

**Rally 2006 Session F01:
Habitat Restoration and Management on Easement Lands**

Notes from Round Table Discussion

Sunday October 15, 2006 (4:00-5:30 PM)

Moderator:

Cheryl Hummon, Defenders of Wildlife, Oregon

Panelists (had given case study presentations in session E01):

Mark Ackelson, Iowa Natural Heritage Foundation (IA)
Dennis Desmond, Land Trust for the Little Tennessee (NC)
Thom Hulen, Desert Foothills Land Trust (AZ)
Matt Lucia, Teton Regional Land Trust (ID/WY)

Other participants in discussion (there were 5-10 other people who did not comment):

Frank Casey, Defenders of Wildlife, Washington DC
Dan Claussen, American Land Conservancy, San Francisco
Connor Coleman, Land Trust for Central North Carolina
David Diaz, Scenic Hudson Inc, Poughkeepsie NY
Paul Doscher: Society for Protection of New Hampshire Forests
Jimmy Emfinger, Ducks Unlimited, SE Region, Jackson MS
Marilyn Farley, Solano Land Trust, Fairfield CA
Scott Fisher, Maui Coastal Land Trust
Nate Fuller, SW Michigan Land Conservancy
Chris Kirkpatrick, Jo Daviess Conservation Foundation, NW Illinois
Jeff Lerner, Defenders of Wildlife, Washington, DC
Lynn Lozier, The Nature Conservancy, San Francisco, CA
Lisa Mueller, Dakota Co., Minnesota
Melissa Soll, Three Rivers Land Conservancy, Portland, OR
Gary Warner, Ice Age Park and Trail Foundation, Madison WI
Robin Weber, Prudence Conservancy, Prudence Island, Rhode Island
Unidentified, land trust in Nevada

Notetaker:

Bruce Taylor, Defenders of Wildlife, Oregon

Identification and Prioritization of Issues

The session participants listed topics of concern, which were then ranked. The participants preferred to discuss the highest priority topics as long as needed, then move on to other topics.

The highest priority issues were:

- Responsibility for restoration on easements and consequences for failure
- Private inurement for restoration services to an easement landowner
- Public access on easement lands with restoration

Other topics discussed:

- Restoration as an incentive for protection
- Use of affirmative clauses in easements for restoration
- Liability for volunteers working on easement property
- Best day of week for volunteer work
- How can a very small land trust take on restoration
- Making small projects add up to protecting a viable ecosystem

Other issues were identified but not discussed, due to lack of time

- How to work with another land trust on stewardship (i.e., one holds easement, the other does restoration). (Chris Kirkpatrick)
- Is anybody using restoration as a vehicle for mitigating easement violations? (Dan Claussen; Melissa Soll said they have done this)
- How do you amend an existing easement to incorporate restoration? What are the alternatives? We don't have any that allow restoration. (Robin Weber)
- How do you get enough funding to do this? (Melissa Soll)

Round Table Discussion

Failure of Restoration Projects on Easement – Consequences and Responsibility

David Diaz: Have you had any restoration projects fail? What challenges are there when a restoration failed? What has happened? Is the easement intact? Are there liability issues? Does the land value decrease? Does the easement's conservation value decrease? Whose responsibility is it to implement a management plan?

Melissa Soll: If we accept an easement for its ecological value, then it gets invaded by weeds or deteriorates, how do we maintain our obligations? Is there threat that the IRS will do something to the landowner that donated the easement?

Matt Lucia: Teton RLT had an agreement for restoration with a landowner, while still negotiating the easement. We awarded money to him for restoration. Then the landowner wanted to locate a new house next to key natural feature, since there was nothing in writing to prevent it. This became a very difficult issue. Could have been a very expensive failure of restoration. Brings up key point about the dangers of committing funding to restoration before the easement is in place.

Jimmy Emfinger: What are the criteria for success of restoration? If restoration is not successful, do you go back and do it again?

Mark Ackelson: You are going to have some failures, e.g. some years prairie restoration is more successful than others due to weather. We break up the restoration into smaller pieces done at different times, to reduce risk. This needs to be part of project planning.

