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# Conservation Easements

. . . the relevant legal and institutional policies in Oregon



October 1974

Special Report 419

Oregon State University Extension Service

## FOREWORD

This special report is one of a series being developed under the Oregon State University Extension Land Resource Management Program, directed by James R. Pease.\* The series will examine various land use control techniques available to the planner as supplements or alternatives to zoning for implementing plans.

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## CONSERVATION EASEMENTS: THE RELEVANT LEGAL AND INSTITUTIONAL POLICIES IN OREGON

**ABSTRACT:** Property ownership consists of a bundle of rights which may be disaggregated and sold or donated in the form of an easement. A conservation easement and its scenic and use easement subcategories are intended to protect the value of the land in terms of its natural resources, scenery, cultural or historical significance, and recreation potential. In Oregon, any person, organization, or government agency may acquire conservation easements, but only the State Highway Division, U.S. Forest Service, and U.S. Bureau of Land Management can use the power of eminent domain under specified circumstances. Easement acquisition procedures will vary depending upon the parties involved and whether or not Federal funds are used. The value of an easement is derived by using standard procedures that are followed by professional appraisers. Selling or donating a conservation easement will affect an individual's Oregon and Federal income tax and his property tax.

### INTRODUCTION

Conservation easements have been recognized as an effective means of keeping land under agricultural use or in a natural state without purchasing the land in fee simple. Several programs, experiencing varying degrees of success, have been initiated in different areas of the country. For a successful conservation easement program

to materialize, the government agencies and the general public must be knowledgeable of the concept as well as the legal and institutional factors involved. States with informed administrators in government and a knowledgeable citizenry have been able to use conservation easements successfully. Conversely, where such information is unavailable or scattered, little has been accomplished in the utilization of conservation easements.

It is the purpose of this paper to summarize the definitions as well as the legal and institutional policies that are relevant to conservation easements in Oregon. The major topics to be discussed are:

1. The easement concept with an emphasis on conservation easements.
2. The general uses and purpose of conservation easements
3. Individuals and agencies that can legally give, sell, and acquire conservation easements and use the power of eminent domain
4. The procedures that must accompany an easement transaction
5. The methods and rationale for determining the monetary value of an easement
6. The effect of selling or donating a conservation easement on an individual's income and property tax

## THE EASEMENT CONCEPT

Before considering conservation easements, it is helpful to first define the general concept of easements. When a person owns land in fee simple, he actually owns a bundle of rights that are associated with the land itself. For example, he has the right to grow trees, to farm it, remove the vegetation, build on it, mine it, erect signs, and so on. But there are also some rights he does not have. Perhaps the riparian rights to a stream running through his land does not include building a dam across it. The type of buildings or economic activity on his land may be limited by a zoning ordinance or other land use legislation. The landowner's rights may be further limited by the eminent domain of the state, which subjects his individual rights to the rights of the general public.

Usually, when property is purchased, the entire bundle of rights are included. However, these rights can be disaggregated and acquired individually in the form of an easement with the remaining rights to the land being retained by the landowner. For example, the state may own a park along a river and desire to keep the forested land on the opposite bank in its present natural condition. The state is not interested in purchasing the land but simply wants to control a portion of the landowner's rights to insure that the visual characteristics of the land will not be significantly altered. By purchasing certain rights, such as the landowner's right to cut the trees or erect buildings and signs, the state can achieve its purpose

at a lower cost than buying the land outright. The landowner is permitted to continue using his land in the present manner and is limited only by the restrictions concerning future alterations that can be made on his property.

An easement is a legally binding restriction that "runs with the land" so that even if the land ownership changes hands, the easement will still apply to the land parcel. An easement agreement may last a certain number of years or it may be in perpetuity. In Oregon, the conservation easements that are being sought are in perpetuity. An easement may apply to a landowner's entire property or it may be concerned with only a portion of the land parcel.

#### Positive Easements

Positive easements acquire the right to do something with part of a person's property. A public agency may purchase a right of way for a footpath or bicycle trail or it might buy fishing rights so that the public has access to the banks of a stream. Utilities may buy the right to lay a pipeline or place high-tension wires across one's property. Entrepreneurs may purchase rights to cut timber, to graze livestock, or to mine the land. Air rights can also be purchased to build a structure above the land.

