

**PROTECTING MINNESOTA FORESTS FROM PARCELIZATION
WITH CONSERVATION EASEMENTS**

A REPORT PREPARED FOR THE
MINNESOTA FOREST RESOURCES COUNCIL

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JANUARY 2010

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INTRODUCTION AND OVERVIEW

A healthy, competitive forest products industry is important for both the maintenance of healthy forests and the economy of Minnesota. In addition to other requirements, forests are most efficiently managed for forest products if large tracts of forestland are in consolidated ownership.

Where consolidated ownership is not possible, coordinating forestland management across property ownerships is an important strategy to sustain the State's forest resources. The benefits and ease with which this is accomplished decrease in a given area as the number of ownerships and parcels increase.

Today, Minnesota's forest landscapes are vulnerable to both incremental and rapid *parcelization* and the adverse impacts that often follow.

More specifically, forestland parcelization is the division of large forested blocks of land into smaller parcels, often transferring ownership from a single owner to multiple owners. Parcelization has been closely linked to forest fragmentation and development, which have demonstrated negative impacts on timber availability, wildlife habitat, biodiversity levels, recreational opportunities, and other forest-related benefits. Recognizing that large blocks of forestland support a host of economic, environmental, and social benefits, ensuring continuation of these benefits is a significant concern as parcels get smaller and, in time, become developed.

A well-designed and funded conservation easement program is one tool that can play an efficient and effective role in *preventing* parcelization of privately owned forestland and the negative impacts of that parcelization. While conservation easements have somewhat limited historic use in Minnesota, experience elsewhere indicates that easements are effective in limiting parcelization through specific terms directly limiting land division. Conservation easements in a working forest context do, however, require specialized skill and often-significant time to negotiate and manage over the long term. Typically less expensive to initially acquire than purchasing land for conservation in fee title, conservation easements can be efficient as well as effective over the long-term.

Background on conservation easements, their use in Minnesota and elsewhere and how conservation easements might be used to protect Minnesota's forests from further parcelization is set out below. This discussion is then the basis of specific recommendations for creating an effective and efficient conservation easement program as part of a suite of tools available to address this problem.

CONSERVATION EASEMENTS: A LEGAL AND PRACTICAL BACKGROUND

A. What is a conservation easement?

A conservation easement is a legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values.

The Conservation Easement Handbook, Land Trust Alliance and the Trust for Public Land, 2005

Conservation easements, from a legal standpoint, are a mixture of different legal concepts. They have some of the attributes of contracts, some the attributes of real property easements and some of the attributes of charitable trusts.

A Tax Guide to Conservation Easements, C. Timothy Lindstrom, 2008

A conservation easement is an interest in real property created through a recorded legal agreement by which a landowner restricts the future use and development of the land to protect identified natural, scenic and/or other resources and conveys to a conservation organization or government agency the right to enforce that easement.

An Inventory of Conservation Easement Activity in Minnesota, Minnesota Land Trust, 2009

“Conservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

Minnesota Statutes Section 84C.01.

There is no single, standardized definition for a conservation easement.

Rather, conservation easements are complex legal arrangements involving state real estate, contract and trust law—as well as federal tax law in situations involving charitable gifts—that occupy a unique niche in the array of available land protection techniques and strategies.

In general, conservation easements restrict land use and development to preserve or protect specific conservation features of the covered parcel of land. The land itself remains in the existing ownership, with the current landowner and future landowners bound by the terms included in the specific easement document—in most instances in perpetuity.

The easement itself is conveyed to and held by an independent party—either a non-profit conservation organization or a governmental entity—which has the right and obligation to monitor the property and enforce the terms of the easement. In some easements, rights of access may also be given to the public, though this is less common.

As noted above, a conservation easement is in part a real estate interest in land and in part a contract, with the specific terms of the arrangement set out in the document creating the conservation easement.

In some instances, a conservation easement may also create a charitable or public trust arrangement, giving elevated status to the intent of the original grantor of the easement and allowing the Attorney General's Office to become involved under certain circumstances.

Where conservation easements are purchased, particularly with government funding, there may be additional restrictions or requirements governing the easement or the terms that need to be included in the easement document.

Historically used in some parts of the country since the late nineteenth century and by the federal government since the 1930s, conservation easement activity increased dramatically as states around the country enacted specific conservation easement enabling acts, thereby eliminating any concerns that conservation easements—and particularly perpetual conservation easements—would not otherwise be valid under state common law.

Today, all states and the District of Columbia have enacted statutes recognizing the validity of conservation easements and all recognize *perpetual* easements except North Dakota that does not permit easements longer than 99 years.

There are a few statutory requirements that need to be met to create a valid conservation easement (and additional federal tax code requirements for an easement to be deductible as a charitable gift or meet funding requirements) but many easement terms and conditions are negotiable.

B. Statutory authority: Uniform Conservation Easement Act—Minnesota Statutes Chapter 84C

To create a consistent approach to conservation easements around the country, the National Conference of Commissioners on Uniform State Laws finalized the *Uniform Conservation Easement Act* in 1981. Minnesota adopted the Uniform Act in 1985. Today, 24 states and the District of Columbia have adopted the Uniform Conservation Easement Act, with others adopting versions of the Act or similar legislation.

The purpose of the Uniform Conservation Easement Act was to require recognition of conservation easements as valid interests in land in spite of common law principles to the contrary. Therefore, the Act contains broad language allowing conservation easements to be used in a broad variety of settings.

To be valid, a conservation easement must meet all the typical requirements for creating or transferring an interest in real estate, such as writing, signing, recording, etc. An easement may be created by an express grant (or conveyance) or by reservation in a deed. **BUT** conservation easements do not need to meet older easement common law requirements to be

valid, such as being appurtenant to a particular parcel of land or not involving privity of estate.

The Act does require that all conservation easements must have a conservation purpose providing benefits to the public. Identified statutory purposes are:

- Protecting natural, scenic or open-space values of real property.
- Protecting natural resources.
- Maintaining or enhancing air or water quality.
- Preserving architectural, archaeological or cultural aspects of real property.
- Assuring the property's availability for agricultural, forest, recreational or open-space use.

A conservation easement can also impose restrictions or affirmative obligations.

The Act does limit who can hold a conservation easement to specified entities identified in the statute:

- A governmental body empowered to hold an interest in real property.
- A charitable organization—corporation, association or trust—with a conservation purpose.

Private individuals *cannot* hold conservation easements.

Of course, an easement holder must still have its own authority to hold interests in land or to create a protection program and must comply with any restrictions on that authority.

Finally, the Act specifically states that no duty or right is created in favor of or against a conservation easement holder before the easement's acceptance by the holder and a recordation of that acceptance. This limits the responsibilities that can be placed upon an easement holder without the holder's consent.

There are no other specific easement terms are required for an easement to be valid under state law.

Result: *Conservation easements can be and are quite different.* Easements can be drafted in a variety of styles with a range of terms to meet the differing needs on the landowner and the easement holder while protecting the conservation values of the land. Typical easement terms and provisions are discussed below.

NOTE: Minnesota does have an earlier statute authorizing easements. Minnesota Statute Section 84.64, enacted in 1974, does authorize conservation easements to be held by the commissioner of DNR, a nonprofit charitable conservation corporation, or a home rule charter or statutory city. This statute is more limited in nature and requires notice to DNR and reversion to DNR in the event of corporate dissolution of the easement holder. Easements today are more typically created under the Uniform Conservation Easement Act.

C. Other legal issues related to conservation easements.

Because of their unique nature, conservation easements often raise other legal and related issues. A number of these are discussed below.

1. Impact on other interests: A conservation easement does not take precedence over any other pre-existing rights or interests in the land without consent of that party. Most frequent issue: mortgage holders. All pre-existing mortgages must typically be subordinated to the conservation easement in order for the easement to provide for appropriate land protection in the event of foreclosure.
2. Permanent or perpetual conservation easements vs. conservation easements for a specified term of years: The Uniform Conservation Easement Act specifically allows, and in fact has a presumption in favor of, perpetual conservation easements. But an easement does not need to be perpetual to be valid. As discussed below, federal tax law requires easements to be perpetual to be deductible as charitable gifts. Programs that use conservation easements have varying requirements, though most now favor perpetual easements.
3. Amending conservation easements: One of the issues most discussed today involves whether and when a conservation easement may be amended. The Uniform Conservation Easement Act simply states that easements may be “released, modified, terminated or otherwise altered or affected in the same manner as other easements.” However, the ability to amend an easement may also be subject to restrictions from other sources.

The terms of the easement itself may suggest or limit the conditions for amendment.

501(c)(3) public charities are constrained by federal tax code restrictions against private inurement and conferring impermissible benefits on private parties. This will limit what easement amendments they can allow and under what circumstances.

Amendments of donated easements may require involvement by the original donor or others depending upon interpretation of charitable gift rules. Amendments of easements donated under federal tax law may be subject to the same regulation as the original easement. Amendments of easements that include rights of third parties or are funded by third parties may require their involvement in the amendment process. An amendment that eliminates or changes too many restrictions may be deemed to terminate the easement, subject to those considerations as well.

4. Terminating a conservation easement: Conservation easements are designed to be difficult to terminate under most situations. However, there are limited circumstances under which an easement might be terminated.

As noted above, the Uniform Conservation Easement Act provides limited guidance on terminations stating only that the easement may be “released, modified, terminated or

otherwise altered or affected in the same manner as other easements.” This may allow a holder of a conservation easement to terminate the easement through its own action or with agreement of the landowner. However, the ability to terminate an easement may also be subject to the same restrictions noted above on easement amendments. Terminations are more serious and require even more careful scrutiny than amendments.

The *easement document itself* may establish the conditions or process of termination. Conservation easements for a *term of years*, of course, will automatically terminate at the end of the term of the easement as specified in the document. Easement documents of donated easements include language required under federal tax law allowing extinguishment *only* when an "unexpected change in the conditions surrounding the property can make impossible or impractical the continued use of the property for conservation purposes."

The *30-year limitation* on covenants and restrictions under Minnesota Statutes Section 500.20 however does not apply to perpetual or permanent conservation easements. The applicability of *40 year Marketable Title Act*, Minnesota Statutes Section 541.023, has not been definitively determined, however. Re-recording a conservation easement within the requisite time period will avoid termination under this statute if in fact it is applicable.

Condemnation of protected property may also terminate a conservation easement. In most circumstances, a conservation easement is unlikely to survive the proper exercise of the power of eminent domain by the government. If easement protected property is properly condemned, the condemnation procedure will extinguish the easement.

There is one exception to this rule: the higher public use doctrine. Under that legal theory, easements held by a government agency may have more immunity from condemnation than privately held easements, particularly from a lower level of government. That is, federally held easements cannot be condemned by a state or local agency and a state-held easement cannot be condemned by a local unit of government.

Additionally, a conservation easement may represent both the ecological or natural resource value of the land and the public benefits furthered by protecting the land, demonstrating a public purpose competing with the basis of the condemnation and providing a strong argument against condemnation.

If an easement is condemned, the distribution of condemnation proceeds must still be decided. While some states specifically direct that the proceeds be split between the fee owner and easement holder (e.g. California and Pennsylvania), others direct that proceeds go entirely to the fee owner (e.g. Arizona and Alaska.) The Uniform Act does not directly address condemnation. But by suggesting conservation easements can be terminated in the same manner as other easements, the Act implies an easement holder should be entitled to a share of any proceeds from a condemnation equal to the value of that interest. Minnesota courts have yet to definitively address this issue.

Another possibility of extinguishing an easement is based upon the *doctrine of merger*. Under that real estate doctrine, when an easement holder becomes the owner of the underlying fee title, the interests may merge--thereby making the easement no longer valid. To avoid this result, language can be added to the easement prohibiting a merger of interests in this situation.

Other possible theories under which an otherwise perpetual easement might be terminated include abandonment (where a conservation easement is deemed to be abandoned from “non-use” such as failure to monitor or failure to enforce), adverse possession of the underlying fee, or tax forfeiture. There is no Minnesota law on point and specific language in the easement may help avoid this result if desirable.

D. Creating and drafting conservation easements, including typical terms and provisions.

Because the Uniform Conservation Easement Act has so few specific requirements or other provisions, conservation easement documents must be drafted to include all of the terms and provisions required for the given situation. Some programs or funding sources include specific requirements or require specific easement terms. Donated easements must meet very specific federal tax code and related regulatory requirements if the donor wishes to take a tax deduction. Otherwise, terms included are at the discretion of the parties involved.

In the first addition of the *Conservation Easement Handbook* in 1988, the Land Trust Alliance and The Trust for Public Land suggested a single model conservation easement form. In the 2005 revised version of the *Handbook*, the “model easement” concept was replaced with guidance on the terms to be considered in any conservation easement along with a series of sample easements and easement provisions to “encourage the drafter to be responsive to the unique property, landowner, easement holder goals, and desired future condition of the land.”

Many easement holders follow this new approach, negotiating and drafting conservation easements with the uniqueness of each situation in mind. These holders typically begin with an easement template, a practice recommended by the Land Trust Alliance, and often have program requirements or preferences that provide consistency. But resultant easements are not identical to each other in all of the included terms. These easements are typically more time-consuming and complex to complete but are very effective at addressing unique situations.

Other holders use a standard, non-negotiable document in their easement programs. This approach is more typical of government programs that have very specific criteria for land that is eligible for program participation along with specific program requirements on land use and restrictions. For example, the Board of Water and Soil Resources (BWSR) uses a standard document for all of its Reinvest in Minnesota (RIM) Reserve program easements coupled with extensive application materials that limit the lands that can be enrolled in the program. Using a standard document does simplify the easement negotiating and acquisition process but limits the easements applicability to specific situations.

Regardless of the drafting approach taken, terms included in conservation easements often include the following.

1. Conservation values and purpose: The conservation values of the property are those physical and ecological attributes of the property that provide the reason for protecting the property. The conservation purposes behind an easement are the protection of those conservation values. The public benefit of preserving land that remains in private ownership is derived from the protection of the land's conservation values.

Together, the conservation values on the land, the purpose of the easement and the public benefits derived from that protection establish the context for creating land use restrictions and identifying rights reserved to the landowner.

The conservation values associated with the property exist whether or not they are fully described in the easement but describing the values in the easement provides a context in which to better understand the easement's purpose and restrictions. Similarly, the public benefits of protecting these values exist, whether or not described, but directly spelling out public benefits in the easement provides an important reminder regarding the reason behind protecting the land.

Conservation easements can be established for a single conservation purpose, to protect a specific conservation feature, to further a number of conservation purposes or to protect a range of features or characteristics of the land. For example, many wetland preservation programs focus easements on directly protecting identified wetlands and associated uplands or buffers but may not include restrictions on surrounding land. These easements tend to cover smaller acreages. Other easement programs, such as the Minnesota Land Trust's program, focus on all of the conservation values of a tract of land, creating restrictions to protect all identified natural and scenic values. Other easements may also add insuring public access to the identified purposes of the easement.

2. Land use restrictions: Restrictions are created to address and protect identified conservation features and attributes of the property to further the purposes of the easements. As a result, restrictions in each easement vary accordingly but any specific restrictions desired must be spelled out in the conservation easement document.

Restrictions can be imposed in any number of ways such as:

- Prohibit a specified use or activity.
- Allow a use or activity only in accordance with specific, detailed restrictions set out in the easement.
- Allow a use or activity in accordance with performance standards such as: federal, state or local law, best management practices applicable to the activity, third party certification programs, or defined management principles or goals applicable to the activity as set out in the easement.
- Allow a use or activity in accordance with performance standards set out in an approved management plan.

- Allow a use or activity only with notice to or approval of the easement holder.
- Divide the property into land use zones or areas with different levels of restrictions for each area.
- "Sunset" or limit a use to the current landowner or for a specified period of time.

Easements can also mandate affirmative obligations, although this is less common.

Approaches can be and often are combined in a single easement.

Restrictions, regardless of how established, typically address a range of topics including the following:

- Use:
 - Industrial or commercial use of the property, including forestry and agriculture.
 - Residential use of the property.
 - Right of way across the property to develop or commercially use adjacent property.
 - Mining, drilling or other extraction of minerals or fossil fuels from the property.
 - Recreational use, including snowmobiling or other motorized vehicle use and commercial recreational use.
 - Educational use.
- Division of the property into separate parcels in separate ownership.
- Density or ability to transfer "development rights" to other parcels.
- Buildings and structures, including:
 - Placement and construction of new buildings, structures, and other permanent improvements including residences, garages, barns, and other accessory structures (sheds, guest homes, greenhouses, etc.)
 - Alteration, expansion or replacement of existing buildings and structures, including historic buildings.
 - Placement of temporary buildings such as mobile homes or season structures.
 - Fences.
 - Utilities.
 - Signs or billboards.
 - Outdoor lighting.
- Roads and trails, including boardwalks or bridges.
- Alteration of the surface or topography of the land.
- Dumping.
- Water:
 - Water *quality*-draining, ditching or altering the shoreline of any wetlands, ponds, lakes, streams or rivers on the property or otherwise affecting water quality.
 - Water *quantity*-diversion or appropriation of ground water or surface water.
- Vegetation:
 - Management of trees, shrubs and other vegetation.

- Noxious weeds or invasive species.
- Restoration.
- Wildlife and wildlife habitat management.

NOTE: The above are examples only. They are not all applicable in all situations and other areas of concern not listed here may be applicable in some situations.

Specific restrictions related to conservation easements in a forest setting are discussed below.

3. Landowners' rights and responsibilities under a conservation easement. Under typical conservation easements, landowners continue to have those rights and responsibilities associated with land ownership, subject of course to the restrictions placed on the land through the easement. Often spelled out in the easement document, these include:

- Continued ownership and use of the property in any manner not inconsistent with the restrictions in the easement.
- The right to transfer or sell the property, subject to the terms of the easement.
- The obligation to continue to pay property taxes.
- Continued liability for owning and managing the land.
- The obligation to comply with the restrictions set out in conservation easement.
- The obligation to allow monitoring visits by the easement holder.

Landowners can also be given affirmative obligations or responsibilities to manage or maintain the property to a specified standard. Example:

- Restore and/or manage the property to an agreed upon ecological standard.
- Maintain adequate insurance.
- Provide notice of sale or other proposed changes to the property as specified.
- Meet with the easement holder periodically as specified.

In some instances, landowners may also be required to allow the public access to and use of the property, particularly for recreational purposes, often subject to limitations or restrictions on that public use. Requiring public access is not typical of most conservation easements or easement programs. When required, is more often associated with easements purchased with public funds or held by public agencies.