Jimmy Emfinger: IRS / tax deduction is not an issue, you are not destroying value, you are just not enhancing it.

Marilyn Farley: We have a problem with some people who want to do restoration (on easement, as mitigation) for one species, not for the whole ecosystem. How do we get them interested in broader restoration/conservation goals?

Mark Ackelson: The fundamental problem is a poorly conceived easement. We came to the conclusion not to write an easement based on single species conservation. Managing for a natural community is okay, but managing for a single species is very difficult and more likely to fail. Some species are ephemeral and won't be there in the future.

Jimmy Emfinger: We are dealing with diverse habitats and species.

Matt Lucia: You need keep in mind, when drafting an easement, that you don't want to restrict it to a single species or a box you can't get out of, in a restoration scenario. I draft easements with a clearly defined difference between the easement and the management plan. The easement is permanent, the plan is dynamic. We don't want to limit an easement to just one restoration goal if we decide 10 years down road that something different is needed.

Nate Fuller: We say in the easement that restoration can happen, but it happens through separate plan. Climate change also raises issues for perpetuity, if the easement is too specific.

Chris Kirkpatrick: Lots of easements have multiple resources that they protect. Maybe a single endangered species is gone but you still have the habitat for other species.

Paul Doscher: Some of our easements are specifically to protect a rare plant species, and we also do management to enhance plant's habitat. We won't know for years whether our management efforts for that species have succeeded or failed. If we fail, the easement will remain intact because it also includes other conservation purposes beyond that species.

Gary Warner: In the upper Midwest, we have come to conclusion that it is more important to restore ecological processes than try to recreate a particular suite of species. If you have a natural process like fire, you need to protect or restore the ability for it to occur on your protected lands. We should be thinking more in terms of process rather than static conditions.

Mark Ackelson: We also need distinctions in our language between habitat restoration and reconstruction. Both might fail, but you are more likely to fail in reconstruction. Example: we had a project where the land was grazed to dirt, but there were some good remnants along the

fence line. There was no guarantee of success. We burned it, and three years later it's being considered for state preserve system.

Thom Hulen: We have always tried look at natural processes. We help get the land to its appropriate successional stage and then let it function naturally.

Matt Lucia: We haven't had any restoration failures, yet, but success largely depends on partners. We partner a lot with the Natural Resources Conservation Service; they have lot of experience and recognize the potential for failure, and know ways to mitigate. If we partner the landowner with the Conservation Reserve Program to enhance for sharptail grouse by introducing more forbs and grasses, then if it fails, they can go back in for funding next year.

Mark Ackelson: Invasive species on easement lands can wipe out part of conservation value.

Scott Fisher: A lot of our easements and even fee lands are all 98% invasive species (Hawaii). We have had a lot of success looking at natural processes – like trade winds that spread invasives. We find zones where have biggest concentrations of indigenous species and work out from there, with the wind direction, to increase the possibility of success. Even if we only expand the native plants by one or two percent, it's not a failure.

Mark Ackelson: The only way to fail is by not trying.

Gary Warner: All our restoration work is done by volunteers, with at least 50% of time on invasive species. The way we look at it, it's a critical part of the effort to protect and restore the landscape, and if don't do it, we are not being responsible stewards. However, it constantly feels like a losing battle. But it's part of our biological and ethical responsibilities.

David Diaz: We have a clause in some easements where the landowner is not allowed to introduce invasive species. (Others say they have this too). For stream restoration, NRCS has a contract 10-year agreement with landowner signed beforehand, so we have adopted that approach too, have landowner sign an agreement first and get it recorded.

Private Inurement for Restoration on Private Lands

Nate Fuller: Is there any concern about private inurement for providing services that the landowner would otherwise pay for? How do donated vs. purchased easements fit in?

Tom Hulen: All of our easements donated, none taking a federal income tax deduction, difficult to build in flood zone. We do have the issue that our restoration work has increased value of adjacent properties.