#### Negative Easements

A negative easement differs from a positive easement in that physical access to the property is not required. The purpose of a

negative easement is to obtain specific rights from the owner to prevent him from engaging in certain land use activities. For example, such an easement may stipulate that a landowner may not erect billboards or buildings, engage in mining activities, or greatly modify the vegetation on his property. These limitations vary from one situation to another depending on the goals of the party acquiring the easement. The restrictions are tailored to fit the particular needs of landowner and the desires of the purchaser.

#### Appurtenant Easements and Easements in Gross

Easements have been legally classified into the general categories of appurtenant easements and easements in gross.<sup>1</sup> Easements in either of these categories can be positive or negative. The first type refers to a situation involving two adjacent parcels of land. For example, Mr. Brown owns land parcels A and B and sells parcel B to Mr. Green along with an easement to Green over parcel A allowing Green access to the highway. Green's easement is an appurtenant easement that "runs with the land" so that if Green sells, his grantee also takes title to the easement and if Brown sells, his grantee takes parcel A subject to the easement. Black's Law Dictionary gives the following definition of an appurtenant easement:

An "incoporeal right" which is attached to and belongs with some greater and superior right or something annexed to another thing more worthy and which passes as incident to it and is incapable of existence separate and apart from the particular land which it is annexed.

This means that an appurtenant easement is an intangible (incorporeal) right which is annexed to an adjacent parcel of land that is owned in fee simple.

An easement in gross occurs when one acquires an easement that is not contiguous to a tract owned by the purchaser. This easement can be exemplified by Mr. Jones' favorite fishing spot to which he can only get access by way of Mr. Davis' property. Jones does not own the land adjacent to Davis but simply acquires an easement allowing ingress and egress over Davis' property. Jones' easement is an easement in gross. It also "runs with the land" so that when Davis sells his property, the new owner takes the land subject to Jones' easement rights. Black's Law Dictionary gives the following definition:

Easement in gross is not appurtenant to any estate in land (or not belonging to any person by virtue of his ownership of his estate in land) but a mere personal interest in, or right to use, the land of another.

#### CONSERVATION EASEMENTS

A conservation easement (sometimes referred to as an open space easement) is designed to protect the value of land in terms of its natural resources, scenery, cultural or historical significance, and recreation potential. It can be either an appurtenant easement or an easement in gross. It may be a positive easement, a negative easement or a combination of the two. Two subcategories of conser-

vation easements are scenic and use easements. Although they serve many of the same functions as a conservation easement, scenic and use easements have more limited goals and purposes.

### Scenic Easements

A scenic easement is a negative type of easement which does not include public access to the property. The purpose of the restrictions is to protect the present visual or esthetic value of the land for the public. For example, if a scenic easement is placed on a farm, the owner will continue to farm it in the present manner but he may not be allowed to put signs or billboards on his land, build new structures, or modify the existing vegetative cover. The number and type of these regulations will vary with each situation.

### Use Easements

A use easement (or easement of access) is a positive easement which has several applications outside the realm of conservation easements. In this context, it permits public access to a portion of a landowner's property for a specific purpose. The particular use allowed is defined in the agreement between the parties involved. Fishing rights allowing the public to use the banks along a stream or a bicycle path running through the landowner's property are two common examples of use easements. The primary objective of a use easement is significantly different from that of a scenic easement.

While the scenic easement is designed to preserve the natural setting and provide only "visual access" to the land, the use easement is mainly intended to provide recreational opportunities for the public with scenery being of secondary importance. The cost of acquiring a use easement is typically higher than the scenic easement largely because the public is permitted on the property.

#### Legal Definition

The definition of these easements according to Oregon law states that:

... "conservation or scenic easements" means an aggregation of easements, covenants or conditions running with the land, designed to preserve or maintain all or part of the natural or existing state of recreational, cultural, scenic,<sup>2</sup> historic or other appropriate places of public significance.