4. Conservation easement holders' rights and responsibilities. Under typical conservation easements, conservation easement holders have the following rights and responsibilities:

- The right, and responsibility, to monitor compliance with the terms of the easement, often through annual visits to the site.
- The right, and responsibility, to defend or enforce the easement in the event of a violation or potential violation, including the process for enforcement and the remedies are available. Enforcement is discussed in detail below.

Although less typical, easements holders can be given the right or the obligation to manage the land itself. This is more typical of easements held by public agencies and often involves agency responsibility for initial restoration and landowner responsibility for long-term management.

4. Technical legal issues: Conservation easements typically include a myriad of technical legal provisions to ensure the easements enforceability over time, particularly given the reality of changing ownership and circumstances.

E. Third party rights.

While conservation easements are primarily legal arrangements between the landowner and the easements holder, others may have an interest in the arrangement.

Easements can be conveyed to co-holders, entities with shared responsibility for monitoring and enforcement. A right to enforce an easement can be created in a third party even though that party is not otherwise identified as a "holder" or has other rights conveyed to the holder.

Easements funded with public money may create contract or even statutory rights in the funder. For example, conservation easements purchased with funds from the Environment and Natural Resources Trust Fund are subject to contract provisions and appropriation language governing the specific grant or project as well as the provisions of Minnesota Statute Chapter 116P regarding use of real property purchased through that Fund.

Others may have a legal right to enforce an easement or object its management under some circumstances such as the Attorney General's Office, a neighbor, community members, a donor or prior owner. There is no Minnesota law on this point although the Uniform Conservation Easement Act generally grants the right to bring an action affecting a conservation easement "to a person authorized by other law."

F. Acquiring and valuing conservation easements.

Conservation easements can be acquired in the same manner as any other interest in land:

- Purchase, which can be expensive particularly given today's land prices, although the cost to purchase an easement is still typically less than purchasing land in fee title.
- Donation, which requires the generosity and ability of the landowner to give land away but may provide the landowner with some tax benefits if tax code and related regulatory requirements are met. (See the discussion below.)
- Bargain sale, combines purchase and donation and requires meeting the federal tax code requirements for charitable gifts as well as the requirements of any funding program.

- Condemnation or the threat of condemnation, which was used historically by the federal government to purchase some conservation easements but has not been used in recent decades in Minnesota to acquire land in fee for conservation or to acquire a conservation easement by any unit of government.
- Extraction as part of a land use development or similar regulatory scheme.
- Settlement of a dispute or enforcement proceeding, often thought of as “mitigation” of other impacts.
- Reservation of partial interest such as a conservation easement in a conveyance of fee title.

Most easements in Minnesota have been acquired through voluntary transactions with the landowner by purchase, gift or bargain sale. A few conservation easements were historically acquired by the federal government through condemnation along the St. Croix River. And many of the easements held by local units of government have been obtained as part of the development process, often required by ordinance.

As noted in the section on conservation easements in Minnesota, most easements currently held by state or federal agencies have been purchased, often but not always at full fair market value—depending upon the program involved. Easements held by non-profit organizations are more likely to be donations or deeply discounted bargain sales. And, as noted above, easements held by local units of government have often been required as a part of a development or other regulated process.

Valuing a conservation easement is an important part of most conservation easement transactions. Before purchasing an easement, many easement holders must determine the “fair market value” of the interests being acquired. The value of an easement must also be determined to calculate the amount of a tax credit or deduction when appropriate.

However, establishing the value of a conservation easement is more complicated than valuing land in fee title.

Although many programs and entities initially purchase conservation easements from landowners, there is a very limited secondary market for those easements. Unlike fee title transactions, this makes comparable sales data difficult if not impossible to obtain. Additionally, many easements are extensively negotiated often vastly differing terms and restrictions resulting in making each one different and, again, difficult to value comparatively.

In recognition of these problems, the tax code has established a very specific set of rules for valuing easements for income tax deductions. Discussed in more detail below, this approach focuses on the value of land unrestricted compared to the value of the same land with the specific restrictions of the particular easement in place. The difference is the value of the easement itself.

This “before and after” approach has also been adopted by many when purchasing an easement. Each easement appraisal or evaluation must take the specifics of each parcel of land and the specific easement into account. There is no set value or percentage of fee value assigned to the easement. Each is unique and independently assessed through a comprehensive appraisal. This approach is required by the U.S. Forest Service for conservation easements purchased with federal funds from the Forest Legacy Program. It is the approach typically taken by the Minnesota Department of Natural Resources (DNR) as well.

However, some entities purchasing easements have chosen a valuation approach that relies on a standardized calculation. Used primarily in agricultural settings, some programs have created standardized calculations that reflect the lands eligible for their programs and the identical rights acquired with each easement. For example, the Board of Water and Soil Resources (BWSR) working with the Natural Resources Conservation Service (NRCS) have established an approach to calculating an easement purchase prices for wetland conservation easement based upon average agricultural land values in a county. Once a formula is established, it is applied uniformly to all easements purchased.

More recently, the DNR received legislative authority to use this approach in purchases conservation easements as a part of the Camp Ripley Army Compatible Use Buffer Program. See Minnesota Statutes Section 84.0277, authorizing DNR to purchase easements based upon a percentage of the assessed market value of the land, depending upon the specific rights acquired.

G. Conservation easement stewardship—management, monitoring and enforcement.

Increasingly, the effectiveness of conservation easements as perpetual or permanent land protection tools is linked to the stewardship of those easements.

Specific monitoring and enforcement rights of a conservation easement holder are typically detailed in the easement document itself. These often cover the concepts below.

1. **Enforcement:** Enforcement of the terms in a conservation easement requires that the easement holder be given extensive enforcement rights to protect the conservation values of the property involved and the public’s interest in protecting the property.

Ultimately, judicial enforcement of easements is required. Mediation or arbitration may be used but typically these are not considered remedies of last resort.

Specific remedies provided for in an easement often include the following: warnings or education, damages (including the potential of “liquidated damages” as damages to natural resources are hard to measure), injunctive relief and restoration of the property—required by federal income tax law.

Given the public purpose and benefits of conservation easements, courts have typically not hesitated to enforce their terms. See the Land Trust Alliance *Land Conservation Case Law Summaries* available through the Land Trust Alliance on its web-based *Learning Center*.

Easement enforcement is typically limited to the easement holder or a holder of third party right of enforcement, with the Uniform Conservation Easement Act generally granting the right to bring an action affecting a conservation easement “to a person authorized by other law.” This may, under some circumstances, include the Office of the Attorney General, particularly if a charitable gift is involved.

A conservation easement holder may lose its right to enforce an easement through failure to monitor, failure to discover a violation or failure to enforce a violation allowing a landowner to invoke possible defenses to easement enforcement including legal doctrines of waiver and laches. Many current easements contain language to attempt to guard against this result. In addition, courts may find that these doctrines do not apply given the public purpose behind conservation easements.

However, most believe that the best defense involves an active easement management and monitoring program that seeks to prevent violations.

2. **Monitoring:** Basic conservation easement monitoring consists of monitoring land subject to a conservation easement for compliance with easement terms. More comprehensive programs might include monitoring for whether easements are meeting desired ecological or other programmatic goals.

There are no legal or regulatory requirements in state conservation easement enabling legislation, including Minnesota Statutes Chapter 84C, that require monitoring although the trend is to recognize the importance of monitoring in a successful conservation easement program.

The Land Trust Alliance in its *Land Trust Standards and Practices*—guidelines for private, nonprofit conservation organizations—and in a number of its publications

HOW REAL IS THE THREAT OF CONSERVATION EASEMENT LITIGATION?

In 2004, the Land Trust Alliance analyzed information on state and local land trust experience with litigation. The survey revealed the following:

- There were more than 1,500 land trusts in 2003.
- These land trusts held and managed approximately 17,800 easements.
- Violations were reported on approximately 5 percent of these easements.
- Of these reported violations:
 - 75 were major violations.
 - 52 were settled out of court.
 - 23 were resolved through court proceedings—approximately 0.1 percent of all easements.

Information from the *2004 Conservation Easement Violation & Amendment Study* conducted by the Land Trust Alliance and available at www.ltanet.org.

consistently recommends *annual* monitoring that includes both an evaluation of the land itself and personal contact with the land's owner. Most typically, this consists of a physical visit to the land to evaluate easement compliance, coupled with a visit with the landowner. However, dependent upon the size and nature of the protected land, a review of the property itself might consist of an aerial flyover or review of satellite photography rather than a physical walk around the land.

Annual monitoring is now a requirement of the Land Trust Alliance independent accreditation program.

Additionally, most conservation professionals believe that consistent landowner contact will prevent easement violations and the Land Trust Alliance has some limited information to support that approach. Therefore, this is a recommended component of an easement monitoring program.

Historically, public agencies have been less likely than private land trusts to create and implement comprehensive easement monitoring programs. That is now changing as both the public and the private sectors have recognized that conservation easement sustainability may well depend upon well-established easement monitoring programs, coupled with the commitment of easement holders to follow-up on easement violations.

State statutorily created programs such as the Maryland Environmental Trust and Virginia Outdoors Foundation have extensive conservation easement stewardship programs. For example, the Virginia Outdoors Foundation, funded entirely by state appropriations, now has more than a dozen staff members dedicated to the stewardship of its 2,565 easements protecting over 581,000 acres of land. See, www.virginiaoutdoorsfoundation.org.

Public funding sources now often require easement monitoring as a condition of receiving funds to purchase easements. See, for example, conservation easement project requirements of the following:

- Legislative-Citizen Commission on Minnesota Resources project requirements for conservation easements acquired with funds from the Environment and Natural Resources Trust Fund.
- Federal Forest Legacy program requirements.
- Great Outdoors Colorado conservation easement project funding requirements.

For the most part, these easement monitoring programs are focused upon compliance. There is little ecological (or other programmatic) monitoring undertaken by easement holders to determine ultimate easement effectiveness.

3. Easement management: In addition to the recognized need for monitoring and enforcement, conservation easement programs increasingly involve other management responsibilities such as responding to landowner requests for information, handling

landowner outlined approvals, and keeping accurate data. Costs for this component of conservation easement programs need to be acknowledged and provided for.

5. Costs and funding: Perpetual conservation easement stewardship and enforcement is not without cost.

While the components of any particular easement stewardship program will determine its specific annual costs, there are some typical approaches—particularly in the nonprofit sector—to understanding and funding these long term costs. The Land Trust Alliance has documented much of this work in many of its publications, including in the recently published *Determining Stewardship Costs & Raising and Managing Dedicated Funds*, part of the Land Trust Alliance curriculum series for land trust interested in meeting *Land Trust Standards and Practices*.

Annual easement stewardship costs include the labor, travel, and overhead costs associated easement monitoring and other ongoing easement stewardship activities noted above for *each* easement held by the easement holder.

Some land trusts estimate an average cost for every easement acquired. Others estimate the cost for each specific easement acquired. Others use a hybrid, estimating costs based upon the terms included in a particular easement. The following identifies the approaches and relatively recent costs established by several entities:

- The Minnesota Land Trust has conducted a comprehensive analysis of its easement stewardship and enforcement program and related costs and estimates that it *typically* needs approximately *\$700 annually* to cover the costs of stewardship for each easement it holds. The Land Trust has created a worksheet that it can use to evaluate any particular easement against this estimate to insure that it is adequately estimating long-term stewardship costs for a specific project.
- Colorado Open Lands, the largest land trust in Colorado, uses a similar approach and has arrived at an annual cost of approximately *\$500 per easement* for ongoing stewardship.
- The Columbia Land Conservancy in New York estimates annual easement stewardship costs at *\$1,200 per easement*.
- The Maryland Environmental Trust, a quasi-governmental entity created by state statute, estimates that annual stewardship costs between *\$100 and \$500 per easement*.
- The Vermont Land Trust bases its stewardship cost estimates on the number of house sites or subdivisions allowed under a specific easement.
- The Ausbon Sargent Land Preservation Trust, a small land trust in New Hampshire, bases its stewardship costs on the size of the property and the number

of reserved building rights or other activities requiring land trust approval, giving credit against suggested stewardship donations for easements that allow for public access.

Neither the Minnesota Department of Natural Resources or the Board of Water and Soil Resource, the two state agencies hold a large number of easements in Minnesota, have yet created a per easement calculation for annual stewardship activities. However, under a cooperative arrangement with the USDA Natural Resources Conservation Service, BWSR receives \$600 per easement form NRCS to monitor NRCS easements.

Easement violations and potential litigation create additional funding requirements.

While easements held by public agencies will fall under the jurisdiction of the appropriate attorney general (or similar agency providing legal support), reserves sufficient to cover potential litigation are suggested by the Land Trust Alliance and typically included in evaluating easement stewardship costs.

In the private nonprofit sector, a preferred approach to *funding* the long-term conservation stewardship management and enforcement expenses involves building a *dedicated fund* to cover ongoing and anticipated costs, regardless of how they are calculated.

In its recent *Conservation Capacity and Enforcement Capacity* research report, the Land Trust Alliance suggests that a dedicated stewardship fund should be large enough cover 75% to 100% of projected annual stewardship costs, assuming a 5% return on the fund. The Alliance also suggests assuming annual easement expenses at *a minimum* of between \$200 and \$500 per easement leading to an endowment or dedicated fund amount of \$4,000 to \$10,000 per easement.

Additionally, the Alliance suggests a minimum of \$50,000 in an easement enforcement fund with an additional \$1,500 to \$3,000 for each easement held.

These are, of course, general estimates. The Minnesota Land Trust estimates noted above require that it look for approximately \$14,000 per easement to provide long-term support for its annual costs along with another \$1,000 per project for future enforcement.

Recent estimates annual cost and enforcement by others leads to different results:

- Colorado Open Lands looks for \$12,000 for each easement it holds.
- Columbia Land Trust estimates it needs \$60,000 for each easement.
- Vermont Land Trust schedules suggest between \$2,000 and \$8,000 or more per easement.
- Maryland Environmental Trust suggests \$5,000 per easement.

Travel and staff time for travel are among the biggest variables in these calculations.

Creating dedicated funds through this approach is rarely possible for public agencies, requiring that they typically rely on annual budget appropriations for easement management and enforcement. Organizations like the Maryland Environmental Trust are able to create separate external accounts dedicated to stewardship and enforcement in part due to their quasi-public nature.

With regard to sources of funding, most private conservation organizations rely on private contributions to support long-term, dedicated stewardship funds. Additionally, although relatively rare, some states do provide public funds to private, nonprofit conservation groups to support their stewardship and enforcement fund.

For example, for decades the Vermont Housing and Conservation Fund has made direct grants to organizations like the well-respected statewide Vermont Land Trust to be invested in its pooled stewardship fund to support the long-term management and enforcement of its conservation easements.

New York and Colorado programs have similarly included funds for long-term stewardship and enforcement as a part of easement acquisition grants to nonprofit conservation organizations. The Great Outdoors Colorado program will cover 50% of estimated stewardship needs for a project up to \$8,000 while New York's farmland protection program will pay up to \$10,000 for stewardship and enforcement for each project funded under that program.

Using a somewhat more complicated approach, the New Hampshire Land and Community Heritage Investment Program (LCHIP) has created its own stewardship endowment for LCIP funded projects and uses the fund to reimburse land trusts or other holders of easements acquired with LCHIP support for costs associated with monitoring those easements in accordance with LCHIP standards. In the absence of land trust monitoring, LCHIP uses its own stewardship endowment to undertake needed monitoring.

Minnesota has followed this approach in limited situations, providing funds for easement stewardship and enforcement to selected conservation organizations from both the Environment and Natural Resources Trust Fund and the Outdoor Heritage Fund.

H. Current issues in conservation use and management

While conservation easements are now well-accepted in most parts of the country as effective and efficient land protection tools if used under the right circumstances, there are a number of emerging concerns about easement use. A few of these are noted below. These concerns do not apply universally to all conservation easements or easement programs. Many can be addressed through the design of an easement program.

They do, however, represent the types of issues that arise as conservation easement use increases.

1. Conservation easement stewardship and stewardship funding: As conservation easements age, as landownership changes and as easement violation experience increases, conservation easement holders and those that fund them are increasingly aware of the importance of an ongoing easement stewardship and enforcement program.

However, not all easement holders have such programs in place. And those that do must often rely on inadequate or unreliable funding.

Through its recently created accreditation program, the Land Trust Alliance is able to advance the importance of easement stewardship with adequate funding. Locally, the Minnesota Land Trust has completed the accreditation process and has become one of the first land trusts in the country to achieve that status. With accreditation is the recognition that its conservation easement stewardship program meets national standards for excellence.

Public agency easement holders, however, often face difficult funding challenges, relying on annual appropriations or budgets rather than dedicated funds. Even more importantly, many public agencies do not have a comprehensive understanding of the locations or terms of their easements, making easement monitoring impossible and enforcement based upon complaint.

Many believe that easements will be increasingly violated and thereby lose legal, political and practical support if long-term stewardship issues are not systematically addressed.

2. Accountability and oversight: For the most part, conservation easements are privately created arrangements between the landowner and the easement holder. This requires easement holders to exercise judgment and discretion in determining which lands to protect. Many believe that this is what makes easement programs nimble and effective and avoids unnecessary bureaucratic involvement. Others are concerned about the lack of public oversight of transactions that can permanently affect the landscape.

While this may be a concern for donated easements, there is typically more public oversight or involvement when public funds are used in easement transactions. Well-drafted program criteria for publicly funded programs can go a long way in providing appropriate levels of oversight and accountability.

3. Data: Understanding and evaluating conservation easements and conservation easement programs is hindered by lack of data. While there are important privacy issues related to capturing information about land that often remains in private ownership, better data collection would assist in creating better programs in the future. Some national data collection efforts discussed below are currently underway and will provide much needed context and information to help evaluate conservation easement use and effectiveness going forward.

INCOME, ESTATE AND PROPERTY TAX ISSUES RELATED TO CONSERVATION EASEMENTS

A. Federal (and state) income tax deductions for qualified conservation easements.

Since 1976, the federal tax code has recognized a gift of a conservation easement that meets the requirements specified in the tax code and related regulations as a charitable contribution that allows a taxpayer can take a federal income tax deduction for the value of the easement.

The provisions in tax law that allow this deduction are an exception to the general tax rule that a taxpayers may take a deduction for a gift only when they give up their entire interest in the property involved. See Section 170(f)(3) of the Internal Revenue Code. As a result, there are extensive requirements governing conservation easement donations that are designed to make sure that the there is a public benefit in any transaction for which a donor is taking a charitable contribution deduction by ensuring that the conservation values of the property are protected in perpetuity in exchange for the tax benefits to the donor.

Federal income tax laws apply only to gifts of conservation easements and only to those gifts where the donor takes a deduction. They do not apply to easements purchased for fair market value or extracted as part of a regulatory process. However, if an easement is purchased at a bargain price, the taxpayer may be able to take a deduction for the difference between the fair market value of the easement and the purchase price, in which case the easement must be the tax law requirements as well as any applicable program or funding requirements. The requirements of the tax code and the fiscal impact of donated easements are discussed below.

