the next 5 years, subject to the same 30 percent limitation.

The easement deduction limitation for farmers and ranchers whose income from farming or ranching is greater than 50 percent for a year is 100 percent of their adjusted gross income with a 15-year carry forward, provided the property remains available for agriculture or livestock production. C Corporations, S Corporations, partnerships, and limited liability companies also have tax benefits.

Relief from estate taxes is often the most significant benefit for easement grantors. For estate tax purposes, a conservation easement is gifted through a will and reduces the tax burden of the heirs. The easement must be granted on or before the filing date of the estate tax return. Check with a qualified accountant or tax attorney for the latest tax relief developments. A conservation easement donation can result in a reduction of up to 40 percent of the property value for estate tax purposes in addition to the reduction in taxable estate value resulting from the easement itself. These values are on a sliding scale and can be reduced based on the value of the conservation easement.

On the local level, restriction of future owners' rights reduces the fair market value of the property, which corresponds to a reduction in property taxes. The county tax assessor determines the extent to which property taxes may be lowered. Tax assessors are often reluctant to lower property taxes because county revenues are likewise reduced.

In addition, Mississippi allows for a **tax credit** with the qualified donation of land to a charitable organization. The credit is 50 percent of the allowable transaction costs involved in the donation of the easement. Landowners should be aware of limits on the total amount of transaction costs. Costs that may be credited include property appraisals, surveying fees, and legal fees.

To qualify, the property must be nonindustrial private land, adjacent to a stream that is in the Mississippi Scenic Streams Stewardship Program (Mississippi Code Section 51-4-1), or a priority site for conservation under the Mississippi Natural Heritage Program (an inventory of rare plant and animal species,

as well as special natural communities, geological features, and natural areas—Mississippi Code Section 49-5-141). The purpose of the easement must be to preserve stream banks or protect land with high biodiversity or areas of special concern.

Are There Any Disadvantages?

Conservation easements are not a good choice for all landowners. Some landowners may have tax or financial circumstances that preclude entering into an agreement with a land trust or government agency. In addition to donation of development rights, some land trusts require that the property owners make a financial contribution to help defray the costs of administering an easement. It is important to remember that many qualified organizations are not-for-profit groups with limited budgets.

Although tax benefits are meant to curb the reduction in property value, landowners should weigh their objectives and desire to protect the land with future economic potential of the property. Conversely, sometimes a donation increases the value of other properties owned by the donor, possibly cancelling out any tax relief (it does not matter whether or not the property is contiguous). In either case, in the event of a foreclosure, the easement remains in effect as a restriction on the property.

Natural gas has become an important source of income for many landowners in Mississippi. In a perpetual easement, surface mining is not permitted. If the landowner does not own the mineral rights, however, no deduction is allowed. There are special provisions for landowners who own mineral rights.

Landowners should understand that some land trusts might purchase an easement at below market value, then sell the easement to the government at market value (Mulholland 2004). Such an action may conflict with the goals of the donor. As such, landowners must thoroughly research potential land trusts before committing to a perpetual agreement.

Similarly, some property owners wish to enter into a perpetual easement to shield their land from developers forever. However, such arrangements could be detrimental to the public benefit over the long term. Because conservation easements are a relatively new conservation tool, they have yet to fully prove themselves

as conservation instruments. Over time, economic and ecological factors may change conservation needs, aesthetic definitions, and cultural values resulting in a loss of the easement's ecological benefit.

What Happens Next?

The landowner first identifies financial goals and consults with a tax advisor to determine whether an easement is in line with his or her financial and tax situation. The landowner then seeks out a qualified land trust working in the geographic area of the property and whose vision for the protection of the property is consistent with that of the landowner. A land trust representative may visit the property, work with the landowner to identify a potential conservation purpose, and consider where to reserve rights for development. A land trust may also work with the landowner to develop a resource management plan or contract with professionals to develop a plan as part of the conservation easement.

After an appraiser determines before and after values of the property encumbered with an easement, the landowner and land trust obtain a title report to review status of ownership, liens, mortgages, covenants, and mineral rights. A baseline inventory is secured to describe the status of natural resources and ecological characteristics and scientifically define the conservation purpose. A mineral report is obtained to show ownership of minerals associated with the property. A mortgage subordination agreement from the lender must be acquired to show that the mortgage holder agrees to follow easement terms in the event of foreclosure. Finally, the deed of conservation easement is prepared with legal representation for both the grantor and grantee.

After the document is signed and recorded, representatives from the land trust make scheduled, usually annual, visits to document property condition. If any violation of the easement exists, the donor is notified. The easement holder can take legal steps to correct the violation if needed.

GLOSSARY

Before and after method – A land valuation technique used to appraise an easement gift.

Charitable contributions – Money or property gifted to religious organizations.

Charitable organizations – (1) Religious organizations, (2) Federal, state, or local governments, if the contribution is solely for public purposes, (3) Nonprofit schools and hospitals, (4) Public parks and recreation facilities, (4) Charitable organizations (e.g., Red Cross, Boy Scouts), (5) War veterans groups, (6) Expenses paid for a student living with you, (7) Out of pocket expenses when serving as a volunteer with a qualified organization. Conservation land trusts qualify as charitable organizations.

Conservation easement – A nonpossessory interest of a holder in real property imposing limitations or affirmative obligations for specified conservation purposes.

Conservation purposes – Protection of natural or open-space resources, protection of air or water quality, preservation of historical aspects of property, or other similar objectives spelled out in state law.

Easement holder – A governmental body or charitable corporation empowered to hold an interest in real property under the laws of Mississippi or the United States.

Extinguished – Nullified.

Fair market value – The price of a commodity as agreed upon by the seller and the buyer.

Fee interest – Absolute title to the land, free of any other claims. Transferable to heirs.

Fee simple ownership – Ownership of fee interest.

Grantee – See easement holder.

Grantor – Individual, group, or corporate property owner that donates the conservation easement.

Land trust – Nonprofit conservation organizations.

Perpetual easement – A conservation easement with limitations or affirmative obligations that apply to all future owners.

Public benefit – According to the UCEA, “public benefit will be evaluated by considering all pertinent facts and circumstances germane to the contribution. Factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution. No single factor will necessarily be determinative.” See Act for factors to be considered.

Real property – Immovable property, especially land holdings.

Tax credit – A dollar for dollar reduction in taxes based on money invested in something the government considers a public good.

Additional Resources

Mississippi Statutes <https://law.justia.com/codes/Mississippi/>

Mississippi Natural Heritage Program www.mdwfp.com/museum/seek-study/heritage-program/

Internal Revenue Service <http://www.irs.gov>

Land Trust Alliance <http://www.landtrustalliance.org/>

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Distributed by **Brady Self**, PhD, Associate Extension Professor, Forestry. Written by **Jason S. Gordon**, PhD, former Associate Extension Professor, Forestry.



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