#### THE UTILITY OF CONSERVATION EASEMENTS

By keeping land open, conservation easements produce several environmental and social benefits. Watershed protection is often an important planning objective. Restrictions maintaining the vegetative cover on key land parcels within a watershed can help prevent excessive run-off and erosion. Highly productive agricultural land can be protected from the pressures of urbanization. Important wildlife areas can also be maintained through the acquisition of conservation easements. A significant portion of today's outdoor recreational activity occurs on private property. Conservation

easements can be a useful means to insure that these private recreation areas will be available in the future.

Conservation easements can be of great value as a land use planning tool. In terms of cost, it can be a considerably less expensive method than fee simple acquisition for controlling land use. In many cases it is a more acceptable technique than zoning because the landowner receives compensation for the rights he is giving up. By acquiring easements on key parcels of open space land, development can be directed into areas that are more suitable for urbanization. Conservation easements are one of several planning tools that can be used to reduce scatteration of urban development and provide for open space needs.

#### LEGAL RECIPIENTS OF CONSERVATION EASEMENTS

Any individual, persons, or organizations may sell, donate, or acquire a conservation easement.<sup>3</sup> In Oregon, enabling legislation permits the state government or any of its political subdivisions to acquire conservation easements. Federal agencies may also receive authority to acquire these easements for particular programs.<sup>4</sup>

#### THE POWER OF EMINENT DOMAIN

Oregon law states that conservation easements can be obtained by any means except by the power of eminent domain.<sup>5</sup> There is one

special variant to this law on the state level which applies only to the Willamette River Greenway program, administered by the State Highway Division. The Division is authorized to acquire scenic easements within 150 feet of the Willamette River. The use of eminent domain is prohibited if the land is devoted to farm use but the Division is allowed to acquire scenic easements by eminent domain on land that is changing from farm use.<sup>6</sup> Farm use is defined in the Oregon Revised Statutes in this manner:

... "farm use" means the current employment of land for the purpose of obtaining profit in money by raising, harvesting, and selling crops or by feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honey bees or for dairying and the sale of dairy products or any agricultural or horticultural use or animal husbandry or any combination thereof.<sup>7</sup>

Under no circumstances may use easements be obtained by the power of eminent domain.<sup>8</sup>

If a farmer intends to change the agricultural use of his property within 150 feet of the Willamette River, the Division would be inclined to condemn the land as a last resort. The Division would first attempt to negotiate an agreement in a similar manner to the method described in the following section. If the landowner refuses, the land can be condemned and a fair market price offered for the scenic easement. The matter will then be filed in the state court if the landowner does not agree with the Division's action.<sup>9</sup>

On the federal level, two agencies have been granted the right to use the power of eminent domain to acquire scenic easements. The

Wild and Scenic Rivers Act of 1968 authorized the U.S. Forest Service and the U.S. Bureau of Land Management to acquire scenic easements by any means including the power of eminent domain on both sides of the Rogue River from the mouth of the Applegate River downstream to Lobster Creek.<sup>10</sup>

### ACQUISITION PROCEDURES

The State Highway Division, the U.S. Forest Service, and the U.S. Bureau of Land Management are the three agencies that are presently actively acquiring conservation and scenic easements in Oregon. Since each of these agencies receive federal funds through the Land and Water Conservation Fund Act program, they are required to follow the procedures set forth in the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (Public law 91-646).<sup>11</sup> Although these three agencies must follow the same general format as specified in the Act, there are some significant differences between the procedures of the State Highway Division and the two federal agencies.

#### State Highway Division

The Division follows five major steps that are necessary to complete a conservation easement transaction.<sup>12</sup> These five steps are:

1. Contacting the landowner
2. Appraisal of the property and the easement

3. A written offer and a tentative agreement
4. A public hearing
5. The final approval

After the Highway Division determines the property it is interested in and the type of easement desired, the owner of that property is contacted. The purpose of the easement, the restrictions involved, and the advantages and disadvantages are explained to the landowner. It is very important to resolve any misconceptions or questions that the owner may have because he certainly will not agree to restrictions he does not fully understand.