1. Federal income tax code and regulatory requirements.

To be deductible as a charitable gift, a conservation easement must meet the tax law requirements that cover the deductibility of "qualified conservation contributions" as set out in Section 170(h) of the Internal Revenue Code and Section 1.170A-14 of the related Treasury Regulations.

By definition, a "qualified conservation contribution" is the contribution of a:

- qualified real property interest to a
- qualified organization
- exclusively for conservation purposes.

The first requirement is relatively easy to meet as a *perpetual conservation easement* valid under state law is a qualified real property interest.

Additionally, the easement must be conveyed to a "qualified organization," defined as a 501(c)(3) public charity or government entity with the commitment to protect the conservation purposes of the gift and the resources to enforce the restrictions.

Finally, the easement must be for one of four specifically enumerated purposes:

- Preservation of land for outdoor recreation by or education of the general public. Regular and substantial public access is required.
- Protection of a relatively natural habitat of fish, wildlife, or plants or similar ecosystems. Limited human alteration acceptable of the land is acceptable and no public access is required.
- Preservation of open space (including farmland and forest land), with the following additional requirements:
 - Protection must be for the scenic enjoyment of the general public and will yield a significant public benefit OR
 - Pursuant to a clearly delineated governmental conservation policy and will yield a significant public benefit.

Visual (not physical) access is required for scenic enjoyment by the general public but for easements pursuant to government policy, the need for visual or physical access depends on the governmental interest being furthered.

- Preservation of historically important land areas or certified historic structures.

Additionally, an easement will not be considered “exclusively for conservation purposes” unless a number of technical requirements are met to ensure the “perpetual” protection of conservation value. These include among others the following:

- The easement must be perpetual and legally enforceable.
- Current and future mortgage interests must be subordinated to the easement.
- No surface mining or any mining inconsistent with the particular conservation purposes of the easement is allowed. If the minerals have been severed from the fee, this requirement is met if the “probability of surface mining occurring on such property is so remote as to be negligible.”
- There must be a baseline documentation report created to establish the condition of the property at the time of the gift.
- The holder of easement must have the right to enter the property at reasonable times to inspect the property to determine if there is compliance with the easement and the right to enforce the restrictions by appropriate legal proceedings, including, but not limited to, the right to require the restoration of the property.

- Extinguishment or termination of the easement is allowed only if “a subsequent unexpected change in the conditions surrounding the property can make impossible or impractical the continued use of the property for conservation purposes” and there is an appropriate judicial proceeding. Any proceeds from any termination must be shared between the landowner and the easement holder.
- There are no specific tax code requirements addressing amending a conservation easement but many believe that an amendment should be allowed only when it is consistent with conservation purpose of easement and it does not interfere with perpetual duration of conservation restriction.

2. Income tax benefits available.

If a donated easement meets these criteria, the landowner may take a tax deduction for the value of the easement. The tax code and regulations also set out a specific methodology for valuing an easement, typically requiring an appraisal by a qualified appraiser in accordance with IRS guidelines to substantiate the value of the deduction.

Most donated easements are valued using the “before and after test.”—the value of the easement is the difference between the value of the land without the restrictions and the value of the land with the restrictions.

EXAMPLE:

Value of the land before the conservation easement:	\$500,000
Value of the land after the conservation easement:	<u>\$275,000</u>
Difference = value of the conservation easement:	\$225,000
Proportionate value of the conservation easement/ unrestricted value of the land in fee:	45%
Amount available as a charitable deduction:	\$225,000

Generally, a more restrictive easement will result in a higher proportionate easement value. But each parcel of land and each set of conservation restrictions are unique. Therefore, no set or average percentage of value can be attributed to the rights relinquished in an easement.

The tax benefit received by the donor is calculated by multiplying the value of the easement by the donor's combined federal and state tax rates. EXAMPLE:

If an individual donor has sufficient income so that the entire \$225,000 value of the easement in the example above would be taxed at the maximum federal income tax rate of 35%, the federal tax benefit from the gift of the easement would be \$78,750 (\$225,000 x 35%).

Minnesota income taxes are tied to the federal income tax system so a Minnesota resident taxed at the maximum state income tax rate of 7.85% would be entitled to an additional tax benefit of \$17,662 ($\$225,000 \times 7.85\%$).

Total tax benefit: $\$78,750 + \$17,662 = \$96,412$

While a landowner may be able to take the entire fair market value of the easement as a deduction, charitable deductions are generally limited to 30% of a taxpayer adjusted gross income. These deductions can be spread over 6 years, making it more useful deduction to lower income landowners.

Using the example above, an individual donor with an adjusted gross income of \$150,000 who donates an easement worth \$225,000 is limited to taking \$45,000 ($\$150,000 \times 30\%$) as a charitable contribution for the year of the gift. If the donor's income remains the same, the donor should be able to use \$45,000 per year for the next 4 years and thereby take deductions for the full value of the gift (\$225,000) over time.

NOTE: The above examples apply to *individual donors* of easements on lands that are considered *long-term capital gain property*. Other rules not covered here apply to property categorized as ordinary income property or to other categories of taxpayers such as corporations. For more information, there are a number of publications that discuss federal income tax issues related to conservation easement donations in more detail including the recently published *A Tax Guide to Conservation Easements*, C. Timothy Lindstrom, 2008 and various Land Trust Alliance publications, many of which are available on line.

3. Special short-term rule for conservation easements.

In 2008, Congress renewed for two additional years until December 2009 a special rule expanding the federal income tax benefits for gifts of conservation easements that raises the maximum deduction a landowner can take for donating a qualified conservation easement from 30% of their adjusted gross income in any year to 50%.

This rule also allows qualifying farmers and ranchers to deduct up to 100% of their adjusted gross income. A qualifying farmer or rancher must receive at least 50% of his or her gross income from the trade or business of farming or ranching

This rule also extends the carry-forward period discussed below from 6 to 16 years.

Using the example above, an individual donor with an adjusted gross income of \$150,000 who donates an easement worth \$225,000 over land owned for more than one year can now take \$75,000 ($\$150,000 \times 50\%$) as a charitable contribution for the year of the gift and use the entire value of the easement in three years. A farmer or rancher could take \$150,000 as a deduction, and use the entire value of the easement in just two years.

While this expanded benefit technically expires at the end of 2009, many believe that it will be re-established retroactively by Congress in early 2010.

4. Impact of income tax deduction benefits.

Although there are limited studies or evaluations available, those that exist indicate that landowners are primarily motivated to donate conservation easements by a desire to protect the land.

Nevertheless, it is clear that the significant income tax benefits available from donating easements have encouraged and fueled the donation or bargain sale of conservation easements around the country. This has been particularly true with the enhanced benefits set to expire at the end of 2009. The Land Trust Alliance estimates that allowing landowners to deduct a larger portion of their income, over a longer period of time, has *increased* the pace of conservation by at least *535,000 acres over the past two years*.

Elimination of income tax deductions would no doubt have a negative impact on the use of conservation easements as land protection tools.

Allowing tax deductions for donated easements has also had an impact on the federal—and state—treasury. The IRS only recently began collecting cumulative data on non-cash charitable contributions and therefore has data only for a few years. Selected data from the most recent report examining 2006 tax returns is summarized below.

INDIVIDUAL NONCASH CHARITABLE CONTRIBUTIONS (selected) 2006			
TYPE OF CONTRIBUTION	NUMBER OF CONTRIBUTIONS	TOTAL AMOUNT OF CONTRIBUTIONS	AVERAGE AMOUNT/ CONTRIBUTION
Conservation Easements	3,529	\$1,489,589,000	\$422,092
Real Estate	4,674	\$1,358,630,000	\$290,699
Land	13,438	\$2,245,019,000	\$167,067
Façade Easements	1,145	\$264,575,000	\$231,167
Stock	429,139	\$22,993,269,000	\$53,580
Art and collectibles	147,896	\$1,222,044,000	\$8263
Clothing	7,697,930	\$6,262,697,000	\$814
TOTALS FOR ALL CONTRIBUTIONS (including those not listed)	15,682,030	\$46,841,245,000	\$2,987

See Individual Noncash Charitable Contributions, 2006. *Internal Revenue Service, SOI Bulletin*. Spring 2009
www.irs.gov/pub/irs-soi/09sumbulindcontri06.pdf

There were more than 3,500 deductions for conservations easements totaling more than \$1.48 billion dollars. While the number of easement donations accounted for less than .05% of all donations, the value of those donations was 3.2% of all donations.

Importantly, the average value of each conservation easement deduction was over \$422,000—compared to an average of approximately \$53,000 for a gift of stock which total almost half of the charitable gifts or \$8,200 for a donation of artwork— thus leading

the IRS to view each individual conservation easement donation as having a significant effect on revenue and providing an equally significant opportunity for abuse.

B. Federal estate tax benefits for conservation easements.

A federal estate tax is levied on a decedent's estate (not on the amount received on inheritances received from a decedent, as is the case in some states.)

Since passage of the Economic Growth and Tax Relief Reconciliation Act of 2001, the amount of an estate that is not subject to tax has increased from \$675,000 to \$3.5 million in 2009. For tax year 2010, there is no estate tax at all. And without congressional action in 2010, the 2001 law will expire and in 2011, the estate tax will be reinstated with a more limited \$1 million credit and with tax rates at the 1997 levels of up to 55 percent from the current level of 45 percent.

As a result of these changes over the past few years, increasingly fewer estates have been liable for any estate tax. Nevertheless, estate tax appears to fall more heavily on those with appreciated assets such as farms and ranches. The U.S. Department of Agriculture estimates that while approximately 1% of all estates owe estate taxes, 4% of all farm estates owe estate taxes. As a result, estate taxes can lead to the break-up, sale and development of family-owned farm, ranch and forestlands, even when landowners would prefer to keep these lands intact.

Other data indicate that the impact of estate taxes may be even greater for forested lands. Findings from a recent study reported in a publication of the Society of American Foresters indicated that 38% of forest estates owed federal estate tax, a rate obviously many times higher than U.S. estates in general. In 28% of the cases where estate tax was due, timber or land was sold because other assets were not adequate and in 29% of the cases where land was sold, it was converted to a more developed use. See *Effect of the Federal Estate Tax on Nonindustrial Private Forest Holdings*, Journal of Forestry, Volume 104, Number 1, January/February 2006.

Given concern about this issue, the U.S. Forest Service has recently written an entire book geared at assisting nonindustrial private forest owners with estate planning. See, *Estate Planning for Forest Landowners: What will Become of Your Timberland*, 2009.

A decedent's estate that includes land subject to a conservation easement may provide an alternative by entitling the estate to two estate tax benefits:

- The value of the land subject to the easement is lowered for purposes of valuing the estate for estate tax purposes.
- Under some circumstances, the estate may be entitled an additional exclusion for up to 40% of the value of the land as restricted by a conservation easement.

See sections 2031(c) and 2055(f) of the Internal Revenue Code.

EXAMPLE:

Value of the land before the conservation easement:	\$500,000
Value of the conservation easement:	<u>-\$225,000</u>
Value of the land after the conservation easement:	\$275,000
Proportionate value of the conservation easement/ unrestricted value of the land in fee	45%
40% exclusion: (\$275,000 x 40%)	\$110,000
Amount to be included in the estate for tax purposes: (\$275,000 - \$110,000)	\$165,000

A lifetime gift of easement will provides both income and estate tax benefits.

Conservation easements can also be donated through a will and, although no lifetime income tax benefits are available, the conveyance does constitute a deductible gift at death lowering the value of the decedent's taxable estate. There is no limitation on the value of gifts deductible at death. Section 2055(f) of the Internal Revenue Code.

Finally, if allowed under applicable state law, an easement can be donated post mortem by the beneficiaries or an executor or trustee of an estate even when not provided for in a will.

To qualify for these benefits, conservation easements must meet the same criteria established for federal income tax deductions.

C. State conservation tax credits

While taxpayers who donate conservation easements often qualify for the federal income tax deduction described above, 15 states (not including Minnesota) also provide for more extended state income tax benefits for conserving land by offering a *credit* against state income tax liability.

Unlike tax deductions, tax credits offer a direct one-to-one offset against income tax liability. Like tax deductions, credits are of greater benefit to those with greater incomes. But some provisions—like transferability of credits to other taxpayers or the ability to carry-over credits to reduce taxes over a number of years—can reduce this inequity.

Each state's program is unique, and qualifying for a federal income tax benefit does not necessarily or automatically qualify a donor for a state benefit. Typical provisions in state conservation tax credit incentives address:

- Type of donation covered—fee title, conservation easements or both.
- Criteria for the type of property eligible for the credit—federal tax code criteria or state specific criteria which might be more or less stringent.
- The value or size of credit—often linked to a % of the value of the donation (25% to 50% is typical) although some states link the income tax credit to property taxes assessed against easement protected property or to transactions costs.
- Any limitations or caps on credits both for specific taxpayers (can be as low as \$5,000 or unlimited) and/or cumulatively for the state.
- Taxpayer eligibility—individual taxpayer, corporate taxpayers or both.
- Entities eligible to hold donations—public agencies, nonprofit conservation organizations, or both with some states now requiring pre-approval of easement holders for donations to be eligible.
- Carry-over by the taxpayer or transferability of credit to other taxpayers.
- Program oversight and reporting

Information on then existing state tax credit programs is detailed in the 2007 report *State Conservation Tax Credits: Impact and Analysis* prepared by the Conservation Resource Center, a nonprofit organization that specializes in transferring or selling tax credits. Information on state programs is also summarized in the addendum at the end of this section.

The Conservation Resource Center also analyzed the effectiveness of these tax credit programs in driving additional land conservation and protecting important conservation resources. Although hindered by limited data, the Conservation Resource Center concluded that effectiveness of tax credit programs to *increase* land protection was dependent upon the *value of the credit* available to a taxpayer and the *transferability of credits*.

Generally, programs with credits valued at less than \$100,000 reported no significant increase in conservation activity and programs with credits valued at or greater than \$100,000 reported varying degrees of increased donations.

The two states with transferable credits—Virginia and Colorado—reported the highest increases. Professionals in these states estimate that land donations have tripled in Colorado and quadrupled in Virginia as a direct result of the creation of transferable conservation credit programs.

In short, programs with high-value, transferable credits will drive significant additional land protection. Programs with high-value credits that are not transferable and programs with low-value credits that are transferable do not approach the success of programs that combine high-value credits with transferability.

The report concluded that a conservation tax credit program can be a valuable tool in a state's overall land protection strategy and has the potential to dramatically increase voluntary land protection but the amount of additional land protection attributable to a such a program is primarily driven by two factors: (1) the maximum value of credit that may be earned and (2) whether the credit may be deferred over several years, transferred, and/or refunded.

The report also noted that continued success of tax credit programs will depend on diligent attention to (1) ensuring that transactions earning credits are worthy of public investment and (2) tracking the lands conserved and conservation benefits protected so that program success can be better evaluated and results shared.

D. Property tax issues related to conservation easements.

For many landowners of rural lands, high property taxes are often cited as a primary reason landowners sell all or part of their lands for development. Landowners financially stressed by property taxes often look to property tax relief programs as an alternative.

In contrast, local units of government relying of property taxes to support needed local services are typically concerned about programs that either lower land values (and as a result the taxes based upon those values) or otherwise impact property tax revenues. Consequently, many local governments are concerned about programs and practices that limit development, including conservation easement programs, generally believing that development will enhance land values and thereby increase the resultant taxes.

In reality, there is little direct data regarding the impact conservation easements do or should have on land values, property taxes and property tax revenues in Minnesota.

1. Minnesota data on conservation easements and property taxes: Minnesota Statute Section 273.117 does recognize that conservation easements can affect land values but leaves the analysis to the discretion of the local assessor:

The value of real property which is subject to a conservation restriction or easement may be adjusted by the assessor if:

- (a) the restriction or easement is for a conservation purpose as defined in section 84.64, subdivision 2, and is recorded on the property;
- (b) the property is being used in accordance with the terms of the conservation restriction or easement.

Emphasis added.

In 2005, the Minnesota Legislature tasked the Minnesota Department to study property tax assessment practices related to lands enrolled in selected conservation programs in agricultural areas, some of which involved the use of permanent conservation easements. In issuing its February 21, 2007 report, *Assessment and Classification Practices Report: Land Enrolled in State or Federal Conservation Programs*, the Department of Revenue first concluded that there was a significant lack of data available to it or to local assessors. This, the report concluded, was a major factor leading to inconsistent approaches among assessors to valuing lands protected either temporarily or permanently for conservation purposes.

The report also concluded that state law provided inadequate guidance to assessors to promote uniformity or consistency in assessing protected land and that the Department of Revenue should take a greater role in this area. NOTE: The Michigan Department of Treasury provided such guidance to its assessors in 2006 noting that they should employ the “before and after” approach to valuation. See the March 22, 2006 memorandum from the State Tax Commission to Assessors and Equalization Directors.

Finally, from the limited data available, the report concluded that not all temporary or permanent conservation restrictions negatively impact land value—a conclusion that led to the changes in the statute set out above giving county assessors greater discretion in evaluating an easement’s impact.

The report echoes work previously done in 1990 by the University of Minnesota, *Property Tax Assessors’ Treatment of Parcels Entered into Minnesota’s RIM Reserve Program*, reviewing the assessment practices of more than 50 county property tax assessors and concluding that there was little consistency in approach.

In 2004, the University of Minnesota again looked at the effect of short-term and perpetual conservation restrictions on land value, *Evidence of a Market Effect from Conservation Easements*, this time studying the effect of short-term Conservation Reserve Program contracts and RIM Reserve permanent easements on land sales prices, rather than on assessments. The report noted that earlier work found significant value reductions associated with USFWS permanent wetland easements in North Dakota. This research similarly found that both short-term and long-term conservation restrictions negatively influence sales price.

This supported existing “theory” that long-term restrictions do lower value but contradicted the prevailing theory that short-term restrictions did not have a negative impact. As noted above, however, the impact on property value was not always reflected in property tax assessments.

These studies focused on conservation easements and restrictions that primarily prohibited agricultural use of property. The final University of Minnesota study on conservation easement impact on property value looked at easements that included more comprehensive restrictions on use and development. The December 2004 paper,

Tracking the Effects of Conservation Easements on Property Tax Valuations, examined conservation easements held by the Minnesota Land Trust in Washington County, Minnesota. Again looking at assessed values but on a very limited number of properties, the study concluded:

“On average, valuations of properties with development rights restrictions increased over the years at a rate lower than did those of unrestricted properties.”

