

Ecosystem Services and Land Conservation

“Ecosystem services” generally means the natural processes of land and water that provide direct and indirect benefits to humans. These include benefits to water quality and quantity, pollution control, food production, wildlife habitat, biological diversity and cultural services such as recreation. The commodification of ecosystem services is rising in the United States. Currently, carbon and mitigation markets are the drivers, but biodiversity and water quality/availability are likely to grow in the coming years. This pointer addresses ecosystem services and conservation easement drafting and interpretation, land trusts’ role as paid consultants on ecosystem services projects, affirmative obligations and assessment and selection of conservation projects using ecosystem services valuation. When thinking about ecosystem services, it is important to note that the reciprocal relationship between humans and nature has long been recognized by Indigenous Peoples.

Drafting Conservation Easements with Ecosystem Services in Mind

When considering whether an easement should allow, prohibit, or be silent on landowner participation in ecosystem services markets, a crucial step is to identify the land trust’s approach to easement drafting and reserved rights. Some easements prohibit all rights except those reserved by the landowner. If the easement uses this “prohibited if not reserved” approach and the parties want to allow for commercial ecosystem service projects, the easement must clearly establish that as a reserved right. The opposite drafting approach is when an easement allows for the continuation of any rights not expressly extinguished by the easement. If the easement uses this “allowed unless prohibited” approach, the right to commodify a property’s ecosystem services will be automatically reserved to the landowner unless it is expressly prohibited. Some land trusts purposefully choose to be silent on ecosystem services in a conservation easement, while others address it outright. Where an easement follows the “allowed unless prohibited” model, some land trusts choose silence on ecosystem services because these markets are evolving and the land trust doesn’t want to unintentionally be overly restrictive. Some land trusts who explicitly address ecosystem services do so because silence could have the effect of reserving a right to the landowner without conditions for compliance with the conservation easement or provisions for land trust oversight and approval. The key is to think it through and make an informed decision one way or other. The following are general considerations for drafting conservation easements with ecosystem services in mind:

Thoughtful drafting. Specificity, precision, and clarity in drafting are essential to the long-term interpretation and application of perpetual conservation easements. To avoid future conflicts, both the land trust and landowner should understand the easement’s implications for ecosystem services market participation. As you have these discussions, think about whether the ecosystem service project related activity would be visible on a typical monitoring visit, and if not, why restrict it? Discuss whether the land trust should get a share of ecosystem service project related proceeds and ensure that the appraisal reflects the final decisions. And as with any provision in a conservation easement, consider

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your willingness to go to court to enforce the terms related to ecosystem services, if not, then don't include those terms.

Landowner financial viability. Some land trusts have concluded that allowing for commercial ecosystem services projects under a conservation easement will strengthen a landowner's financial viability without harming conservation purposes and values. Furthermore, they believe that allowing this kind of nature-based activity might prevent a landowner from engaging in some other revenue generating activity that is much more harmful to the conservation values and purposes protected by the conservation easement.

Defining ecosystem services. If using the term "ecosystem services," define it and provide examples of permissible and impermissible ecosystem services projects. Examples of pro-conservation ecosystem services projects include: wetland mitigation, streambank restoration, greenhouse gas emissions offset programs, water quality, wildlife habitat restoration, and rare or endangered species restoration. Examples of activities that should not qualify as ecosystem services include restoration projects to correct a violation of the easement, topsoil/mineral/water extraction, or renewable energy projects that involve improvements and structures.

Conservation purposes and values. The easement should make clear that permissible ecosystem services projects must be consistent with the conservation purposes and have no adverse effect on the conservation purposes or values. The easement must make clear that the land trust has the sole discretion to determine consistency with conservation purposes.

Funding Partners. If the acquisition involves third party funding, the funding entity might disallow commercial ecosystem services projects or require some level of oversight. In addition, the land trust, landowner and the funder should reach agreement as to whether the funder intends to own any or part of the rights in and to the property's ecosystem services and this should be reflected in the appraisal. Be sure to consult with funding partners at the drafting stage for clarity.

Notice and approval. If the reserved right to commercialize ecosystem services involves active management of the property, to ensure that the conservation values are protected in the final project-related agreements, consider requiring that: (i) Such management be subject to the land trust's express written prior approval; and (ii) The land trust can participate in negotiations for any such agreements. See the practical pointer on [drafting approval clauses](#).

Commercial Uses. Harmonize commercial use prohibitions and a reserved right to engage in commercial ecosystem services projects on the property by excluding ecosystem services projects permitted under the easement from any commercial use prohibitions.

Stewardship. Work with stewardship staff from the outset to ensure the provisions for ecosystem services projects are workable from a stewardship perspective and if added capacity or special equipment/procedures are necessary, ensure that the land trust is doing the necessary operational and budget planning to support this.