If the owner expresses interest in the proposition, an appraisal of the property is made to determine the cash value of the proposed conservation easement. In the case where the total value of the land is less than 50,000 dollars, only one appraiser is required. Two appraisers are necessary when the land value exceeds 50,000 dollars. The methods used by the appraisers to determine the value of the conservation easement will be discussed in the following section.

A written offer is then submitted to the landowner stating the restrictions included in the easement, the area of land to be placed under the easement, and the appraised value of the easement. At this point it is important that the landowner is cognizant of each of the provisions in the agreement and the activities that are restricted. If the landowner does not agree with the appraised

value of the easement, he may request that another appraisal be made. In addition, he may submit his own appraisal of the easement's value along with his rationale for desiring the particular value. The appraisals are then reviewed by the State Highway Division's Appraisal Review Section which considers all of the pertinent information and the opinions of the landowner and the appraisers. If the decision of the Appraisal Review Section is not satisfactory to the landowner, he may elect to decline the offer since he is not obligated to sell the easement.

If an agreement is reached between the State Highway Division and the property owner, the acquisition process continues on to the step which requires a public hearing. In Oregon the law reads:

Prior to the acquisition of conservation or scenic easements, the state agency, county, city or park and recreation district considering acquisition of such easements shall hold one or more public hearings on the proposal and the reasons therefor. The hearings shall be held in the community where the easements would be located and all interested persons including representatives of other governmental agencies, shall have the right to appear and a reasonable opportunity to be heard.<sup>13</sup>

In this law, the word "acquisition" refers to a sale or a donation of a conservation easement.<sup>14</sup> The law goes on to say that at least two notices of the hearing must be circulated in a newspaper of general circulation five or more days in advance. A notice of the hearing must also be mailed thirty days in advance to the governing body of each county, city and other governmental agencies having jurisdiction in the area of the proposed easement.<sup>15</sup>

The purpose of these hearings is to obtain some feedback from the citizenry and the other governmental agencies concerning the proposed conservation easement. Conflicting views or interests may pose a problem. For example, the landowners adjacent to property where a use easement is proposed may be apprehensive of difficulties with the public trespassing onto their land. Likewise, a public utility may be interested in putting a power line through an area that is being considered for a scenic easement. If negative responses such as these arise and cannot be resolved, the State Highway Division will usually drop the whole matter before it is necessary to go to court. It is felt that it is not worth having a court battle or the public resentment created which can only hinder a conservation easement program in the long run.<sup>16</sup>

The proposed conservation easement goes through the final approval procedure after it has been received favorably in the public hearings. The conservation easement must be approved by a number of agencies so that each one is aware of the activities occurring within its respective area of jurisdiction. This six to twelve month journey begins in the Right of Way Office within the State Highway Division. Based on the location of the proposed easement, the approval procedure goes to the appropriate Council of Governments (COG) office as well as the State Clearing House. After approval by the State Clearing House, the proposal is sent to the federal Bureau of Outdoor Recreation in Seattle. If the Bureau grants the permission to buy,

a five member board in the state Department of Transportation will give the final approval if the easement to be purchased is in keeping with the purpose of the State Highway Division's outdoor recreation programs.<sup>17</sup>

While the conservation easement proposal filters through the various agencies, the State Highway Division does some additional investigating. It confirms that the area covered by the easement is within the owner's property and that the owner has legal claim to the land. The Division also confirms the absence of conflicting interests and makes sure that the provisions are thoroughly understood by the landowner. This is done to avoid any future legal problems due to misunderstandings during the acquisition process.

#### U.S. Forest Service and U.S. Bureau of Land Management

The U.S. Forest Service and the U.S. Bureau of Land Management were both specifically authorized to acquire land in fee simple and by scenic easements only along the Rogue River in southwestern Oregon with the passage of the Wild and Scenic Rivers Act of 1968. The easements are scenic easements with public access limited to within ten feet of the river's high water level.<sup>18</sup> Easement acquisition is different from the State Highway Division in two important aspects. First, these agencies have been granted the power of eminent domain to purchase scenic easements along the river so that the landowner cannot refuse to sell. Second, the entire program has been approved

by the state and the counties affected so that public hearings for each easement acquisition are not required.<sup>19</sup> Although the procedures followed can be somewhat flexible, there are five steps that are performed to complete an easement transaction. They are:

1. Contacting the landowner
2. Appraisal of property and the easement
3. Written offer and a tentative agreement
4. U.S. Attorney General's approval
5. Final agreement

When the landowner is contacted, the purpose of the easement and the restrictions involved are explained. Time is also taken to answer any questions the landowner may have concerning the easement. A date is then set for the appraisal to be made.