Emphasis added. Noting that there was a wide range in the valuations histories on individual parcels, the study cautioned against drawing conclusions that conservation easements will lead to reduction in property taxes in all cases.

A later 2007 study commissioned by Embrace Open Space, a collaborative of public and private organizations working to conserve land in the greater metropolitan area, looked at the relationship between proximity to open space and residential home values in Washington County. See *The Economic Impact of Proximity to Open Space on Single-Family Home Values in Washington County, Minnesota*. The study looked at a range of open spaces, including conservation easement protected property, and concluded that homes directly adjacent to open space were worth an average of \$16,750 more than those that were not resulting in a positive impact on Washington County property tax revenues of more than \$1.56 million.

2. National data on conservation easements and property taxes: Minnesota is not unique in having limited data regarding the relationship between conservation easements and property taxes. There is very limited from other states.

A frequently cited 2004 study of Vermont towns studying overall impact of easements on the local tax base found that conservation easements were either neutral or diminished property taxes over the long run. See *Marginal Property Tax Effects of Conservation Easements: A Vermont Case Study*, American Journal of Agricultural Economics, November 2004.

A 2005 study by the Trust for Public Land, *Managing Growth: The Impact of Conservation and Development on Property Taxes in New Hampshire*, looked more broadly at the effect of land conservation—both through fee title land acquisition and with conservation easements—on municipal property taxes in New Hampshire in comparison to the effect of development on property taxes. The study looked at both short-term and long-term impacts.

In the short term, the TPL study found that permanent protection of land generally results in a tax increase to local taxpayers. In the long term, however and contrary to common perception that development will result in lower taxes, property tax bills are generally higher in more developed towns than in rural towns.

“All else being equal, a town’s taxes are likely to be somewhat lower if its tax base has a high proportion of nonresidential property to help offset the costs of residents.

The tax bills are not higher in towns that have the most permanently protected land—conservation land or easements owned by a government agency or conservation organizations. In fact, tax bills are generally lower in these towns.

The study does not conclude that land protection, in and of itself, leads to lower taxes. And it does not conclude that development is bad while land protection is good. However, it does indicate that local units of government should not assume negative property tax impacts from land protection.

3. Property tax incentive programs: In addition to the income and estate tax incentives designed to encourage land conservation that are discussed above that may also have an impact on property taxes, every state in the country has created at least one preferential property tax program which includes, and often exclusively, forestland.

In Minnesota, this includes the Sustainable Forestry Incentive Act (SFIA), Minnesota Statutes Chapter 290C. While the act provides enrolled landowners with limited property tax relief, land enrolled in the program is not permanently protected, as it would be with a conservation easement.

Many states have more directly linked conservation easement and property tax assessments. Through a recent referendum, Florida residents—who do not pay any state income tax—recently approved exempting all lands protected by perpetual conservation easements from paying property tax.

New York has recognized landowner concerns about high property taxes by providing for an income tax credit based upon the property taxes assessed against land protected by a conservation easement thereby providing landowners with indirect property tax relief while not impacting local tax revenues.

A 2006 report of the Defenders of Wildlife, *Incentives for Biodiversity Conservation: an Ecological and Economic Assessment*, suggests that property tax incentives may be most effective on the fringes of rapidly developing areas where assessed property values have increased dramatically. However, report also concludes that landowners with primarily financial motivations would likely chose profits from development unless a package of easements and tax incentives was economically competitive.

ADDENDUM

STATE CONSERVATION INCENTIVES

Arkansas | California | Colorado | Connecticut | Delaware | Florida | Georgia | Iowa | Maryland | Massachusetts | Mississippi | New Mexico | New York | North Carolina | South Carolina | Virginia

The following summarizes state income tax credit legislation from 15 states around the country. Also included is information on a property tax program in Florida—which has no income tax.

This information is excerpted from the Land Trust Alliance web site, www.landtrustalliance.org.

ARKANSAS

In early 2009, the Arkansas legislature expanded the Wetland and Riparian Zones Tax Credit Program to allow credits for the donation of conservation easements in wetland and riparian zones. Easement donors in these areas may qualify for an income tax credit for 50% of the easement's appraised value, up to \$50,000. While these credits are not transferable, remaining amounts may be carried forward for up to 9 years. Unfortunately, the entire tax credit program is capped at \$500,000.

The full text of the act can be found at <http://www.anrc.arkansas.gov/act351.pdf>. Also, see the Wetland and Riparian Zones Tax Credit Program website for information about program rules when they are written, <http://www.anrc.arkansas.gov/WetlandTaxCredits.html>.

CALIFORNIA

The Natural Heritage Preservation Tax Credit Act offers incentives to preserve wildlife and plant habitat, agricultural lands, open spaces, and water rights on private lands. Landowners who donate land, an easement, or water rights are eligible for the credit. Eligible donations must meet the goals of a conservation plan, protect species or habitat, conserve threatened agricultural land, or increase public access to open space or archaeological resources. The tax credits are managed by the state resource agencies and essentially "granted" to landowners. Donors are allowed an income tax credit of 55% of the fair market value of the donated property right against their income, with an eight-year carry-forward period. The tax credit program was suspended in 2002, but reinstated in 2005. Under the reinstated program, the state resource agencies and departments have to provide funds to the state's general fund to replace any tax credit claimed by a landowner. The California conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

See the California Council of Land Trusts website, callandtrusts.org, for more details.

COLORADO

A conservation tax credit is available to Colorado residents, corporations, estates, and trusts who donate a conservation easement. Originally, easements worth less than \$100,000 were allowed a credit worth 100% of the fair market value of the easement and easements of greater value were entitled to a credit of \$100,000 plus 40% of the easement's value above \$100,000—with a maximum credit that can be claimed is \$260,000. An unused credit can be carried forward for 20 years. Revisions that took effect January 1, 2007 will replace the two-tiered tax credit structure with a single-tier in which 50% of the charitable donation can be claimed as a tax credit, up to a maximum credit of \$375,000. A taxpayer can also sell all or part of a credit to a "transferee." Additional restrictions have been added to curb perceived abuses or potential for abuse, including limits on acceptable easement holders.

CONNECTICUT

Connecticut provides a state corporate income tax credit for donations of conservation land or easements equal to 50% of the donation's fair market value. A 10-year carry forward period is available to donors whom do not use up the entire credit in the year of its origination. Donated land or easements must a) conserve natural or scenic resources, b) protect natural streams or water supplies, c) conserve of soils, wetlands, beaches, or tidal marshes, d) enhance neighborhood parks, forests, wildlife preserves, nature reservations, or other open space, e) enhance public, recreation opportunities, or f) preserve historic sites. The Connecticut conservation easement tax credit is non-transferable and applies in addition to federal tax benefit.

DELAWARE

The Delaware Land and Historic Resource Conservation Credit act provides a tax incentive to individuals or corporations that donate land or conservation easements. The credit is equal to 40% of the fair market value of the donation with a maximum credit of \$50,000 for individuals per year and a statewide cap of \$1,000,000/year. A 5-year carry forward period is available to individuals whom do not use up the entire credit in the year of its origination. Delaware conservation donations aim to conserve open space, natural habitat, recreational properties, resource conservation, and historic properties. The Delaware conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

See the text of the law at <http://delcode.delaware.gov/title30/c018/sc01/index.shtml> or visit Delaware Preservation, Inc. at <http://www.preservationde.org/programs/easement.htm> for more information.

GEORGIA

Georgia provides a state tax credit to individuals and corporations donating land or easements for conservation. The tax credit allows taxpayers to claim a credit against their state income tax liability of 25 percent of the fair market value of the donated property interest, up to a maximum credit of \$250,000 for individuals and \$500,000 for corporations. The allowed tax credit may not exceed the amount of tax owed for the taxable year, but any unused portion of the tax credit may be carried forward for the next five years. The Georgia conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

See the text of the bill at http://www.legis.state.ga.us/legis/2005_06/fulltext/hb1107.htm.

IOWA

New legislation passed in 2008 allows Iowa taxpayers to claim a substantial income tax credit for donations of land or conservation easements. Donors may receive 50% of the fair market value of the donated property interest up to a maximum tax credit of \$100,000. The credits are not transferable, but any remaining value may be carried forward over a total of 20 years.

See the Iowa Natural Heritage Foundation guide for landowners, <http://www.inhf.org/landowner/tax-finance/iataxcredit-10-08.htm>, which includes a wealth of links including legislative text.

MARYLAND

Maryland income tax payers who donate a conservation easement may be eligible for a conservation tax credit to \$5,000 per year with a 15-year carry forward period. Easements must be held or co-held by the Maryland Environmental Trust or the Maryland Agricultural Land Preservation Foundation, and approved by the Board of Public Works. In addition, easement donors may also qualify for the credit if their easement protects unimproved, non-commercial land. This credit is worth 100% of the property tax paid on the eased land. The Maryland conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

Learn more about the credit from the Maryland Environmental Trust at <http://www.dnr.state.md.us/met/sitc.html>.

MASSACHUSETTS

In January 2009, Massachusetts enacted a new state tax credit for donors of land or easements. Donors may receive 50% of the fair market value of the donated property interest up to a maximum tax credit of \$50,000. These credits are not transferable, but any remaining value may be carried forward for up to 10 years. The entire program is currently capped at \$2 million per year. The new credit enters into effect January 1, 2011.

MISSISSIPPI

The state of Mississippi offers a credit toward 50% of allowable transaction costs associated with donating an easement, up to \$10,000. The credit may be carried forward for 10 years. The Mississippi conservation easement tax credit is non-transferable.

NEW MEXICO

The Land Conservation Incentives Act of New Mexico offers a tax credit of up to \$100,000 per year to anyone donating a qualified fee interest or conservation easement to an open space program or environmental organization or government entity. The credit is for 50% of the fair market value of the land and may be carried forward for twenty successive years. Qualifying land or easements must be donated for natural resource, open-space or biodiversity conservation, or agricultural, watershed or historic preservation (note: this is different from the federal tax code

specification). The New Mexico conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

NEW YORK

Beginning in 2007, this innovative credit will give New York State landowners whose land is restricted by a conservation easement an income tax credit. The landowner's state income tax will be reduced by 25% of the property tax paid on the property, up to \$5,000. It is available to all owners of easement-restricted land, regardless of when the easement was created, provided that the easement was wholly or partially donated to a land trust or a governmental agency. The New York conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

NORTH CAROLINA

The North Carolina Conservation Tax Credit Program, the oldest established program going back to 1983, provides an income tax credit to some land easement donors. Land or easement donations must provide public access to land or water, fish and wildlife conservation, or fulfill other land conservation purposes (note: this is different from the federal tax code criteria). The credit is worth 25% of the fair market value of the donation with a total credit of \$250,000 for individuals and \$500,000 for corporations. Any unused portion of the credit may be carried forward for five succeeding years. Credit taken in any year may not exceed the amount of income tax imposed by the state, reduced by the sum of all other credits. The North Carolina conservation easement tax credit is non-transferable and applies in addition to federal tax benefits.

SOUTH CAROLINA

South Carolina provides an income tax credit equal to 25% of the fair market value of the conservation gift. To be eligible for the state income tax credit, a landowner must have qualified for and claimed on their federal income tax return a charitable deduction for a gift of land for conservation or for a qualified conservation contribution. The tax credit is limited to a maximum of \$52,000 per year, and to \$250 per acre. The South Carolina tax incentive allows the landowner to carry the unused portion of the credit forward indefinitely until the full credit is claimed. The credit is also one of the few that is transferable. The South Carolina conservation easement tax credit applies in addition to federal tax benefits.

VIRGINIA

Under the Virginia Land Conservation Act of 1999, one of the earliest tax credit programs, every landowner who donates land or an easement for conservation is entitled to a credit against state income tax. The credit is worth 40% of the easement's fair market value, up to \$100,000 per year. Virginia's income tax credit is available to tax-payers who donated a conservation easement after January 1, 2000. If the credit is not used up in the year of the easement donation, it can be carried forward for an additional five years. Furthermore, if the easement was donated after 2001, the credit may be sold or transferred to other Virginia taxpayers. Individuals and corporations in the state of Virginia may buy or sell conservation tax credits, as long as a notification of the transfer of the credit is sent to the tax commissioner. For 2009 and 2010, the Legislature reduced the cap from \$100k to \$50k, but since the credits are transferable, a donor

should still be able to claim full credit--they may just have to transfer credits to more separate taxpayers.

See <http://www.tax.virginia.gov/site.cfm?alias=TaxCredit2#preservation> for information from the Virginia Department of Taxation on the tax credit program.

FLORIDA

Florida has no state income tax, so in November 2008, Florida voters took the innovative approach of exempting land under easement from all state property tax, passing Amendment 4 by an overwhelming margin. The law has two parts -- the first provides for a tax exemption for properties with a perpetual conservation easement. The second provides for a "conservation assessment" on land that is in conservation use. The legislature is currently considering implementing legislation, which is required to be in place for the tax year beginning in January 2010.

The permanent conservation easement portion includes requirements that mirror what land trusts already do in compliance with IRS rules and land trust standards and practices. The bill does require that properties be at least 40 acres, unless they have special environmental features or are located next to protected areas, and excludes one acre around homes and buildings. The second section allows for voluntary ten year covenants to restrict development rights. There is a recapture mechanism for back taxes when the land is taken out of conservation, but the rules for this are not spelled out, and will be developed by the Department of Revenue.

AN INVENTORY OF CONSERVATION EASEMENT ACTIVITY IN MINNESOTA

In the past decade, the use of conservation easements has dramatically increased around the country as public agencies and nonprofit conservation organizations have recognized that easements can be an effective strategy to meet their missions. There are limited data, however, on the extent to which conservation easements are used as land protection tools and by whom.

The data discussed here includes the best and most recent national data available. The Minnesota data was collected by the Minnesota Land Trust in late 2009 and is as current and accurate as possible. The data covers all types of conservation easements—natural area, open space, agricultural, forest and scenic easements. Term easements, as well as perpetual or permanent easements, are included and are identified accordingly when known.

A. National data and trends.

Currently, there is no national database or other comprehensive compilation of information covering all conservation easements established in the United States.

There have been a number of national efforts to document and map the status of protected lands throughout the United States. See, for example, PAD-US, the Protected Areas Database of the United States, initially created by the Conservation Biology Institute, www.protectedlands.net, that identifies and maps publicly owned conservation lands or the Conservation Almanac, created by the Trust for Public Land to track land conserved on a state by state basis in conjunction with funding data and growth trends.

Some efforts have focused on forest resources such as the NatureServe Forest Program that provides data incorporated into three forest certification systems—the Forest Stewardship Council, the American Tree Farm System and the Sustainable Forestry Initiative.

However, these efforts have typically included only lands owned in fee by federal or state public agencies. They have not included lands protected by conservation easements held by either public agencies or private nonprofit organizations.

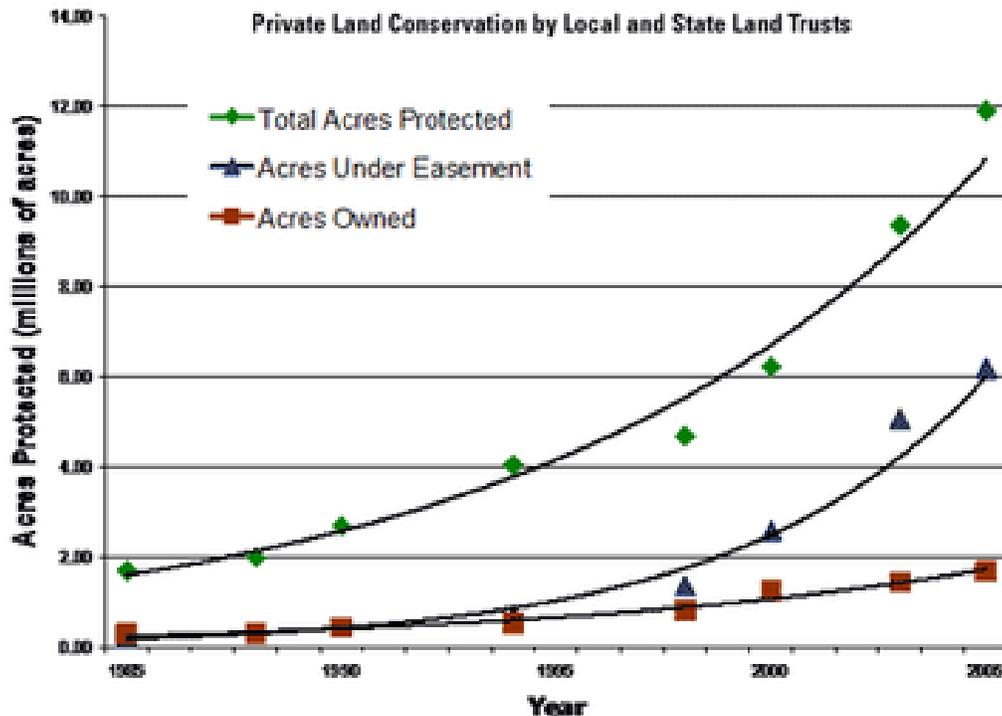
Nor have the systems compiled data consistently.

Recognizing the importance of compiling such data, particularly the missing conservation easement data, the U.S. Endowment for Forestry and Communities has just recently funded a collaborative effort to create a single, up-to-date, sustainable nationwide system for managing and accessing data about conservation easements. The National Conservation Easement Database (NCED) will be the first comprehensive national database of conservation easement information, collecting information from both public agencies and private conservation organizations.

This data will not, however, be available for some time.

Currently, the only cumulative national data available on conservation easements are what has been collected by the Land Trust Alliance, a national association of conservation organizations and others dedicated to strengthening land conservation across the country. For several decades, the Land Trust Alliance, has been periodically conducting voluntary surveys tracking national trends in *private* land conservation by *nonprofit land trusts* defined as those nonprofit organizations that, as all or part of their mission, actively work to conserve land by undertaking or assisting in land or conservation easement acquisition, or by the stewardship of such land or easements.

With efforts now underway to collect 2010 data, the 2005 National Land Trust Census is the Land Trust Alliance's most recent compilation. That survey, available in full at www.landtrustalliance.org, notes that the effectiveness and popularity of private conservation are demonstrated by the vast gains in acreage protected and by the establishment of new land trusts in so many communities across the country. This is evidenced by a tripling of the pace of private land conservation, a 148% increase in the use of conservation easements from the prior survey, and a doubling of total acres conserved.



From the Land Trust Alliance 2005 National Land Trust Census, available in full at www.landtrustalliance.org.

Private *state* and *local* land trusts have helped protect more *37 million acres* of land and now hold conservation easements on more than *6,245,900 acres of land*, a dramatic increase from 2000. The Nature Conservancy, Ducks Unlimited and other national organizations hold easements on more than another *4 million acres* of land.