Monitoring and Enforcement. Include language that makes clear that under the terms of the easement, the land trust grantee is not responsible for monitoring or enforcing the ecosystem services project related activities. Note that a land trust still retains the flexibility to take on such monitoring via a

separate contractual obligation if it determines appropriate. See the discussion below regarding land trusts as paid consultants.

Prohibit the use for violation remediation. A landowner should not be incentivized to monetarily benefit from their own violation of the easement's terms. To prevent this, consider prohibiting curing violations through market-based ecosystem services project.

Mutual Cooperation. Consider including a clause allowing the grantor and grantee to mutually cooperate on ecosystem services projects if both parties are interested.

Liability. Be mindful of inadvertently putting the land trust on the hook for monitoring and enforcing the health and functioning of a property's ecosystem services, as this would be nearly impossible to monitor. One can imagine a litigious landowner or neighbor suing a land trust for failing to, for example, protect an endangered species on the property. In addition, it is critical to include a strong indemnification and hold harmless clause covering any financial losses a land trust might suffer because of an ecosystem services project on the property, including costs from claims associated with this indemnity provision. This is akin to the indemnification and hold harmless clauses relating to hazardous substances on the property that is standard in most conservation easements.

Ecosystem Services are Not Development Rights

In a limited number of states, there is rising skepticism among a small number of private property advocates as to whether a conservation easement holder would market the ecosystem services functions of the property without landowner consent. It is difficult to envision a land trust that would do this, and in many states, this would likely be prohibited outright as conservation easements are considered by many state statutes as "nonpossessory" interests.

- When responding to these claims, note that the extinguishment of development rights in an easement likely won't terminate rights in and to the commercialization of ecosystem services.
- The term "development rights" typically refers to a landowner's rights to develop structures and improvements on the land for human use. Many conservation easements terminate development rights when they explicitly prohibit a) new structures/improvements and b) the transfer of development rights in support of development outside the subject property. Commercializing ecosystem services would not likely be considered a development right.
- If a landowner wants to prohibit commercial ecosystem services outright, the easement should expressly state that and not rely on development rights prohibitions for such purposes.
- Presumably private property advocates would not want to limit their property rights in such a restrictive manner, so an alternative is for the easement to allow the landowner to participate in ecosystem services markets while prohibiting the land trust from marketing any interest it holds in ecosystem services without written landowner consent and/or assignment. Retaining landowner consent/assignment preserves private property rights by giving landowners the future flexibility to partner with or assign future ecosystem services projects to the land trust.

Ecosystem Services Markets and the Land Trust Role as Paid Consultant

There is a rise in carbon project developers soliciting land trusts to hold conservation easements for a particular project. If so approached, ask whether the land trust has the staff capacity and expertise to hold, monitor and enforce the proposed conservation easement terms and the obligations, which might or might not exceed the standard scope of conservation easement stewardship and enforcement.

Evaluate the land trust's liability as easement holder and factor that into your negotiations and risk management considerations.

If the land trust has the capacity and expertise and wants to move forward, the land trust should consider itself a consultant providing a valuable service that should be paid accordingly. Be firm in negotiations for sufficient stewardship funds and legal defense funds to cover the land trust's anticipated costs in perpetuity to monitor and enforce the easement. The project lifetime will likely be less than perpetual, but substantial (i.e., 20-100+ years in the case of carbon offset projects), but the costs will obviously go down when the project term is completed.

Affirmative Obligations

Be on the lookout for conservation easement provisions requiring that the land trust monitor and enforce affirmative obligations pertaining to ecosystem services. Affirmative obligations are those where the landowner is required to perform an act. Affirmative obligations by way of management or conservation plans are familiar tools that many land trusts are comfortable with. However, overly burdensome affirmative obligations are generally disfavored amongst the land trust community as it is less likely that a landowner will perform an affirmative act rather than merely ceasing to act pursuant to a negative restriction to refrain from, for example, building a structure. And also note that affirmative rights and business disputes are both exclusions under any TerraFirma policy. Disputes over affirmative obligations and ecosystem services project agreements likely fall within both exclusions. For more considerations see the Carbon Offset practical pointers on [carbon projects](#) and [project related agreements](#).

Land trusts contemplating taking on affirmative obligations in an easement must also determine whether these obligations are allowed under the state's conservation easement enabling act. Some states explicitly allow for affirmative obligations, while others are ambiguous. The Uniform Conservation Easement Act, upon which many states' own easement enabling act is based, allows for affirmative obligations.

Ecosystem Services Valuation Tool

In recognition of the absence of a common metric to value ecosystem services, the Land Trust Alliance has developed an Ecosystem Services Valuation Tool. Lands owned, protected or managed by land trusts often generate ecosystem services that provide benefits to society and nature. These "co-benefits" can be an important value-add in the assessment and selection of conservation projects, stewardship strategies, carbon offset projects, and other conservation activities. Estimating the monetary value (both market and nonmarket benefits) of the co-benefits of conservation and carbon offset projects can help land trusts access new sources of conservation finance, including alternative environmental markets and federal grants to expand land acquisition and stewardship efforts. Note that this tool cannot be used to determine the fair market value of a specific parcel to substantiate the purchase price, to substantiate the value of a donation for a federal or state income tax deduction (or state tax credit), to determine any offset for impermissible private benefit arising from stewardship administration or to determine the valuation of conservation damage required for litigation.