While the appraisal of the property is being conducted, the landowner is invited to accompany the appraiser to assist him and to point out the valuable aspects of his property. In all instances one appraiser is used to determine the value of the easement. The appraiser's estimate is then forwarded to the U.S. Forest Service or U.S. Bureau of Land Management office for approval.

After the appraisal is approved, a written offer is presented to the landowner. The appraised value of the easement is the amount of money offered as reimbursement. If the landowner does not agree with this value, he may have another appraisal made at his own expense or take the matter to court. If there are no objections, a tentative agreement is reached between the landowner and the agency.

The proposed easement must then be approved by the U.S. Attorney General's Office in Washington, D.C. where the title to the land is reviewed. This is to insure that the agencies are actually buying what is intended. It eliminates the possibility of paying for an easement which includes a portion of government property. After the approval of the Attorney General, the easement contract is signed and the transaction is finalized.

#### Other Government Agencies and Private Organizations

When a county, city park and recreation district, or non-profit organization acquires a conservation easement financed all or in part with federal funds, the procedures followed are the same as those performed by the State Highway Division.<sup>20</sup> If a political subdivision or other official public agency in Oregon wishes to apply for grants from the Bureau of Outdoor Recreation's Land and Water Conservation Fund Act program, they must propose their projects to the official State Liaison Officer appointed by the Governor.<sup>21</sup> Currently, Mr. Dave Talbot of the State Parks and Recreation Section of the State Highway Division is the State Liaison Officer.<sup>22</sup>

An easement transaction involving a public agency that does not utilize federal funds will not necessarily follow the State Highway Division's procedure. Whether the easement is sold or donated, the agreement is between the government agency acquiring the easement and the landowner.<sup>23</sup> However, the basic ingredients of the transaction are the same. There has to be an initial

negotiation and a tentative agreement. An appraisal of the property must be performed to determine the value of the easement. A public hearing is still required and a legal contract stating the provisions of the agreement must be signed by both parties.

In the case where an easement transaction occurs between private organizations or individuals, a public hearing is not required. Such a transaction between private interests will follow the same procedure as a sale of property among two private parties.<sup>24</sup>

#### APPRAISING THE VALUE OF EASEMENTS

The value of an easement is directly related to the appraised value of the land to which it applies. The easement's value is equated with the difference between the fair market value of the land before the easement and its fair market value after the easement is in effect. In this instance, fair market value is defined as follows:

The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell<sup>25</sup> and both having reasonable knowledge of relevant facts.

Since property is appraised for its "highest and best use", there is a decline in property value after such an easement becomes effective. Depending on the number and type of restrictions, the reduction in land value may range from practically nothing to over fifty percent.

The difficult aspect, then, of determining the value of an easement is the appraisal of the land itself. There are three methods used simultaneously by appraisers to evaluate the fair market value of property. These approaches are the market data or comparison approach, the cost approach, and the income or earnings approach. Each technique values property from a different viewpoint. When property is appraised, it is accepted practice among professional appraisers to always employ each of these three methods to derive a dollar value for the property.<sup>26</sup> They may have equal weight in the appraiser's final decision or one method may have more influence on this decision, depending upon the circumstances and the data available. In one area the appraiser may have adequate data to derive an accurate estimate using any of the three methods. In this event, he would give each estimate equal weight in his final appraisal. However, in many cases the data available may be lacking so that one or two of the methods do not really have sufficient data to back them up. Then the appraiser will attach the most weight to the estimate which utilized the best information.