While private conservation easement activity is increasing across the country, much of that conservation activity has taken place in parts of the country that have the longest history of working with conservation easements and private land trusts.

In the forested northeast where conservation easements have the longest history, as of 2005 land trusts held conservation easements on 1,492,279 acres in Maine (with a single easement accounting for half of that acreage), 399,681 acres in Vermont, 191,095 acres in New York and 133,836 acres in New Hampshire.

In the west, easement activity focused on huge swaths of unprotected forests and grazing lands.

The existence of public funding or other conservation incentives, such as transferable tax credits in Colorado and Virginia, fueled much this conservation easement activity.

The Land Trust Alliance data does not include detailed land cover information on land protected by these easements. It notes only the general land type reported as being the primary focus of land trust efforts: natural areas and wildlife habitat (39%), followed by open space—which can include farmland and forestland (38%) and water resources (26%), especially wetlands.

While these data do not include any information on conservation activities or conservation easement holding by government agencies, the following summarizes some general information available regarding conservation easements held by selected federal agencies:

- USDA/Natural Resources Conservation Service: The NRCS manages a number of programs that employ conservation easements including its Wetland Reserve

TOP 10 STATES WITH THE MOST LAND UNDER CONSERVATION EASEMENTS HELD BY STATE AND LOCAL LAND TRUSTS	
STATE	ACRES UNDER EASEMENT
Maine	1,492,279
Colorado	849,825
California	427,411
Vermont	399,681
Virginia	365,355
Maryland	191,330
New York	191,095
New Mexico	142,072
Pennsylvania	139,301
New Hampshire	133,836
TOTAL (including states not listed)	6,245,900
Data from the Land Trust Alliance 2005 National Land Trust Census, available in full at www.landtrustalliance.org .	

Program, Farm and Ranchland Protection Program and Grassland Reserve Program. In 2008, the NRCS estimated that it held approximately 11,000 easements protecting more than 2 million acres of land under these programs, with this number anticipated to increase by 250,000 acres annually.

- Department of the Interior/U.S. Fish and Wildlife Service: Using conservation easements since the 1950s to protect the prairie wetlands or “potholes” of the Dakotas, Minnesota, and Montana, the USFWS estimated that by 2007 it held more than 29,000 wetland easements covering 2.5 million acres of land. At least another 400,000 acres of land are estimated to be protected by a companion grasslands protection program. USFWS holds other conservation easements as part of its National Wildlife Refuge System.
- USDA/Forest Service: While holding very few easements itself, the U.S. Forest Service manages the largest federal program funding the purchase of conservation easements on privately owned forest lands by state or other local units of government.

As of August, 2009, the Forest Legacy Program had provided funding to support the purchase of conservation easements protecting 1,855,222 acres of forest land in 41 states.

ACRES PROTECTED WITH FOREST LEGACY FUNDING AUGUST 2009					
Alabama	10,127	Iowa	1,986	North Carolina	6,696
Alaska	2,924	Kentucky	3,144	Ohio	436
Arizona	630	Maine	659,606	Oregon	25
Arkansas	31,846	Maryland	1,247	Pennsylvania	2,956
California	14,215	Massachusetts	6,751	Puerto Rico	2,867
Colorado	9,231	Michigan	37,076	Rhode Island	3,392
Connecticut	7,911	Minnesota	59,531	South Carolina	71,200
Delaware	2,032	Missouri	154	Tennessee	38,473
Florida	4,742	Montana	169,996	Utah	62,363
Georgia	20,926	Nevada	111	Vermont	67,603
Hawaii	37,055	New Hampshire	215,104	Virginia	5,971
Idaho	57,223	New Jersey	5,413	Washington	30,535
Illinois	493	New Mexico	7,593	West Virginia	764
Indiana	6,786	New York	133,118	Wisconsin	54,970
TOTAL	1,855,222				

Data from the USDA Forest Service web site
http://www.fs.fed.us/spf/coop/programs/loa/flp_projects.shtml

B. Minnesota data.

As is the case throughout the country, there is no statewide registry, compilation or list of conservation easements or easement holders in Minnesota.

In order to address the vacuum in knowledge, in 2006 the Minnesota Land Trust commissioned a study of conservation easement activity in Minnesota. This data was then updated by the Land Trust in 2009.

Entities contacted for the study were those that the Minnesota Land Trust believed would be most likely to hold conservation easements in the State.

- All federal agencies owning or potentially owning land in Minnesota were contacted: Department of the Interior—U.S. Fish and Wildlife Service, National Park Service, and the Bureau of Land Management; U.S. Department of Agriculture—Natural Resources Conservation Service (NRCS) and Farm Service Agency (FSA) and U.S. Forest Service; and the Department of Defense.
- All state agencies known to hold easements or potentially holding easements were contacted: the Minnesota Department of Natural Resources (DNR), the Board of Water and Soil Resources (BWSR), the Minnesota Pollution Control Agency, and the Minnesota Department of Transportation.
- Only selected local units of government were contacted. Contacting *all* local units of government was beyond the scope of this study. Instead, counties and cities that were known to hold conservation easements or to be interested in holding conservation easements along with other selected local units of government such as soil and water conservation districts and watershed districts were contacted. Most of these were in the greater metropolitan area with a sampling of others.

Additionally, the study looked at information collected by Washington County, the only county known to have attempted to inventory all the conservation easements in its jurisdictions, regardless of ownership.

- All those private, nonprofit conservation organizations known to hold easements or thought to be interested in easements were contacted along with a selection of other nonprofit conservation organizations that could possibly hold easements.

In addition, several other organizations such as The Conservation Fund and the Trust for Public Land help facilitate conservation easement transactions but do not typically hold them long-term. Therefore, they are excluded from this study.

During the course of the study, a number of previously unknown conservation easement holders were discovered. Accordingly, it is likely that there are no doubt other entities that hold easements in Minnesota, particularly at the local level, that are not included here.

Those contacted were asked for the following:

- Number of conservation easements held, both perpetual or permanent easements and those for a term of years.
- Acres protected by those easements.
- Data on the programs under which the easements were acquired, including statutory or programmatic authority for acquiring easements, geographic or other focus of the easement programs, funding sources and other similar programmatic information.
- Components of easement acquisition programs, as appropriate, including nature of easements drafted, existence of baseline property or documentation reports and mapping.
- Information on management and monitoring of easements held.

Not all entities contacted knew whether they held easements. This was particularly true at the local level. And not all of those that knew that they held conservation easements knew how many, their acreage or location.

As discussed below, DNR—a major conservation easement holder in Minnesota—is currently in the process of comprehensively reviewing and analyzing its easement holdings under a study funded by the Legislative-Citizens Commission on Minnesota Resources (LCCMR.) DNR data will be more complete and accurate when that study is completed but are relatively accurate at this stage.

Additionally, some acreage may have been counted twice when easements were co-held or where there was more than one easement on the same parcel of land. NOTE: In some instances this has been identified and accounted for but co-holding or multiple easements on the same parcel of land was not always known and is difficult to otherwise discern.

Finally, data below is collected as of October 2009. However, not all agencies or organizations keep collective easement data or have reported data over the same time period. Many of the numbers here, therefore, are necessarily *estimates* as of October 2009.

Details are set out below, but the following are a few general comments and themes gleaned from the data:

- The study uncovered a greater level of conservation easement activity than originally anticipated—more than *12,000 easements* protecting approximately *524,400 acres* of land and almost *700 miles of shoreline*—positioning Minnesota as a major state in terms of numbers of conservation easements protecting the State’s natural resources.

- The level of activity is even greater than indicated when *pending* conservation easement activity that will close in coming months is added. This includes approved and pending very large working forest easements that will protect an additional approximately 279,900 acres and the most recent rounds of pending WRP/RIM Reserve easements that will protect an additional 105,000 acres.
- By far, the majority of easements (more than 93%) are held by government agencies, with approximately one-half of those at the federal level and one-half at the state level. Much more *acreage* is protected by state held easements, an amount that will increase dramatically as currently pending easements close.
- Almost all easements held by nonprofit organizations are held by a single entity, the Minnesota Land Trust (91%).
- Most publicly held easements have been purchased, while nonprofit organizations rely more extensively on donations or discounted sales.
- 95% or more of all conservation easements are perpetual, with most current easement programs preferring perpetual or permanent easements.
- Compliance monitoring of conservation easements is handled inconsistently. Some holders monitor annually, some periodically and some not at all—a particular problem among public agencies. There is, however, growing recognition of the need to create and implement an easement monitoring program as a hedge against more costly violations and enforcement actions.
- Few easement holders—and NO public agencies—have funding dedicated to long-term stewardship and monitoring of easements. Public agencies typically rely on annual appropriations or using other general operating dollars.

Additional work is necessary to better understand conservation easement issues in Minnesota but the data summarized here is a good start.

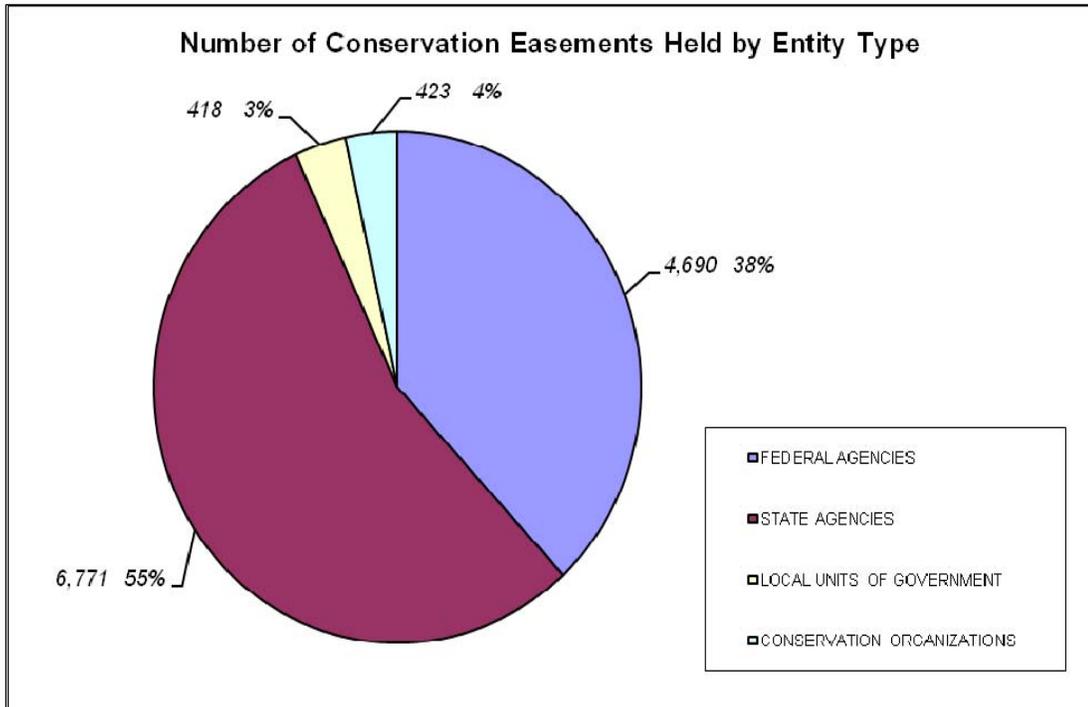
1. Overall data:

As summarized in the charts and graphs below created from the data collected by the Minnesota Land Trust, conservation entities hold more than 12,300 conservation easements in Minnesota.

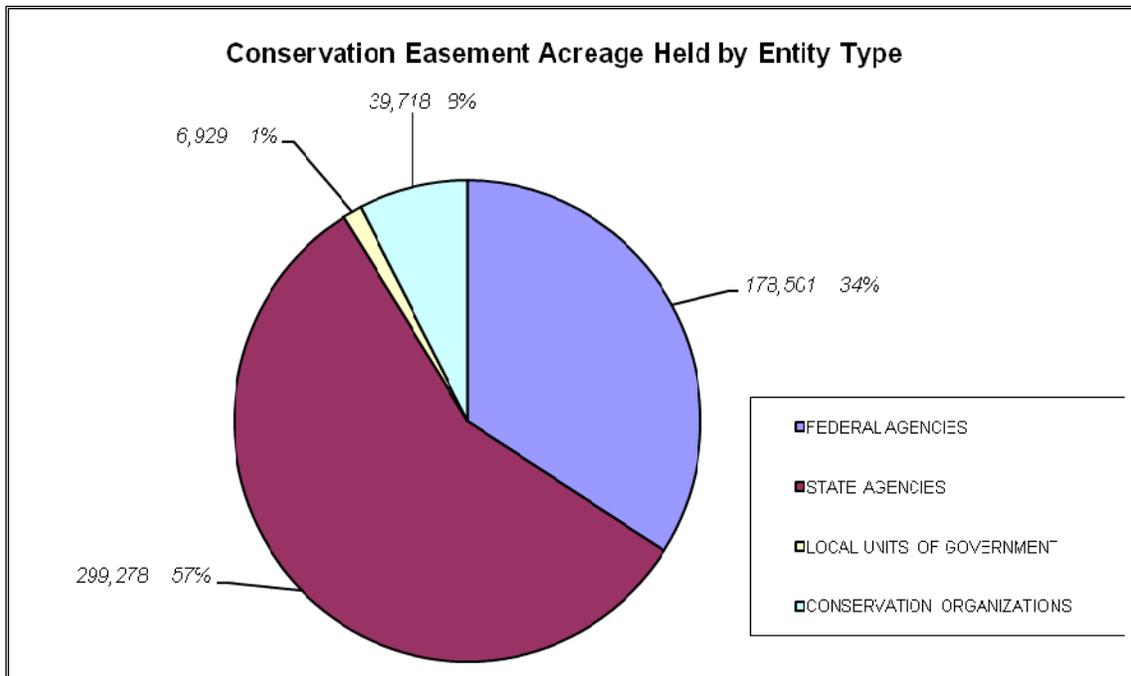
Almost all of these easements are permanent or perpetual. Most are held by public agencies at the state or federal level.

These easements protect over *one-half million acres of land*. Again, almost all of this acreage is under state or federal protection.

SUMMARY OF CONSERVATION EASEMENT ACTIVITY IN MINNESOTA						
October 2009						
	# OF EASEMENTS			ACRES UNDER EASEMENT		
	Permanent	Term	Total	Permanent	Term	Total
FEDERAL AGENCIES	4,528	162	4,690	164,439	14,062	178,501
STATE AGENCIES	6,277	494	6,771	289,250	10,028	299,278
LOCAL UNITS OF GOVERNMENT	418	0	418	6,929	0	6,929
CONSERVATION ORGANIZATIONS	423	0	423	39,718	0	39,718
TOTAL	11,646	656	12,302	500,336	24,090	524,426



NOTE ON EASEMENT NUMBERS: This includes 162 thirty-year easements held by NRCS that protect land also covered by permanent BWSR easements as part of the WRP/RIM Reserve program described below. It also includes a limited number of easements that are co-held and therefore may be counted twice.



NOTE ON ACREAGE: This includes at least 17,500 acres of land under co-held easements, most but not all under WRP/RIM Reserve program. Total protected acreage is accordingly somewhat less than depicted here.

The programs under which these easements have been acquired are listed on the next page and described in more detail below.

In general, about 75% of these easements have been acquired in agricultural areas in Minnesota, primarily focused on wetland and associated upland protection.

Increasingly, however, easements have been used to protect forest resources. With the completion of currently pending transactions, the Forestry Division of DNR will soon hold conservation easements on approximately 350,000 acres of land, which will comprise over *one-third* of all of the acreage protected by easements in the State.

SUMMARY OF CONSERVATION EASEMENT HOLDING IN MINNESOTA BY PROGRAM

October 2009

	ORGANIZATION	# OF EASEMENTS	TOTAL ACRES UNDER EASEMENT
FEDERAL	USDA/ Natural Resources Conservation Service	622	78,754
	Department of the Interior/ US Fish and Wildlife Service	2,864	86,301
	Department of the Interior/National Park Service	504	3,196
	USDA/ Farm Service Administration	700	10,250
STATE	BWSR: Board of Water and Soil Resources	5,536	207,909
	DNR: Department of Natural Resources	1,235	91,369
SELECTED LOCAL COMMUNITIES	Counties	74	4,962
	Cities/Townships	323	485
	SWCDs: Soil and Water Conservation Districts	3	510
	Watershed Districts	18	972
CONSERVATION ORGANIZATIONS	Minnesota Land Trust	387	34,793
	The Nature Conservancy	14	2,426
	American Farmland Trust	4	1,110
	Leech Lake Watershed Association	2	249
	Ducks Unlimited	14	1,100
	Minnesota Forestry Association	2	40
	Pheasants Forever	none at this time	0

2. Federal agencies holding easements in Minnesota: Conservation easements in Minnesota are held under programs of the USFWS, the NRCS, the FSA and the National Park Service.

- U.S. Fish and Wildlife Service: The USFWS holds easements through its refuge program, a collection of public lands and waters set aside to conserve America's fish, wildlife and plants. In Minnesota, the focus is in the tallgrass prairie region, mostly wetland and grassland area with some riparian corridors for fish species. Typically, refuges involve acquisition of fee title. However, easements have been acquired as buffers or on inholdings where fee purchase is not possible. Additionally, the USFWS has an extensive Waterfowl Production Area program in Minnesota. This program consists entirely of conservation easements on wetlands and related uplands and grasslands in designated areas within each county in the prairie pothole region of Montana, North and South Dakota, Minnesota, and Iowa.

Conservation easements are monitored by annual flyovers, with landowners contacted if problems are suspected.

Easements held by USFWS tend to be small, covering only the identified wetlands and immediately associated uplands averaging 30 acres an easement. All have been purchased.

The program is active, depending upon available funding. USFWS has recently received support from the Outdoor Heritage Fund to continue to purchase conservation easements in western Minnesota.

- USDA/Natural Resources Conservation Service: The NRCS has been actively protecting wetlands in Minnesota for decades, primarily through its Wetland Reserve Program. This program specifically targets lands that have been partially drained or altered by farming but may include lands that have been restored or are important to the quality of the area overall. Easements cover wetlands and associated uplands with restoration typically required and are primarily located in the prairie pothole region of the state.

One of its most active current programs is a cooperative program with BWSR that couples a 30-year NRCS WRP easement with a permanent BWSR RIM Reserve easement. This cost share approach has resulted in Minnesota receiving the third largest share of WRP funds of any state in the country.

The NRCS also works with the Farm and Ranchland Protection Program and co-holds a number of easements under that program with Dakota County. See discussion below.

NRCS has just recently instituted a comprehensive easement monitoring program with current protocols calling for field monitoring at least once every three years and aerial monitoring with digital photography in other years.

All WRP easements are purchased, in the past using “before and after” appraisals and now using a calculation approach based upon average agricultural land values in a county.