Dennis Desmond: We have a relationship with the university for interns developing landowner management plans. This benefits the university and students too, not just the landowner.

Mark Ackelson: We have looked at this issue and have agreed it's not a problem.

Lisa Mueller (?): Should the landowner deduct the value of restoration services from the value of the donated easement?

Nate Fuller: Easement holders want me to burn on their property, but consultants want the work also. This shows that my time is worth money, which benefits only some landowners, unless I start offering free services to all landowners.

Lynn Lozier: On easement land, the land trust has a deeded interest.

Paul Doscher: This issue is a treacherous one, not with the easement but with the status of the land trust as a 501c3. Private inurement is when an insider within organization benefits, private benefit is to an outside individual. Incidental private benefit is less problematic than inurement. If the private benefit is incidental to your achieving the purposes of easement, the IRS probably is not going to come after you. It's important to understand the rules, talk with the charitable trust division of the attorney general's office.

Mark Ackelson: if you're risk averse, you're in the wrong business. I wouldn't do anything if I wasn't willing to take risks. If you're true to your values, you're probably safe. Competition is huge issue. If a good contractor is available, try to refer landowners to them. But we have some bad contractors and others charge too much or have secondary goals. We want to encourage more private contractors get into business, so we hire them ourselves.

Jimmy Emfinger: We use local contractors, they work for us instead of landowner.

Matt Lucia: We do the same.

Mark Ackelson: If you have too many lawyers on your board, they can stop you in your tracks.

Paul Doscher: Your insurance company can too.

Cheryl Hummon: If you are working on high priority habitats / places, your work is also providing public benefit. Same with Farm Bill programs, where public money is supposed to be used for public benefit.

Paul Doscher: There is a distinction in using public funds for public purpose. Using charitable dollars, there is not necessarily a public purpose attached to that.

Public access on easement lands with restoration

Paul Doscher: What about public access on restoration lands w/ easements? I serve on national council for Trout Unlimited. We have a raging debate over whether we should invest in habitat improvement that doesn't benefit the public.

Jimmy Emfinger: Most navigable streams are public.

Mark Ackelson: It varies from state to state what's public / what navigable means.

Jimmy Emfinger: We have never written public access into our easements.

Mark Ackelson: We have written public access in to only one easement, because of the long tradition of public hiking on that property. In most cases, the landowner doesn't want open public access and doesn't want it written into an easement, but they do informally allow people to hunt etc. Most of us haven't pressed hard enough to think about public access when writing an easement.

Paul Doscher: In New Hampshire, the practice is that no public funds are used unless the easement permits public access.

Mark Ackelson: The Forest Legacy Program requires public access, therefore we're not using this program anymore.

Scott Fisher: A Supreme Court decision allowed native Hawaiians access for traditional use on any lands. In theory, there is nothing we can do to prevent their access. This underscores the need for close relations with the community - get them to help manage the property.

Frank Casey: In the west, you would you lose a lot of easements if you require public access.

Matt Lucia: We have done only done one Forest Legacy project, and the landowner did grant public access.

Tom: only landowner has put restrictions, cause of archaeological site, but didn't use public funds.

Gary Warner: Our foundation holds 46 easements. Many of them are right-of-way easements surrounded by conservation easements, or one easement that covers the whole area but specifies the right for public access on one portion.

Mark Ackelson: The Wetland Reserve Program doesn't allow trails. If you're going to use WRP, you have to survey them out of the easement. I don't think people are thinking about this, nobody in Iowa is pushing for public access when an easement is written. We've taken it off the table ourselves.

Gary Warner: Public access has resulted in an additional increment of appraised value.

Lisa Mueller (?): I take the long view. If the landowner is not interested, don't push it. Wait for the next generation. We could lose opportunities for easements on a lot of important properties if we push.

Mark Ackelson: We have no agreements for public access with landowners in places with restored trout streams. May landowners allow access but don't want in writing.

Jeff Lerner: Can the owner charge for hunting access if getting paid for public benefit?

Jimmy Emfinger (?): The public benefit is not in hunting.