#### Market Data or Comparison Approach

The market data or comparison approach is a method which compares the property being assessed with other similar property that has been recently sold on the open market. Property sold on the open market is purchased at its fair market value on a competitive basis.<sup>27</sup> For example, a father selling his property to his

son would not usually be considered as a sale on the open market. The land and improvements, such as buildings, fences, and irrigation, are considered as a whole. Obviously, it is impossible to find other property that is exactly the same, so the appraiser must adjust the sales data to arrive at a valid estimate. During the comparison of other property sales from previous years, the appraiser must calculate the rate of inflation from the date of purchase to the present. He also has to adjust the sale price of these other properties to account for differences in size and quality.

#### Cost Approach

This approach is similar to the market data approach except the land and the improvements are considered separately. The land is valued using market data as in the first example. The value of the improvements are calculated by determining their cost when they were new, minus the loss in value due to deterioration and obsolescence. The values for the land and improvements are then totaled to derive a value for the property.

#### Income or Earnings Approach

The income or earnings approach calculates the value of the property based on the amount of income generated from the property. The amount of net income is compared with the capitalization rate in the local area. The capitalization rate is the average rate of return on investment for similar property and operations. The

cash value of the land is calculated by dividing the property's net income by the appropriate capitalization rate.

$$\frac{\text{Net income}}{\text{Cap. rate}} = \text{value of property}$$

For example, if a farm shows a net income of fifty dollars per acre and the local capitalization rate is eight percent, the value of the land would be:

$$\frac{\$50}{.08} = \$625 \text{ per acre}$$

#### Final Appraised Value

After obtaining a dollar estimate for the property using these methods, the appraiser will base his final decision on the results. With all of these methods, the judgement and experience of the appraiser are the most important ingredients. These approaches to the valuation of property are the guidelines utilized to give the appraiser a legitimate basis for assigning a cash value to property. In addition to these methods, the appraiser must be cognizant of zoning ordinances or other land use legislation which limits the "highest and best use" of the property. Although he does not allow future speculation to affect his value estimate, a reasonable probability of a future change of a zoning ordinance should be considered.<sup>28</sup>

## TAXATION POLICIES

Selling or donating a conservation easement will affect the landowner's income tax return and his property taxes. On December 31, 1971, the State of Oregon adopted the Internal Revenue Service code so that the income tax policies described apply to federal as well as state income tax returns.<sup>29</sup> Property taxes levied by local governments (e.g. counties, municipalities) will vary from one location to another.

### Income Tax

#### Sale of a Conservation Easement

In the case where an easement is sold after the landowner has been in possession of the property for more than six months, the profit made by selling the easement is treated as a long term capital gain. One half of the amount of the capital gain is added to the individual's adjusted gross income entered on his tax return for that year. This total represents the individual's total taxable income for that year.<sup>30</sup>

Since this is not a sale involving fee simple, the capital gain attributable to the easement must be estimated on a percentage basis. The percentage of the selling price which the easement represents is used to calculate the value of the easement when the property was purchased. For example, Mr. Jones bought a parcel of land in 1950 for 50,000 dollars and twenty years later his property appreciated to 100,000 dollars. He then sold an easement worth

10,000 dollars or ten percent of the property's total value in 1970. The estimated value for this easement in 1950 would be ten percent of the purchase price or 5,000 dollars. The capital gain resulting from the sale of this easement would be equal to the difference between the sale value of the easement (\$10,000) and its estimated purchase price of 5,000 dollars. Of this 5,000 dollar capital gain, one half or 2,500 dollars is considered as taxable income.

	<u>1970</u>	<u>1950</u>
Total property value	\$100,000	\$50,000
Easement value	\$ 10,000	\$ 5,000 (estimate)
\$10,000 easement value (1970)		
- 5,000 easement value (1950)		
<u>\$ 5,000</u> capital gain of which \$2,500 is taxable income		

#### Donation of a Conservation Easement

A conservation easement given as a gift can be entered as a charitable contribution on federal and Oregon income tax returns if certain conditions are met. These conditions are spelled out in two sections of the Internal Revenue Service Code. The first one defines the type of easement which is acceptable and the second describes a charitable contribution.