- USDA/Farm Services Agency: The FSA holds conservation easements in Minnesota under two programs. The Debt for Nature Program, now known as the Debt Cancellation Conservation Contract Program, originally started in 1985 as a conservation easement program available to persons with FSA loans secured by real estate who qualified for cancellation of a portion of their FSA indebtedness in exchange for conveying fee title or a permanent conservation easement on part of their land. In 1991, the program was modified to provide only for conservation contracts with terms of 50, 30, or 10 years—no permanent easements.

Additionally, FSA evaluates all farms that come into its ownership for certain conservation features and values, placing easements on the property to protect those values before the land is resold on the market. FSA holds far more easements under this program than its Debt for Nature Program and continues to add easements to its portfolio as farms come into its ownership. Given current farm financing arrangements, however, FSA does not come into title currently as often as it did in the past.

Many of the easements created under these programs were conveyed to USFWS or to state agencies. FSA is currently working on better easement recordkeeping and creating guidance documents to improve and enhance monitoring. Annual monitoring is preferred but required no less than every 3 years.

- National Park Service—St. Croix Valley National Scenic Riverway. The National Park Service holds several hundred conservation easements within the designated St. Croix National Scenic Riverway—a corridor established to protect the viewshed from the river. The amount of land authorized to be acquired in fee was limited by enabling legislation so easements became extensively used. Most easements were purchased from voluntary landowners although early in the program, some easements were acquired through condemnation--a process no longer followed. The Park Service is not actively acquiring easements at this time.

The Park Service has been researching current land ownership of protected land and created a conservation easement monitoring plan which has not yet been implemented.

3. State Agencies holding easements in Minnesota: The Minnesota Department of Natural Resources and the Board of Water and Soil Resources are the only state agencies holding conservation easements at this time.
 - Minnesota Department of Natural Resources: The Minnesota DNR has broad statutory authority to acquire land and conservation easements. Unless otherwise

specifically authorized, any lands acquired by DNR—whether in fee or through conservation easements—must fit into one of the 13 legislatively identified categories comprising Minnesota’s outdoor recreation system. See Minnesota Statutes Chapter 86A. DNR must also follow the legislatively prescribed process in acquiring any interests in land. See Minnesota Statutes §§84.0272 and 84.0274.

DNR has historically acquired easements under a number of programs, although that has never been a primary focus of most DNR programs and only a few easement acquisition programs are active at this time. Until recently, DNR has not had a comprehensive recordkeeping system for tracking its easements. Nor has DNR had consistent conservation easement acquisition or monitoring protocols applicable across DNR divisions and programs.

With assistance from LCCMR funding, DNR has created a staffed working group and is currently in the process of remedying this situation. An inventory of all DNR easements is now underway and is expected to be completed within the next six months. Once that inventory is complete, data on DNR easements will be much more accurate. In the meantime, the data included in this report are as accurate as possible and reflects the best information of the various DNR programs with responsibility for conservation easements.

DNR is also evaluating its easement acquisition, monitoring and enforcement protocols. The effort will be completed following completion of the easement inventory. In the meantime, the chart on the following pages summarizes currently known information about the various DNR easement programs.

Most DNR easements have been purchased, primarily at fair market value using comprehensive “before and after” appraisals, although alternative approaches have been legislatively authorized for specific situations. See, for example, Minnesota Statutes §84.0277 for the Camp Ripley ACUB project or §84.0272, subdivision 2 for trout stream easements.

DNR’s program to support working forests is among its most active easement programs, with ongoing efforts to locate appropriate projects and funding. Although the number of easements held through either the earlier *Forest Legacy Program* or the more current *Minnesota Forests for the Future Program*, Minnesota Statute §84.66, is relatively small—26—the acreage is quite substantial—65,750 acres protected. Another 8 easements are pending that will protect an additional 279,900 acres. By focusing more recently on the largest tracts of land available, DNR is able to keep up-front transaction costs to a minimum.

DNR monitors these easements annually, as funding and time allows. In recognition of the importance of monitoring, DNR has included \$750,000 for conservation easement stewardship as part of its budget for its pending purchase of an easement on 187,000 acres of land from UPM/Blandin Paper Company and is exploring mechanisms for protecting this funding to the extent possible.

**MINNESOTA DEPARTMENT OF NATURAL RESOURCES
CONSERVATION EASEMENTS**

October 2009

Conservation Easement Type	# of Easements	Acreage	Comments
ACUB—Camp Ripley			Both DNR and BWSR are actively acquiring land and easements as a part of the Camp Ripley—Army Compatible Use Buffer program. DNR easements, however, are acquired and held under one of the other DNR programs.
Aquatic easements—Aquatic Management Areas, others	15	405	DNR occasionally uses conservation easements to create Aquatic Management Areas—sites protected to preserve natural habitat along lakes and streams and provide angler access. Most AMAs are owned in fee by DNR but institutionally owned camps are a current focus for AMA conservation easements. AMA easements currently protect 7 miles of shoreline and are monitored annually. A few other miscellaneous easements are included here.
Aquatic easements—trout streams	880	7,379	DNR has an extensive and active trout stream program with easements designed to preserve habitat <i>and</i> access for fishing along designated trout streams. Found mostly in SE and NE Minnesota, these easements are typically strips of land extending 66 feet on either side of a stream measured from the center of stream and most give DNR affirmative rights to restore and manage the land. Many were created decades ago through the sale of tax-forfeited land or by county board resolution. Because of the method of creation, calculating the number of easements is challenging and the numbers here are under review. DNR relies on anglers to monitor easements, with back-up by fisheries crews. These easements protect 520 miles of shoreline along 2,000 streams. Some older northern pike spawning easements are also included here.
Conservation—miscellaneous	18	2,070	Easements included here are general conservation easements protecting wildlife, including non-game wildlife. Several easements are part of DNR's Wildlife Management Area system, bordering or buffering WMAs. Also included are unique 4 bat hibernacula easements related to the St. Cloud sewer system. Other easements included here were required during development processes or otherwise accepted by DNR outside of any specific program. Easements are not actively pursued by the Wildlife Division at this time, as WMAs are more typically owned in fee title and managed by DNR for public access for hunting and other recreational purposes.
Forest Legacy and Forests for the Future	26	65,750	Easements under the Forest Legacy and Forests for the Future programs protect important forest areas to keep land available for forest products production, wildlife habitat and other conservation purposes. This is one of DNR's most active easement programs, relying heavily on conservation easements to protect forested areas of the State. Many of these easements have used federal USFS funds. Annual monitoring is the goal as funding/time allow. Management plans are typically required by easement terms. 1 ACUB easement acquired under separate authority is also included here.

Metro Greenways	18	1,252	<p>Metro Greenways is a relatively recent DNR program providing funds to local units of government and NGOs to protect natural areas in the face of urban growth in the 11-county metro area. Some projects involved Metro Greenways acquiring a conservation easement as the appropriate protection for the site. In other cases, easements were required on land purchased through the Metro Greenways program.</p> <p>11 of these easements (313.3 acres) are on land owned by a public entity and protected by a conservation easement held by the DNR. 7 (401.8 acres) are on private land protected by a conservation easement held by the DNR.</p> <p>This program is being evaluated by DNR at this time and no new easements are currently being pursued.</p> <p>These easements are typically monitored annually.</p>
Native Prairie Bank	90	7,280	<p>This DNR program designed to protect unplowed native prairies uses easements as a primary protection tool. Easements are typically purchased at 65% of permanent marginal agricultural land payment rate set by BWSR, less if some limited haying and/or grazing.</p> <p>DNR originally purchased 95 easements and later bought fee title to 5. DNR has land management rights under all Prairie Bank easements.</p> <p>This is an active easement acquisition program, funding dependent. There are good Prairie Bank easement records but monitoring still irregular.</p>
Parks	6	192	<p>DNR has occasionally accepted gifts of easements adjacent to or within state park boundaries at 3 state parks but easements are not a focus of the Parks program that typically acquires land in fee for public access for recreation.</p> <p>Some easements have been monitored annually, others have not been monitored since they were created.</p>
Scientific & Natural Area	20	1,472	<p>Easements are a minor part of the SNA program that protects undisturbed natural areas with exceptional scientific or educational value.</p> <p>Sites under easement are actively managed by DNR. Monitoring is otherwise varied--some sites are monitored annually, others several times a year and others based upon noted violations.</p>
Water Bank	27	1,598	<p>The water bank program was a pre-cursor to other state wetland protection programs. It relied primarily on 20-year term arrangements rather than permanent easements. The program is no longer in existence but some easements remain.</p> <p>These easements include 10 term easements covering 525 acres, all which will expire by 2012.</p>
Wild & Scenic River	135	3,971	<p>Scenic easements are held along 1 federal and 6 state designated wild and scenic rivers as part of one of DNR's earliest easement programs. DNR is not actively seeking new easements in this program at this time.</p> <p>Historically easements were not monitored but DNR is working to identify and contact current landowners and implement a monitoring program.</p>
Total	1,235	91,369	

- Board of Water and Soil Resources: With more limited program authority than DNR, BWSR has a long history of more extensively working with conservation easements, particularly in the agricultural areas of Minnesota.

Operating primarily under the authority of the Reinvest in Minnesota Reserve Program (RIM Reserve), BWSR has specific authority to use conservation easements to restore certain marginal agricultural land and protect environmentally sensitive areas to enhance soil and water quality, minimize damage to flood-prone areas, sequester carbon, and support native plant, fish, and wildlife habitats. See Minnesota Statutes §103F.505.

Under the RIM Reserve legislation, land is eligible for enrollment only if the land:

- (1) is marginal agricultural land;
- (2) is adjacent to marginal agricultural land and is either beneficial to resource protection or necessary for efficient recording of the land description;
- (3) consists of a drained wetland;
- (4) is land that with a windbreak or water quality improvement practice would be beneficial to resource protection;
- (5) is land in a sensitive groundwater area;
- (6) is riparian land;
- (7) is cropland or noncropland adjacent to restored wetlands to the extent of up to eight acres of cropland or one acre of noncropland for each acre of wetland restored;
- (8) is a woodlot on agricultural land;
- (9) is abandoned building site on agricultural land, provided that funds are not used for compensation of the value of the buildings; or
- (10) is land used for pasture.

Minnesota Statute §103F.515, subdivision 2.

The enabling legislation also includes details on terms to be included in RIM Reserve easements, payment rates and State enforcement rights.

BWSR has implemented or participated in a number of programs under the overall RIM Reserve or related wetlands protection authority. These programs have all relied primarily on the use of conservation easements, with permanent easements as the preferred protection tool:

BOARD OF WATER AND SOIL RESOURCES CONSERVATION EASEMENTS			
Program	# of easements	Acres	Comments
RIM Reserve	2,041	61,220	
RIM Reserve/WRP partnership	147	11,509	This partnership combines multiple sources of funding and uses 30 year NRCS easements combined with permanent BWSR easements.
CREP 1	2,479	100,292	The CREP program combines federal Conservation Reserve Program (CRP) contract payments with RIM Reserve easements. Initial program focus was on the Minnesota River Valley.
CREP 2	275	7,058	The second round of CREP had a broader geographic focus than CREP 1 but less success due to lower payment rates and emphasis on term easements.
Permanent Wetlands Reserve	299	11,413	This was an earlier program that is no longer actively used.
ACUB-Camp Ripley	35	5417	This is a limited program with specific statutory authority focused on the land adjacent to Camp Ripley. Funding from the Department of Defense through its Army Compatible Use Buffer Program.
Wetland Banking Easements	260	11,000	Easements counted here are required under wetland protection programs associated with development that impacts wetlands.
TOTAL	5,536	207,909	

To date, easements have been focused on the Minnesota River Valley (2,500 easements protecting 100,000 acres of land) and other agricultural lands predominantly in the prairie/forest border region of the State.

Easements are very restrictive—prohibiting all development and agricultural activity—and are implemented using a standardized document. As a result, the BWSR easements exclude land suitable for even limited development or agricultural activities. Average easement size is about 40 acres. Public access is not required.

Conservation easements are purchased at fair market value, using a calculated value based upon average agricultural land values in the county. Appraisals are not used.

With more than 200,000 acres under easement, BWSR has implemented an easement monitoring program that relies on local county soil and water conservation districts.

Protocols generally involve monitoring every year for the first 5 years of the easement, with monitoring once every three years after that. More intensive monitoring may follow a change in land ownership.

BWSR has done little work in the forested areas of the State, but would consider implementing a forest-focused program if local units of government were also interested. It would likely follow the model that is currently used. It would be implemented under the authority of other RIM Reserve easement programs with a focus on riparian areas.

4. Local units of government: The least amount of information is known about conservation easements held by local units of government—counties, cities, townships and other similar entities. Collectively, local units of government contacted held only 418 easements protecting less than 7,000 acres of land—approximately 1% of easement-protected land in the State.

These numbers, however, are marginally accurate. Only a very small segment of local units of government were contacted.

Additionally, many local units of governments contacted for this study did not themselves know whether they held easements and if so where. This was particularly true in cases where easements were created through the regulatory process related to residential development.

Only two counties in the State—Dakota and Washington—are known to have funded land conservation programs that include the use of conservation easements to protect land. Dakota County has effectively used the federal Farm and Ranch Land Protection program along with local funding, now holding 39 easements protecting more than 3,700 acres of land. Washington County holds fewer easements, 13, and is now exploring expanded use of easements.

Other counties in the greater metropolitan area have expressed interest in creating and implementing similar conservation programs, but none that extensively use easements currently exist.

Cass County, the only rural county consulted in this study, has implemented a local shoreland conservation program that employs conservation easements as a protection strategy but its funding has been somewhat limited. Anecdotally, other counties may also hold some easements but this was not confirmed.

Many cities and townships, particularly in the metropolitan area, require easements under local ordinances related to conservation issues such as wetland or open space protection in conjunction with development. Few of these municipalities tracked or managed these easements, relying instead upon complaints or permit requests as an enforcement mechanism.

Washington County is unique in that it has also taken on a project to understand the extent of all conservation easement activity in the County. The County quickly recognized that it was hindered by the manner in which easement data was collected on the recorded land records. Nevertheless, the County was able to identify 542 conservation easements held in the county. Acreage was more difficult to calculate but is estimated at over 6,000 acres.

In general, easements held by local units of government protect smaller acreages on average and are less likely to be periodically monitored.

5. Private nonprofit entities holding easements: In contrast to some states, only a handful of private, nonprofit conservation organizations hold easements in Minnesota, and the vast majority of those are held by a single organization—the Minnesota Land Trust. Other easement holders include primarily national organizations with Minnesota programs including The Nature Conservancy and Ducks Unlimited. Pheasants Forever has established a national easement program, but holds no easements in Minnesota. The American Farmland Trust previously had an easement demonstration project but does not actively accept conservation easements in Minnesota at this time. A handful of locally based organizations also hold easements but none have active programs.

Private nonprofit conservation organizations hold fewer than 500 conservation easements protecting approximately 40,000 acres of land.

The Minnesota Land Trust, the only land trust in Minnesota that is currently accredited under the Land Trust Alliance national accreditation program, holds the vast majority of these easements—holding more than 90% of the easements protecting an equivalent amount of acreage. These easements protect natural and scenic lands throughout the State, with a concentration in the metro area and in other selected landscapes.

The Nature Conservancy, with a focus on identified ecologically significant lands, has expressed limited interest in holding easements in Minnesota, although it does acquire new easements if they meet program criteria.

Ducks Unlimited has an active easement acquisition program in Minnesota through its Living Lakes Initiative—a program directed at a few specifically selected shallow lake sites in the prairie pothole region of the State.

The Minnesota Land Trust, TNC and DU all have dedicated conservation easement stewardship funds and comprehensive monitoring programs. Smaller organizations holding easements appear to have neither.

This pattern of nonprofit activity is somewhat unusual in that many states have a far greater number of nonprofit conservation organizations that hold easements. However, given recent increased scrutiny and demands of easements and easement holders, a limited number of nonprofit easement holders in Minnesota may be appropriate.

CONSERVATION EASEMENTS IN A FOREST SETTING

A. Unique forest and working-forest issues

There are a number of unique issues related to using conservation easements to mitigate parcelization of Minnesota's forests—need for multiple conservation easement goals, the reality of changing land ownership patterns, and the ability to direct *where* easements are created on the landscape.

1. Multiple conservation goals: While preventing additional parcelization of forest land is the focus of this report, the purpose of this restriction is to prevent the impacts that result from parcelization—keeping forest land available for ongoing commercial use while maintaining ecological and economic balance and compatibility.

Conservation easements drafted to prevent parcelization must also meet these additional goals. As noted below, there is growing experience around the country in drafting such easements but they can be more complex than other easements, requiring unique skills and abilities and often resulting in high transactional costs.

2. Ownership: Changes in the ownership of Minnesota's forests is well documented and follows national trends. Then number of institutional landowners directly tied to the forest products industry diminishing. Moreover the amount of land they own for long-term forestry is also diminishing as the divest themselves of land and/or move to ownership by timber investment management organizations and real estate investment trusts. .

Additionally, economic pressures on non-industrial, family owned forest lands can make continued ownership for forestry difficult or impossible.

These trends all lead to parcelization.

With more than 40% of Minnesota's forest in private ownership, conservation easements can be an effective mechanism for limiting further forest parcelization. But while the impacts of landownership changes can be mitigated through conservation easements, different landowners will respond differently to the concept of permanent protection.

Those who are interested in protecting land with a conservation easement will do so for different reasons and under different situations.

Data indicates that the reasons for owning most family forests in the northern United States. are for the enjoyment of beauty and scenery of the land, privacy and protection of nature and biological diversity. Other reasons given include recreation, investment, family legacy and timber production. Many of these landowners may be interested in a conservation easement to protect their land for these purposes.

However, each landowner's individual economic situation may likely dictate whether they will be interested in donating an easement, taking advantage of available tax benefits, or will need to receive payment.

A recent analysis completed by the Natural Resources Research Institute of the University of Minnesota Duluth (NRRI) of certain lands in Itasca County indicates that land most susceptible to parcelization is primary family owned forest land, supporting the conclusion that conservation easements may be a particularly useful tool in limiting future parcelization.

While there are few institutional forest landowners, they tend to own larger tracts of land. However, they also have different economic concerns and will likely consider conservation easements from a very different perspective. They will likely require payment for conservation easements and possibly different easement terms.

3. Spatial needs: Long-term forest sustainability for economical as well as ecological purposes is dependent upon location and spatial configuration. Any conservation easement program created to limit parcelization while supporting sustainable forestry operations should take into account the amount, location and configuration of forested acres needed to meet program goals.

While there is considerable available data about land cover, additional analysis may be necessary to relate land cover, ownership and threat of parcelization to better evaluate costs and effectiveness of a conservation easement program.