Mark Ackelson: Although there is no legal public access on our easements, there is public use by permission of landowner.

David Diaz: Public access may also damage what you're trying to protect.

Nevada guy (unidentified): Public access would kill our easement program. We look at public benefits other than access. Sometimes public access can get higher ranking in competitive selection for public funding programs. We sometimes include public access for special events so that there is some public access.

Restoration as an Incentive for Protection

Jimmy Emfinger: We are very active in restoration, have 270,000 acres under easements, but haven't done restoration. We want to use restoration as a carrot to do easements, with 75% cost-share on restoration but only if landowner agrees to a 30-year agreement. Has anyone done this?

Mark Ackelson: We bring in restoration only if the landowner is willing to do protection also. The exception is if we think we can hook somebody, we may gamble and invest in the stewardship on the front end, before the commitment to the easement.

Jimmy Emfinger: Lots of potential easement properties for us; many people are not willing to deal with government. Using NAWCA grants.

Use of Affirmative Clauses in Easements for Restoration

Chris Kirkpatrick: How is an affirmative clause used for restoration?

Lynn Lozier: For affirmative clauses or other requirements that give certainty... what does that language look like?

Mark Ackelson: all four of us (the case studies / panelists) talked about using affirmative clauses. Five years ago you didn't hear anybody talking about them. An affirmative clause gives us the right, but not the responsibility, to come on the easement property and do management.

Chris Kirkpatrick: Should the responsibility be the landowner or easement holder?

Mark Ackelson: All of our easements have a management plan. We only come onto the easement to do restoration or management if the landowner isn't following the management plan.

Issue: Liability for Volunteers Working on Easement Property

Connor Coleman: Our board is hesitant to try restoration on easement lands. What are liability issues for providing stewardship services?

Melissa Soll: What about insurance for volunteers and work crews; is this the land trust's responsibly? Does the landowner have liability?

Thom Hulen: We have insurance, including workers comp for volunteers. Volunteers of Outdoor Arizona has another layer of insurance. Landowners are not responsible at all.

Mark Ackelson: We have a general rider on our policy that covers this.

Melissa Soll: What issues are there with volunteers applying herbicide on non-fee property?

Thom Hulen: Each state is different. In Arizona it's pretty gray. If doing for money, have to be licensed; if volunteer, OK without. We're going to have some volunteers get trained and licensed.

Best Day of Week for Volunteer Work

Scott Fisher: What day of the week is best to get volunteers out doing work on the ground?

Thom Hulen: Saturday and Sunday

Mark Ackelson: Friday for us, but it depends on the area. We do big prairie burns at night and they are a big attraction.

Matt Lucia: It depends on the project; for a big sexy project any day works.

Issue: How Can Very Small Land Trust Take on Restoration?

Lisa Mueller: How can land a trust without dedicated stewardship staff do restoration? If volunteers, are they getting the job done, and can they continue the commitment in perpetuity with an aging population?

Cheryl Hummon: I came across an inspirational example last spring at the Midwest Regional LTA conference. I met the executive director of very small land trust from southern Michigan. She was half time, plus they have a half time administrative position. She does not have a background in natural resources. I was very (pleasantly) surprised that they were planning to burn a fen on an easement property, and wonder how this little land trust, with no internal natural resources expertise, figured out that's what they need to do. They had worked with the landowner and the community, through education and building relationships rather than anything in the easement itself, to understand the important ecological benefits of burning the fen.

Cheryl Hummon: Some of our other case studies also give examples of small land trusts doing restoration.

How do you Make Small Projects Add Up to Make a Viable Ecosystem?

Gary Warner: Are land trusts doing restoration looking at a more regional approach, like how the individual pieces of land fit into the larger landscape? With prairie landscape, how do we knit enough pieces together to get viable ecosystem for long term?

Cheryl Hummon: This is more about conservation planning, less about restoration, but very important nonetheless. Lots of resources available; work with partners, plan at the landscape level for where to work.

Thom Hulen: We have divided up our area into watersheds and mountain ranges, with different organizations taking the lead in different places. We share resources.