... a charitable contribution of an open space easement in gross in perpetuity shall be considered a contribution of an undivided portion of the donor's entire interest in property... For this purpose, an easement in gross is a mere personal interest in, or right to use, the land of another; it is not supported by a dominant estate but is attached to and vested in, the person to whom it is granted.<sup>31</sup>

An easement in gross is not necessarily the only type that is allowed. An appurtenant easement meeting all of the other

requirements would be acceptable. The most important stipulation is that the easement be given in perpetuity.<sup>32</sup>

... "charitable contribution" means a contribution or gift to or for the use of-

- (1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made exclusively for public purposes.
- (2) A corporation, trust, or community chest, fund, or foundation-
  - (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
  - (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;
  - (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
  - (D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.<sup>33</sup>

The Internal Revenue Service publishes the "Cumulative List of Organizations in Section 170(c) of the IRS Code of 1954", IRS publication no. 78, which lists all of the eligible organizations that have been approved. This list is continually revised as additional organizations apply for approval.

The value of a conservation easement as a charitable contribution is calculated in the same manner as described in the previous section. When claiming a charitable contribution on an income tax

return, there are two options one can take depending upon his personal preference. First, he could deduct the total value of the easement with a deduction ceiling of thirty percent of his adjusted gross income. Second, a ceiling of fifty percent of the adjusted gross income can be applied if the deduction is reduced by one half of the appreciated value (capital gain) of the easement. If the total deduction cannot be made in one year, the remaining deduction can be carried over for the next five years.<sup>34</sup>

Going back to the example of Mr. Jones' property, these two options would work in this manner:

	<u>1970</u>	<u>1950</u>
Total property value	\$100,000	\$50,000
Easement value	\$ 10,000	\$ 5,000 (estimate)

- Option 1. In this case he can claim a 10,000 dollar charitable contribution with a ceiling of thirty percent of his adjusted gross income.
- Option 2. With this option, Jones would start with the value of 10,000 dollars for the easement in 1970 and then subtract the 5,000 dollar estimate for the same easement in 1950. The appreciation or capital gain realized by Jones would be 5,000 dollars. One half of this capital gain (\$2,500) is subtracted from the value of the easement (\$10,000). The remainder of 7,500 dollars is entered as a charitable contribution which is limited by a ceiling of fifty percent of his adjusted gross income.

Because a conservation easement is not a cash contribution, the taxpayer must also attach a statement that describes the easement, the date it was given, and how he originally acquired the land to which the easement applies. In addition, a signed statement by the appraiser explaining the criteria employed for calculating the value for the easement must be included.<sup>35</sup>

The Internal Revenue Service and the Department of Revenue do not have to accept the value of the conservation easement entered on the income tax return.<sup>36</sup> If they do not agree with the appraisal, a field agent is sent to reappraise the easement. If he concludes that the value of the easement was overestimated, the taxpayer's deduction will be reduced in compliance with the opinion of the field agent. The taxpayer will be notified of the change, which can be appealed by the taxpayer to the department involved. The matter will then go to tax court if a settlement cannot be reached.<sup>37</sup> This situation can be avoided by having a qualified and experienced appraiser assign the value to the easement during the acquisition process.

#### Property Tax

Regardless of whether a conservation easement was sold or donated, the landowner is entitled to a reduction in property taxes if the easement reduces the value of his property. The reduction in the assessed value of the property after an easement is granted will vary in each instance depending upon the restrictions involved.

## SUMMARY

Land ownership includes a bundle of rights that run with the land. One or several of these rights may be sold or donated in the form of an easement. Conservation easements are designed to protect the value of the land in terms of its natural resources, scenery, cultural or historical significance, and recreation potential. The two subcategories of a conservation easement are scenic and use easements. A scenic easement is intended to preserve the esthetic qualities of the landscape, while the primary purpose of a use easement is to provide recreational opportunities.

Any individual, persons, organizations, or government agencies may acquire a conservation easement in Oregon. Except for the U.S. Forest Service, the U.S. Bureau of Land Management, and the Oregon State Highway Division, no other agency in Oregon is authorized to use power of eminent domain. The two federal agencies may only condemn land for scenic easements along the Rogue River and the Highway Division's power only involves acquisition of scenic easements on land changing from farm use within 150 feet of the Willamette River. These two federal agencies and the Highway Division are also the three agencies in Oregon that are actively acquiring conservation easements. Because they all receive federal funding for purchasing the easements, they must follow the same general acquisition procedures.