Without specific program criteria in conjunction with targeting, easement programs based entirely on voluntary incentives may not meet these goals.

B. Options for addressing forest issues in conservation easements and easement programs.

1. Easement drafting: Many conservation easements are drafted to preserve or maintain the current condition of the protected property. All development of the property is prohibited. Structures and improvements are prohibited. Vegetation is to be left in its existing condition.

However, easements designed to preserve the availability of forestland for economically viable forestry are more complicated. And easements designed to further meet ecological or other conservation goals are more complicated yet.

Of particular importance in a forest setting are easement provisions that establish an appropriate standard for forest practices. There are a number of acceptable approaches, some of which are more restrictive or require more external oversight than others, and a number of resources available providing assistance in drafting easements in a forest setting.

The Forest Guild has created a matrix that establishes 11 approaches to drafting forest management easement terms to assure sustainable, ecological and economical forestry—each with a different level of assurance. From lowest to highest levels of assurance, these include:

LEVEL OF ASSURANCE	
Level one	Reliance on existing state, local or federal law
Level two	Reliance on existing definitions of "good forestry"
Level three	Reliance of state forester licensing programs
Level four	Reliance on "best management practices"
Level five	Reliance on forest management certification systems
Level six	Reliance on professional forester associations or certification
Level seven	Defined management principles
Level eight	Defined management goals
Level nine	Defined components of a forest management place
Level ten	Defined performance expectations
Level eleven	Prescribed practices

See the 2006 Forest Guild publication, Ensuring Sustainable Forestry through Working Forest Conservation Easements in the Northeast.

The Land Trust Alliance has also published a book devoted to drafting working forest conservation easements with more comprehensive guidance.

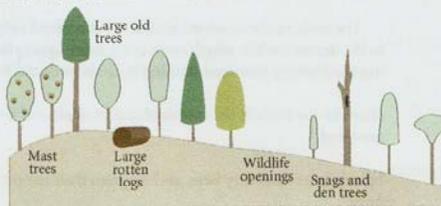
Additionally, forest easements should address ecological issues. On the next page is a chart prepared by the Open Space Institute and the Wildlife Conservation Society suggesting elements that should be routinely included in creating a conservation easement to preserve existing ecological systems in a forest setting.

Using resources such as these, conservation easements can be created to effectively protect multiple conservation goals.

THE STANDARD TOOLKIT FOR PRESERVING EXTANT BIODIVERSITY



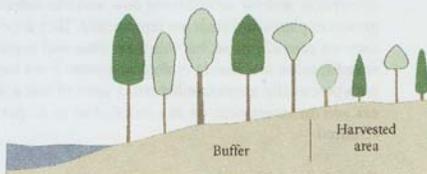
Biological survey. Conducting a survey to locate species and communities of special interest.



Habitat management for wildlife. Protecting features needed by species of particular interest.



Red-lining. Creating reserves and special management areas (SMAs) to protect species and communities that do not tolerate logging.



Buffer strips. Providing strips of uncut or selectively cut forest between waterbodies and more intensively cut areas to provide habitat for wildlife and forest-interior species and protect water quality.



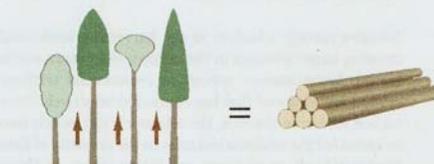
Selective cutting. Harvesting trees singly or in small groups to maintain habitat for forest-interior species.



Balancing size classes across the ownership. Keeping comparable amounts of land in openings, young forests, and older forests to provide habitats for as many types of animals and plants as possible.



Green tree retention. Leaving living trees within forests to carry forest-interior species ("legacies") from the previous forest to the new one.



Balancing growth and harvest. Keeping the harvest of each size class less than growth to ensure that the amount of mature timber does not decrease.

2. Program components: Effective working forest protection programs that use conservation easements incorporate provisions to meet issues unique to forest settings.

To insure that conservation easements most effectively meet program goals, Maine, New Hampshire, New York and Vermont—all with long-standing forest conservation programs--have established mechanisms for setting *acquisition priorities* and setting *criteria* for the use of public money.

For example, Maine's Land Acquisition Priorities Advisory Committee has developed a set of priorities for acquisition efforts in the northern forest. The program has also established extensive criteria for terms to be included in funded conservation easements.

New York's Open Space Plan, first completed in 1992 and updated every three years, has consistently guided the use of hundred's of millions of dollars from the state's Environmental Protection Fund spending as well as guiding other conservation strategies.

Similarly, the federal Forest Legacy Program managed by the U.S. Forest Service requires participating states to identify project areas in which Forest Legacy funds will be spent, insuring that federal dollars are spent in a focused manner on the highest priorities. Federal program criteria also guide terms to be included in conservation easements and components like baseline property reports and monitoring protocols that must be included in programs acquiring easements with these federal funds.

Minnesota Forests for the Future report also suggests detailed project selection criteria for funding future working forest projects.

Further analysis of forest land ownership patterns would help inform the creation of appropriate criteria for an expanded Minnesota program. For example, different lands might be selected as a focus of activity if maintaining the status quo in terms of parcel size and ownership is the objective versus re-establishing single ownership in larger tracts. Similarly, existing parcel size and ownership might influence other program details—such as a focus on purchased or donated easements. This analysis might also help inform the number of transactions needed to meet program goals and related costs.

C. Evaluation of conservation easements and conservation easement programs as a strategy to prevent parcelization.

In light of the above, the following evaluates the ability of conservation easements and conservation easement programs to prevent parcelization.

1. Effectiveness: Conservation easements can be *very effective* at limiting parcelization. Easement terms directed at prohibiting or limiting the division of property into separate parcels are typical in most conservation easements and are quite easy to draft. Additional provisions and restrictions can be included in easements to insure that the land remains available for forestry and meet additional desired conservation goals, although easements

may not be the most effective choice when additional goals involve requiring public access or meeting mandated affirmative land management requirements.

Perpetual conservation easements are recognized under Minnesota law, requiring only a single transaction to achieve long-term, continuing protection. Because conservation easements are designed to be difficult to amend or terminate, they are more effective over time in ensuring continued ownership status than regulatory approaches or even than unrestricted ownership which is still potentially subject to future change.

Although conservation easements are relatively new in the arena of real estate transactions, properly drafted easements are typically upheld by the courts thereby assuring their long-term effectiveness.

Long-term effectiveness does, however, require an easement holder with the commitment and resources to monitor, manage and enforce the easements it holds. Minnesota does have government and nonprofit organizations with such expertise but long-term experience with working forest easements in Minnesota is still somewhat limited.

Identifying and selecting targeted individual parcels that have the greatest likelihood of being sustainable for forestry, and the least likely to lead to violations of easement terms, will enhance the effectiveness of using conservation easements to mitigate parcelization.

Including some flexibility in negotiating easement terms will encourage broader use of conservation easements in a wider range of geographic and ownership situations and increase the overall effectiveness of any easement program.

However unlike regulatory approaches to limiting parcelization, voluntary landowner participation may depend upon the level of funding or other incentives available and the acceptability of any required easement terms.

2. Efficiency: To be effective, all working forest conservation easements must be unique—geared to the specific parcel of land and the specific landowner. Each must be negotiated on a case-by-case basis. As a result, easements result can be complicated and time-consuming to negotiate, draft and appraise thereby increasing transaction costs. This can make easements less efficient from a transaction standpoint than purchasing land in fee and considerably less efficient than the broad brush of regulation.

However, investing in model documents or templates and relying on existing experienced organizations and entities can enhance efficiencies. Some initial training may also be necessary.

From a cost standpoint, the direct cost of purchasing a conservation easement is almost always considerably less than the cost of purchasing land in fee title, although the specific terms of the easement and the nature and location of the land will affect any easement's value and resultant price. Creating a program that meshes with other available incentives may keep program costs lower. It is also important to note that

historically, many landowners have been willing to convey conservation easements at well below the fair market value further decreasing purchase costs.

Other transaction costs associated with acquiring a conservation easement—title work, surveys, etc.—are similar to acquiring land in fee title.

Easements do require long-term monitoring, management and potential enforcement with resultant additional costs. Although there is little empirical data, these easement costs are generally considered to be less than the costs associated with owning and managing land in fee.

Targeting larger parcels in identified areas can assure the greatest impact in from the fewest number of transactions, keeping program costs to a minimum. Selecting sites and designing easements that protect multiple conservation objectives can maximize the public benefits associated with each transaction, enhancing the efficiency of an easement program.

3. Political palatability: Involving voluntary transactions that leave land in private rather than public ownership, conservation easements are on the whole well accepted—particularly as a land protection alternative in areas that already have significant amounts of land in public ownership or that are reluctant to pursue regulation.

Easements have, however, recently come under scrutiny in Minnesota not in concept but as applied. A working forest easement program that provides appropriate accountability for the use of public funds will be more likely to be accepted at the legislative level. Clarity regarding program goals and objectives along with transparency regarding the restrictions included and rights acquired with each individual easement will similarly be likely to increase acceptance.

On a local level, some Minnesota counties do not embrace the concept of perpetual conservation easements. Some are concerned about the impact that easements may have on property values and as a result on property taxes. Others are concerned that the perpetual nature of conservation easements will limit future planning options with private arrangements impinging upon local authority to plan for a community's future.

However, others are concerned about the costs or adverse impacts associated with development and welcome the certainty and protection provided by conservation easements.

A full understanding of economic and other public benefits achieved through an easement program may offset many of these concerns and carefully selected program criteria can help insure that easements are established in appropriate areas, allowing for future development in appropriate areas.

Political palatability may also depend upon who holds the easements.

4. Equity: A working forest conservation program will not affect all communities or all segments of a community equally.

Conservation easements will not be suitable for all forested lands and may not be available for all landowners interested in pursuing an easement for their own lands. However, adequate funding, consistently applied program criteria and a standardized approach to valuing easements can insure that a working forest conservation easement program is equitably applied to *landowners* in forested areas throughout the State.

Forestlands are not distributed equally throughout the State. Landownership patterns of forested lands are also different in different part of the State. So an easement program would inevitably affect some *counties* and *local communities* differently than others. Again, thoughtful, clear and consistently applied program criteria can provide the transparency necessary to demonstrate that the program is equitably applied to achieve indentified program goals.

Application of consistent appraisal guidelines can further insure that landowners selling conservation easements are not over compensated at the expense of taxpayers. As noted above, a full understanding of economic and other public benefits achieved through an easement program may offset concerns over perceived inequities.

5. Technical feasibility: Conservation easements are very technical and require a high degree of skill to negotiate, draft, appraise and manage. However, Minnesota already has in place many of the components necessary to implement a conservation easement program to mitigate forestland parcelization.

- *Legislative authority*: Statutory authority recognizing the validity of perpetual conservation easements is in place with the adoption of the Uniform Conservation Easement Act, Minnesota Statutes Chapter 84C, along with companion legislation providing a statutory framework for a conservation easement program to protect working forests from parcelization under the Minnesota Forests for the Future Program, Minnesota Statutes §84.66.
- *Funding*: There are multiple sources of funding and economic incentives—federal, state, and private—that have been and could be further tapped to support a working forest conservation easement program, particularly ones that emphasizes providing multiple conservation benefits. See, for example:
 - Federal funding available through the Forest Legacy Program. *See* the Cooperative Forestry Assistance Act of 1978 as amended, (16 U.S.C 2101 et. seq.) and related regulations.
 - State funds available through the Clean Water, Land and Legacy Amendment, including funds from either the Outdoor Heritage Fund or the Clean Water Fund. *See* Minnesota Constitution Article XI, section 15 and Minnesota Statutes §97A.056, Outdoor Heritage Fund; Lessard-Sams Outdoor Heritage Council.

- Private income tax benefits available for donated conservation easements. *See* 26 U.S.C. 170(h), Qualified Conservation Contribution, and related regulations.
- Property tax incentives. *See* Minnesota Statutes Chapter 290C, Sustainable Forest Resource Management Incentive Act.
- *Technical knowledge:* There is considerable conservation easement technical expertise in the State. The Minnesota DNR, with the help of experienced nonprofit partners including The Nature Conservancy, The Conservation Fund and the Trust for Public Land has negotiated some of the largest and most comprehensive conservation easements in the country and with a growing understanding of the complexities of working with conservation easements, is working to improve its long-term easement management program.

The Minnesota Land Trust is one of the largest and most respected land trusts in the country, now holding almost 400 easements (more than half of which protect forest or woodlands) and is among the first land trusts to be accredited in the country. While The Conservation Fund, The Nature Conservancy and the Trust for Public Land have expertise in larger transactions with institutional owners, the Minnesota Land Trust has expertise working with smaller, family landowners.

Nevertheless, additional capacity in the private and public sectors will be necessary, as everyone with expertise already has more work than they can effectively handle. Some training may also be necessary to insure that necessary expertise exists for all components of an easement program.

With existing statutory authority and potential sources of funding that can be tapped to implement an easement program in place, no significant legislative changes are necessary to implement a working forest easement program.

With properly directed resources to increase capacity and technical knowledge, the existing governmental and nonprofit organizations have the ability to undertake the needed activities to make such a program effective and efficient.

6. Administrative ease: Without additional analysis, it is impossible to set working forest easement goals or understand the full cost of implementing a working forest conservation program.

DNR has been revising earlier plans and goals created in conjunction with the federal Forest Legacy Program. That analysis along with additional landownership analysis will provide the background for estimating potential program costs and related results—e.g. number of transactions needed to meet projected acreage goals in targeted locations.

Along with estimating initial transaction costs, a conservation easement program requires ongoing attention to prevent easement violations to the extent possible and to enforce easement terms as necessary. In addition to ongoing monitoring and necessary enforcement, education of subsequent landowners to make sure they understand the terms

of the restrictions on their property is an important component of any easement stewardship program. Moreover, many working forest easements require management plans or other approvals, again requiring ongoing attention.

While more complex to administer than owning land in fee, there are numerous models for working forest conservation easement programs around the country that can provide insight into creating an effective long-term conservation easement stewardship program in Minnesota.

CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions.

1. Conservation easements are appropriate protection tools. Conservation easements have been well accepted in Minnesota and around the country as an important tool in protecting forest as well as other resources. A number of states as well as the federal government have created programs to protect forestland specifically with conservation easements as easements keep land available for forestry while prohibiting or restricting those uses or activities that interfere with productive forestry, including parcelization as well as other social and environmental benefits.

The 2008 *Minnesota Forests for the Future* report of the DNR Commissioner's Advisory Team on the Minnesota Forests for the Future Program and the resultant legislation, Minnesota Statute §84.66, specifically recognize an important role for conservation easements in protecting private, working forest land for its "timber, scenic, recreational, fish and wildlife habitat, threatened and endangered species, and other cultural and environmental values."

Conservation easement documents can be easily drafted to include terms that clearly and specifically prohibit or limit the division of property into separate parcels under separate ownership. These types of provisions are common in conservation easements and well understood by those who work with these types of easements.

Additionally, conservation easements can be easily drafted to include other provisions necessary not just to prevent parcelization itself but also to ensure that the negative impacts associated with parcelization—such as inappropriate development—are also prohibited. These types of conservation easements also place sidebars on forest management activities to ensure sustainable forestry. Again, these types of provisions are typical in working forest conservation easements and there is a wealth of information and expertise available to guide easement drafting.

Finally, conservation easements can be drafted to protect multiple conservation and social values, enhancing the public benefits associated with conservation easement protection.

2. Conservation easement stewardship: Monitoring, management and enforcement of conservation easements is the key to success. Under Minnesota law, properly created conservation easements can be perpetual—providing long-lasting protection for the encumbered land and its natural resources through a single real estate transaction. Statistically, national studies indicate that the restrictions in conservation easements are rarely violated or challenged. When they are, the courts have not shown reluctance to uphold easement terms and provide for appropriate remedies. This pattern has held true in Minnesota where easement holders currently experience low violation levels and have had initiated few enforcement actions.

Long-term protection requires easement holders to have the willingness and resources to monitor, manage and enforce easements as a part of a comprehensive easement stewardship program. Lack of funding dedicated to or specifically directed at easement stewardship has been a concern in Minnesota, particularly with respect to public agencies holding easements. However, there has more recently been an increased awareness by agencies themselves and by the Minnesota Legislature, that funding for long-term easement management and enforcement is critical.

Easement stewardship funding should be a part of any forest conservation easement program.

3. Conservation easements can be a cost effectiveness method of protecting land. The limited costs associated with conservation easements also help to make easements an efficient as well as effective forest protection tool.

The costs of initially acquiring conservation easements are typically considerably less than comparable costs of acquiring land in fee title, as only a fraction of all of the rights associated with land ownership are acquired. Experience has demonstrated that landowners are often willing to donate conservation easements or sell such easements at a price below fair market value simply to obtain the confidence that land will remain protected and undeveloped into the future.

Other costs associated with conservation easement transactions, such as title work or surveys, are essentially the same as those associated with other real estate transactions. Conservation easements can be complicated documents to create, thereby adding to transaction time and costs. However, these costs can be minimized by investing in and relying on experienced conservation easement professionals.

Unlike land purchased in fee, land management and related costs typically remain with the landowner. While there are easement management and enforcement costs as noted above, those are typically expected to be much less than costs associated with land ownership.

Finally, privately owned land under easement remains on local property tax rolls, providing local units of government with a continued stream of property tax income. As conservation easements do affect and typically lower land value, they may also affect property tax assessments and resultantly affect local property taxes as well, especially in high-growth areas. However, easement terms and restrictions vary depending upon the purpose of the easement. Along with the location and use of the land protected by an easement, the impact of these restrictions on land values and property tax assessments will vary dramatically. In forested areas, where forestland is typically assessed *as* forestland, a conservation easement that maintains that use in perpetuity will likely have little impact on assessed value. There is very little empirical data or analysis available, however, on the effect of conservation easements on property values, on property tax assessments, and resultantly on local property taxes—particularly in a working forest setting.

4. Landowners are interested in conservation easements. Experience in Minnesota and around the country demonstrates that a great number of landowners are interested in voluntarily protecting their land with conservation easements if the terms and process of participation meet their needs and expectations as well as those of the easement holder.

In Minnesota, where the nature and ownership of forestlands is so varied, easement programs must allow a degree of flexibility in negotiating the terms of conservation easements in order to meet the needs of the range of landowner as well as to protect the conservation values of the land.

5. Working forest conservation easements should be part of a program. While properly designed and drafted individual conservation easements can provide important protection for a specific site or tract of land, the most effective use of conservation easements to protect working forests is as a part of a *comprehensive program* that identifies the land to be protected and provides adequate funding for the acquisition and the long-term management, monitoring and enforcement of acquired easements.