Sample clauses provided for informational purposes only:

Sample 1:

Natural Resource Benefits. Landowner reserves the right to sell, trade, or exchange quantifiable Natural Resource Benefits associated with the Property, provided that such sales, trades or exchanges are (a) exercised in a manner that is consistent with the Conservation Values, and (b) will not diminish the rights either conveyed to Holder or extinguished under this Conservation Easement. The Landowner and Holder acknowledge that any compensation received by Landowner for all such agreements, exchanges or trades shall be payable to Landowner. Holder makes no representations as to whether such Natural Resource Benefits exist and shall have no obligation to participate in Landowner's efforts to sell, trade or exchange Natural Resource Benefits, other than to acknowledge that Holder has no claim to the Natural Resource Benefits.

Prior to Landowner's exercise of the rights under this section, Landowner shall provide notice to Holder pursuant to the terms of Section ____, sufficient to allow a reasonable opportunity for Holder to evaluate the impact of such sale, trade or exchange against the criteria specified in the first sentence of this section. The term "Natural Resource Benefits" as used herein shall mean any and all tax or other credits, benefits, renewable energy certificates, emissions reductions, offsets, and allowances (including but not limited to water, riparian/wetlands, greenhouse gas, carbon, beneficial use, threatened or endangered species habitat, and renewable energy).

Sample 2: Lyme Timber Company Approach to Ecosystem Services:

Natural Resources Benefits. The Grantor, with prior written approval of the Grantee, may enter into agreements, which may or may not be associated with Forest Management Activities, whereby the Grantor agrees to manage natural resources on, or associated with, the Protected Property in a specific manner that is consistent with this Conservation Easement. This shall include the right to sell, trade, or exchange quantifiable natural resource benefits generated from the enhancement of the Conservation Values beyond the values indicated in the Baseline Documentation associated with the Protected Property, provided that such activities do not:

- A. Conflict with the terms, conditions, and Conservation Purposes of this Conservation Easement;
- B. materially reduce the area of productive forest on the Protected Property; and
- C. result in the Grantor benefiting from any such activity if the Grantee requires the Grantor to conduct the activity as a correction to a violation of this Conservation Easement.

Examples of such agreements, sales, trades, or exchanges that may be permitted according to this Section ____ are where the Grantor receives compensation, including transferable credits, for participating in a greenhouse gas emissions offset program; provides clean air, water, or wildlife habitat for the greater public good; or restores, enhances or manages a Wetland, Watercourse or Waterbody as part of a government program, except for restoration projects required to correct a violation of this Conservation Easement. The Parties acknowledge that because the Conservation Values protected by this Conservation Easement shall not be adversely affected by such agreements or activities, and the only interest affected shall be the Grantor's interest, and compensation received by the Grantor. The Parties acknowledge and agree that this Grantor's Reserved Right does not include the right to

exchange, trade, extract, license, lease, transfer, or sell topsoil, minerals, or water located on the Protected Property, except as specifically allowed under the Grantor's Reserved Rights.

Sample 3: Forest Legacy Minimum Deed Terms:

A State Lead Agency may choose to include the following language that discusses engaging in ecosystem service markets (ESMs). Alternately, if the State has a compelling policy reason, it may choose to include language that limits participation in ESMs. If the State does not wish to limit participation, then the State Lead Agency must use the following mandatory language and not other language:

Landowners/grantor/owner may engage in ecosystem services markets under other programs but such action must not adversely affect the interest granted under the easement to the grantee or the grantees right of enforcement or be inconsistent with or defeat the conservation purpose for which the easement was acquired.

No agreements relating to ecosystem service markets shall be made regarding the Property that is or is likely to become inconsistent with the FLP purposes, terms of the easement, or other documents incorporated by reference. If the owner wishes to enter into such an agreement, the owner of the fee title will notify the holder of the easement of any proposed participation in ecosystem service markets the owner deems compatible with the Purposes and Terms of the Easement and related documents and explain why they believe market participation is compatible. The easement holder (in consultation with the State Lead Agency if the holder is not the State Lead Agency) will determine the compatibility of the market participation. As needed and appropriate to make the determination, [Insert name State Lead Agency] will consult with the USDA Forest Service. If it is determined to be compatible, the easement holder will provide an approval and authorization letter to the landowner and include the letter and ESM participation documentation as an attachment to the current Multi-Resource Management Plan/Forest Stewardship Plan. The easement holder may review and monitor all ecosystem service market participation for compatibility with FLP purposes and requirements.

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