The value of an easement is the difference in value of the property before the easement and after the restrictions are in effect.

This assessment is done by an appraiser who uses the market data or comparison approach, the cost approach, and the income or earnings approach as guidelines to calculate the fair market value of the property. The experience and judgement of the appraiser are the most important ingredients throughout the assessment procedure.

Besides selling a conservation easement, a landowner may benefit financially by donating a conservation easement and entering it as a charitable deduction on both the federal and Oregon income tax returns. To qualify for a deduction, it must be a charitable donation, as defined in the Internal Revenue Service Code, in perpetuity. Property tax is also subject to a reduction after an easement is sold or donated.

## FOOTNOTES

1. Metropolitan Planning Commission, "Legal Aspects of Urban Land Development" (Portland, Oregon, 1967), p. A8.
2. State of Oregon, Oregon Revised Statutes, Chapter 271.710 (Legislative Counsel Committee, 1973).
3. Carrel F. Bradley, Attorney at Law. Telephone interview on March 27, 1974.
4. State of Oregon, op. cit., footnote 2, Chapter 271.720.
5. State of Oregon, op. cit., footnote 2.
6. Fifty-seventh Legislative Assembly, Oregon Laws and Resolutions, Chapter 558, Section 6 (2) (Oregon Legislative Assembly, 1973).
7. State of Oregon, op. cit., footnote 2, Chapter 215.203.
8. Fifty-seventh Legislative Assembly, op. cit., footnote 6, Chapter 558, Section 6 (3) (b).
9. Leo Larson, Parks and Recreation Technician, State Highway Division. Telephone interview on January 25, 1974.
10. Tom Waite, Staff Appraiser, U.S. Forest Service. Interview on March 21, 1974.
11. Waite, op. cit., footnote 10.
12. Larson, op. cit., footnote 9.
13. State of Oregon, op. cit., footnote 2, Chapter 271.750.
14. Steve Hawes, Deputy Legislative Counsel, Office of Legislative Counsel. Telephone interview on April 24, 1974.
15. State of Oregon, op. cit., footnote 2, Chapter 271.750.
16. Larson, op. cit., footnote 9.
17. Larson, op. cit., footnote 9.
18. Waite, op. cit., footnote 10.

19. Waite, op. cit., footnote 10.
20. Larson, op. cit., footnote 9.
21. Department of the Interior, Federal Outdoor Recreation Programs and Recreation-Related Environmental Programs (Washington, D.C., 1970), p. 101.
22. Dale Haskins, Bureau of Outdoor Recreation, Regional Office, Seattle, Washington. Telephone interview on March 27, 1974.
23. Larson, op. cit., footnote 9.
24. Hawes, op. cit., footnote 14.
25. Internal Revenue Service, Cumulative Bulletin 1964-2 (Washington, D.C.), p. 63.
26. Manning H. Becker, Farm Management Specialist, Department of Agricultural Economics, Oregon State University. Interview on January 29, 1974.
27. Becker, op. cit., footnote 26.
28. Donald C. Sutte and Roger A. Cunningham, Scenic Easements - Legal, Administrative, and Valuation Problems and Procedures (National Cooperation Highway Research Program Report 56, Highway Research Board, 1968), p. 79.
29. Ted Lindberg, Department of Revenue. Interview on January 16, 1974.
30. Carl P. Loenning, Appellate Conferee, Internal Revenue Service. Interview on March 21, 1974.
31. Code of Federal Regulations, 26, Section 1.170 A-7 (b)(1)(ii).
32. Loenning, op. cit., footnote 30.
33. Section 170 (c), Internal Revenue Code of 1954.
34. Loenning, op. cit., footnote 30.
35. Internal Revenue Service, "Income Tax Deduction for Contributions," 1974 edition, publication number 526 (U.S. Government Printing Office, Washington, D.C., 1973), p. 10.

36. Internal Revenue Service, "Valuation of Donated Property" publication number 561 (U.S. Government Printing Office, Washington, D.C., 1973), p. 7.
37. Walt Ashton, Department of Revenue. Interview on January 20, 1974.

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