Effective programs throughout the country often involve government agencies and private, nonprofit conservation organizations with expertise in working forest conservation easement transactions and funding as well as the landowners of protected lands. These multi-party public/private partnerships can provide the strength, durability and flexibility needed to insure long-term program success.

Based upon this understanding of conservation easements, the following section details recommendations for enhancing working forest protection by mitigating or preventing forestland parcelization with conservation easements within a comprehensive forest protection program.

B. Details of recommendations.

Minnesota already has in place many of the components necessary to implement a conservation easement program to mitigate forestland parcelization:

- Statutory authority recognizing the validity of conservation easements along with a statutory framework for a conservation easement program to protect working forests from parcelization under the Minnesota Forests for the Future Program.
- Government entities and private nonprofit organizations with experience in negotiating and managing conservation easements.
- Multiple sources of funding and economic incentives—federal, state, and private—that have been and could be further tapped to support a working forest conservation easement program, particularly ones that emphasizes providing multiple conservation benefits.

Any program using conservation easements to mitigate the parcelization of forestland should *build upon and enhance* these *existing* resources.

Such a program should also promote a *coordinated public/private* approach to forest protection where responsibility for protecting Minnesota's forest is *shared* by *government entities*, qualified *nonprofit organizations* and *private landowners*.

A *coordinated* program serving as an umbrella for those public and nonprofit entities working to protect working forests would reduce confusion and provide *equity* and *options* for landowners wishing to protect their land while also reducing unnecessary competition among programs leading to price escalation or shopping for terms. With appropriate criteria combined with enough flexibility in the program, the needs and interests of landowners, potential easement holders and the public can all be met.

To maximize effectiveness and efficiencies, such an enhanced program should include the details identified below.

1. Create a program that emphasizes *multiple* public benefits. While reducing parcelization of private forestlands is the primary purpose of these recommendations, additional conservation and related public benefits can often be achieved through carefully selecting and designing conservation easement projects. This will not only be a more effective use of program resources but it will also allow access to multiple sources of funding that have broader program goals.

Emphasizing multiple public benefits may also make the program appealing to a boarder audience.

In this regard, in addition to limiting parcelization and keeping land available for forestry, the program might also focus on both *fish and wildlife habitat* protection and *clean water protection*, to the extent that selected sites include such benefits and that their protection is consistent with keeping the land available for timber harvesting.

This multiple benefits approach has been chosen by other successful forest protection programs. See, for example, Land for Maine's Future Program which states that the basic intention of the program is to protect both the natural values *and* economic values of the forest. See also the general program guidelines for the federal Forest Legacy Program noting that the purpose of the program is not only to protect forestland conversion to other uses but also protect important scenic, cultural, fish, wildlife and recreational resources, riparian areas and other ecological values.

Additionally, growing understanding of and interest in the role of Minnesota's forests and forestlands in sequestering carbon suggests that any easement program should be designed to also consider carbon sequestration. For example, in California, where there is a regulated carbon cap and trade market, the carbon market has proven to be a significant source of capital to help pay for conservation of forestlands as well as providing a financial incentive to owners to sustainably manage their lands. In

Minnesota, this might include targeting Minnesota's northern peatlands, one of the most important carbon sinks in the country, for additional protection as well as drafting easements with emerging carbon trading markets in mind. .

Note on *public recreation benefits*: Some working forest conservation easement programs have emphasized providing public access to private forestlands, particularly in areas where there are few publicly owned lands or access to them is limited due to surrounding private ownership. Using a conservation easement program to provide for public access for recreational purposes may, however, be problematic. Conservation easements are not typically the best tool for meeting that public need. While some large, institutional landowners may agree to provide public access to lands protected by an easement, most private, family forest owners will not be so inclined. Experience indicates that mandating public access will greatly reduce the number of landowners interested in the program.

2. Capitalize on the strengths of existing public and private programs, particularly *Minnesota Forests for the Future*. Any program using conservation easements to reduce or limit parcelization should *build upon* and *take advantage* of *existing* forest protection programs. Such a program should also promote a *coordinated* approach to forest protection where individual efforts to protect Minnesota's forests are complementary, furthering a shared goal and maximizing use of limited resources.

The program should allow for and encourage participation by appropriate government agencies *and* qualified private nonprofit conservation organizations. Government agencies and private nonprofits each have their own strengths (and limitations) and allowing both to participate will provide the broadest range of options for landowners and the ability to align specific project needs with the most suitable entity. While current federal Forest Legacy limits the involvement of nonprofit organizations, many state funded programs—Colorado, Maine, New Hampshire, New York, and Vermont, for example—all allow and often encourage participation by appropriate nonprofit conservation organizations.

As noted above, Minnesota is fortunate to have public and private programs with experience and expertise in working with conservation easements. Enhancing and promoting coordination among these organizations is far more effective and efficient than initiating completely new programs or creating new organizations. As noted below, gaps in existing delivery systems can be met without diluting easement excellence.

Equally important, there are a number of existing programs that could provide *funding or incentives* for working forest easements. Any easement program directed at limiting parcelization should make sure that requirements or criteria are compatible with these funding sources to the greatest extent possible and appropriate.

The structure created by the *Minnesota Forests for the Future* legislation referred to above may provide the best available platform from which to launch an enhanced and coordinated program. That program, currently implemented through DNR, has the most

experience in the State with large-scale, working forest easements, and it has made efficient use of outside expertise in developing and funding its many successful projects. The program also has an established advisory group of technical experts to provide additional expertise and program guidance.

Importantly, previous collaborative efforts involving both government agencies and nonprofit organizations are credited with bringing together the financial, organizational and political resources that were required to complete some of the largest conservation projects in Minnesota's history. The relationships and goodwill established in these earlier efforts provide an excellent base upon which to build future efforts.

Through an enhanced or expanded *ad hoc* advisory group or team lead by DNR and with increased program capacity (as noted below), the *Minnesota Forests for the Future* program can provide a *forum* for:

- Establishing the focus and criteria for a conservation easement program as discussed below.
 - Getting needed technical expertise and involvement from federal, state (particularly BWSR and the Minnesota Forest Resources Council) and selected local government agencies as well as from nonprofit organizations working with forest conservation easements and from the forest products industry.
 - Coordinating the otherwise independent efforts of those engaged in forest conservation.
3. Focus efforts. A conservation easement forest protection program should *focus* on those landscapes and individual parcels that are most likely to achieve the goal of reducing parcelization while providing other conservation benefits in the most efficient and cost effective manner.

Criteria to use in identifying lands for protection should include the following:

- Minnesota Forest Resource Council Landscape Program and Regional Landscape Committees: Any working forest conservation easement program should focus on supporting the MFRC Landscape Program, as well as specific MFRC regional landscape committees and their respective goals as part of a comprehensive sustainable forestry initiative in the State.
- Size: Targeting larger parcels for conservation easements keeps more land in unified ownership (the primary goal) through the fewest number of transactions. This will keep transaction costs, and ultimately easement monitoring and stewardship costs, to a minimum. In addition to mitigating parcelization, larger parcels are more likely to deliver multiple benefits (increase economic viability, protect water quality, protect wildlife habitat, etc.). Protection of smaller parcels from parcelization may be more effectively achieved through other tools, though due consideration should be given to smaller parcels adjacent to larger protected

parcels as conservation easements on such parcels may be able to leverage a very large overall benefit on the fragmentation issue.

NOTE: Establishing more specific acreage criteria requires more extensive knowledge of current ownership patterns in relationship to other criteria listed below.

- Forest productivity: Limiting parcelization is a strategy to meet the ultimate goal of keeping land available for forestry. Therefore, lands selected or targeted should be those that have the qualities necessary for the land to be economically viable for forestry: appropriate timber stands, proximity to forest products infrastructure such as paper mills, size, etc.
- Location—connectivity: Connecting corridors or larger parcels of land may not provide the same management benefits as working with a single owner but it does provide important ecological and timber management benefits.
- Location—threat: Parcels targeted for protection might be prioritized based upon the threat of parcelization or development. Conversely, if surrounding uses based upon development will result in stress on forested lands, it may indicate that the identified land is not appropriate for protection with a conservation easement.
- Ease of monitoring: Conservation easements require ongoing monitoring. The location and configuration of a parcel should be taken into account in evaluating the likelihood of possible violation of easement terms as well as in calculating the ongoing costs of easement monitoring. For example, multiple protected parcels that are adjacent are more efficient and therefore less costly to monitor than multiple dispersed parcels.
- Type of landowner: Any conservation easement program should evaluate land ownership based upon criteria listed above as well as identifying other ownership characteristics that might influence the design of or interest in a program, e.g. emphasis on family owned forestlands vs. institutional forestlands, level of participation anticipated or desired, amount of funding required, etc.
- Other public benefits: As suggested above, criteria for selecting individual projects should include other conservation benefits such as fish and wildlife habitat preservation, clean water protection, and carbon sequestration.

An advisory team, potentially the group referred to above with respect to the *Minnesota Forests for the Future* program, should be established to review these criteria, making modifications or additions as appropriate to meet program goals, and then *identify* and *map* those areas within Minnesota on which to focus and prioritize efforts—short-term and long-term.

Short-term efforts should initially focus on the remaining approximately 1,000,000 acres of land in northern Minnesota in large industrial forest ownership, while longer term efforts should focus on the remaining approximately 6,000,000 acres of forestland in family ownership. These efforts should be further refined by research on parcelization threat and ownership patterns.

This team might continue to be lead by DNR, the state entity with the most forestry expertise and experience, with participation from other state agencies (particularly BWSR) and selected local units of governments and private conservation organizations.

4. Create efficiencies in the delivery structure. Current systems of negotiating, acquiring and holding conservation easements have some limitations. In the public sector, lack of adequate long-term easement stewardship practices and resources is among the most notable. Cumbersome acquisition procedures and statutory requirements have also been problematic. In the private sector, the absence of nonprofit organizations with a local identity may be problematic in engaging local communities to the maximum extent possible.

Easement holders are increasingly aware of the need to improve systems of easement management and are working to make needed changes. Local connections can be established without creating new, inexperienced organizations.

With working systems already in place, emphasis should be placed upon improving existing systems rather than creating new ones.

Personnel:

Conservation easements, and working forest conservation easements in particular, are unique real estate transactions. The negotiation and management of conservation easements requires a specific set of skills and abilities. These skills include understanding and experience in working with conservation easements, knowledge of the forest products industry, experience in working with private landowners, knowledge of basic real estate law and transactions, and understanding forest ecology and forest management.

This requires an *interdisciplinary* team approach, potentially using personnel from a number of different organizations or entities, but should also include *dedicating personnel* with the specialized skills necessary for a forest conservation easement program.

To be efficient and to insure the quality of working forest conservation easement transactions, there should be an investment in those *public and private* organizations and entities with *existing abilities* to handle such transactions. This might include:

- Creating a “forestry conservation easement unit” within DNR for forest conservation easement acquisition, monitoring and enforcement as part of the

Minnesota Forests for the Future program. This unit could also draw on outside expertise through consulting arrangements with qualified private organizations.

- Coordinating forest conservation efforts of DNR, BWSR, local units of government and private nonprofit organizations, as discussed above.
- Directing additional resources to private conservation organizations.
- Identifying existing areas of technical expertise among current easement holders and qualified private organizations and encouraging arrangements that share such expertise such as through contracting, easement co-holding, etc.

Note on *appraisals*: Conservation easements typically involve complicated appraisals to determine value. Currently, there are a very limited number of qualified appraisers in Minnesota. Investment in training appraisers in conservation easement appraisals would help eliminate a current roadblock affecting the time it takes to complete easement transactions.

Standardized documents and protocols:

Given the range in the ownership and nature of Minnesota's forestlands and the goals to achieve multiple public benefits, conservation easements under the proposed working forest conservation easement program will need to be *individually crafted* to meet the needs of each landowner and the conservation goals to be achieved on each parcel of land. A "one size fits all" easement is not likely to work in Minnesota's forest landscapes and has proven problematic in other states.

However, establishing a set of criteria for the terms to be included in these easements, creating model templates or sample documents, and identifying appropriate easement protocols will make working with complex documents and programs more efficient.

This might include developing outcome-based parameters for working forest conservation easements, such as requiring "sustainable forestry" or other ecological conditions, establishing parameters on minimum parcel size and levels of development to achieve parcelization goals, etc. Additionally, many working forest conservation easement programs have "piggy-backed" on acceptable forest certification programs such as Sustainable Forestry Initiative and Forest Stewardship Council, incorporating these programs into conservation easement terms and thereby providing an efficient and effective means to define acceptable forestry and provide third-party oversight.

Create local connections: To create local enthusiasm for forest conservation, establish connections with local government entities and other nonprofit organizations to promote forest conservation easements rather than create new organizations to negotiate and hold easements. Regionalize program criteria and establish regional or local contacts as needed.

5. Increase capacity through directed use of existing resources. All public and private entities working with conservation easements are currently at capacity. There is more work to be done than there are resources currently directed to complete the work. This is especially acute as Minnesota now has significant capital resources to deploy to the

acquisition of working forest conservation easements. This is particularly true with respect to operational and easement stewardship needs.

Demands for and upon public funding are enormous, but there are resources available for certain forest conservation projects.

To complete more transactions and protect more land from parcelization, efforts should be made to direct *existing* funding towards forest projects. These resources should be used to *fully fund all costs* associated with negotiating, completing and holding easements. This includes not only capital funding to purchase easements but also funding to cover costs to hire and train staff for landowner outreach and easement negotiation, costs of knowledgeable legal staff or outside counsel to complete transactions, routine transactions costs associated with all real estate transactions such as appraisals and surveys, and related operational or overhead costs.

If even with increased resources there are gaps in the ability of existing entities and organizations to meet local needs, funding should be provided to those local units of government or other organizations that have the experience and expertise to negotiate and hold conservation easements. To improve or enhance expertise where needed, efforts should be made to provide technical expertise to less experienced easement holders or to require other arrangements to insure quality and long-term easement sustainability such as co-holding or back-up enforcement arrangements as well as making available to agencies the outside expertise that exists in Minnesota.

6. Maximize landowner participation. One of the most appealing aspects of most conservation easement programs is their voluntary nature. But to be effective, a voluntary working forest conservation easement program must be of interest to targeted or eligible landowners.

With respect to the easement document itself, this will require that landowners be given some options and that there is room for appropriate flexibility to allow for negotiation of terms outside of a core set of required terms as noted above. Again, allowing negotiation would also retain the potential of gaining multiple conservation benefits and qualifying for funding from a range of existing programs and incentives. Limiting negotiation flexibility will also limit the pool of landowners and translate into lost opportunities.

Again, as noted above, providing landowners with a choice of organizations to work with will encourage participation by landowners with concerns about public ownership. Similarly, the complexity of conservation easement projects varies and providing options will help align projects with those best suited to complete them.

An added, and extremely important, benefit of extensive landowner participation is building a conservation constituency that is dedicated to the long-term preservation of Minnesota's forests.

7. Ensure long-term management and enforcement for forest conservation easements. Conservation easements are only effective if the easement holder has the commitment and resources to monitor, manage and enforce an easement. This requires long-term, stable funding *and* organizational capacity.

National standards and practices for *private* nonprofit land trusts require that a land trust have a comprehensive easement monitoring and enforcement program and that it maintain funds sufficient to meet ongoing conservation easement stewardship needs as well as funds adequate to defend or enforce the easements it holds. Typically, this is accomplished by the creation of a dedicated fund to meeting identified stewardship needs.

Creating dedicated or restricted funds is a common practice among nonprofits and is well recognized under nonprofit law and accounting.

As an accredited land trust, the Minnesota Land Trust meets these standards for having an easement stewardship program in place and maintaining adequate stewardship funding. *Any private conservation organization participating in a forest conservation easement program should similarly meet such requirements.*

Minnesota has been among the few states that have provided funding to private conservation organizations for this purpose. This practice should continue and be enhanced as working forest easements can be among the most complicated to monitor and manage.

Segregating and restricting funds for conservation easement stewardship long-term can be more complicated for public agencies, including the State. As a matter of constitutional law, one legislature cannot restrict or limit the authority of future legislatures with respect to appropriations except in compliance with constitutional provisions. Therefore, segregating stewardship funds within state funds may not have the same security as segregated or restricted funds held by nonprofit organizations.

Nevertheless, full conservation easement stewardship funding should be a component of any conservation easement program.

If segregating State funds for long-term easement stewardship is not considered adequate protection of such funds, efforts should be made to enhance the use of the private nonprofit sector for holding conservation easements and the related dedicated funding while providing the State adequate involvement in easement stewardship such as through easement co-holding or third party rights of enforcement.

8. Provide for equity and accountability. Assuming the investment of public resources in a conservation easement program, it is critical to provide for accountability regarding the use of public resources and desired outcomes as well as ensuring that any program is implemented equitably among landowners.

As noted above, focusing on *targeted sites or landscapes* and establishing *criteria* for easement acquisition and easement *holding* will help ensure that the program actually protects the most important land.

Similarly, there should be “quality control” measures for participation as an entity acquiring forest conservation easements, such as requiring holders to be accredited under national standards or to otherwise meet accreditation standards.

Creating a consistent approach to valuing conservation easements in the forest setting would reduce inconsistencies and provide equity. Working forest conservation easements are designed to encourage continued economic activity on the protected parcel. They do not assume or require *removal* of economic activity as is the case with many wetland easements in agricultural areas. Accordingly, traditional fair market value appraisals versus a formula based approach will ensure that purchase of conservation easements remains cost effective and consistent with other easement programs.

The formula approach to valuing easements may be suitable in an agricultural setting where lands and their highest and best economic use may be more homogenous, criteria for program participation are very restrictive, standardized conservation easements are typically used and landowner expectations are consistent with that approach. But that is not the nature of the land or landownership in Minnesota’s forested landscapes where land cover and topography are quite diverse and easements are likely to be more individualized to protect the land and meet landowner needs. This suggests that an individualized approach to value is more appropriate.

9. Ensure compatibility with local planning and zoning. Conservation easements are only one tool protect Minnesota forests, though arguably the ONLY tool to permanently protect private land. Any easement program should take into account other approaches to forest protection, particularly any local efforts or programs—including planning and zoning.

Conservation easements can be used in conjunction with local planning and zoning efforts to provide long-term, reliable protection upon which to build other forest conservation as well as local development plans. For example, Cass County uses conservation easements as a means to prevent development in areas where public services would be costly to provide but where zoning does not fully achieve this goal.

For the most part, conservation easements established under a local program should meet the same criteria as other conservation easements created to limit forest parcelization. Local needs may dictate that some criteria be modified, especially if local funds are involved. However, easement holding criteria and/or the availability of technical support is of increased importance if proposed local easement holders do not have expertise or extensive experience with conservation easements.

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