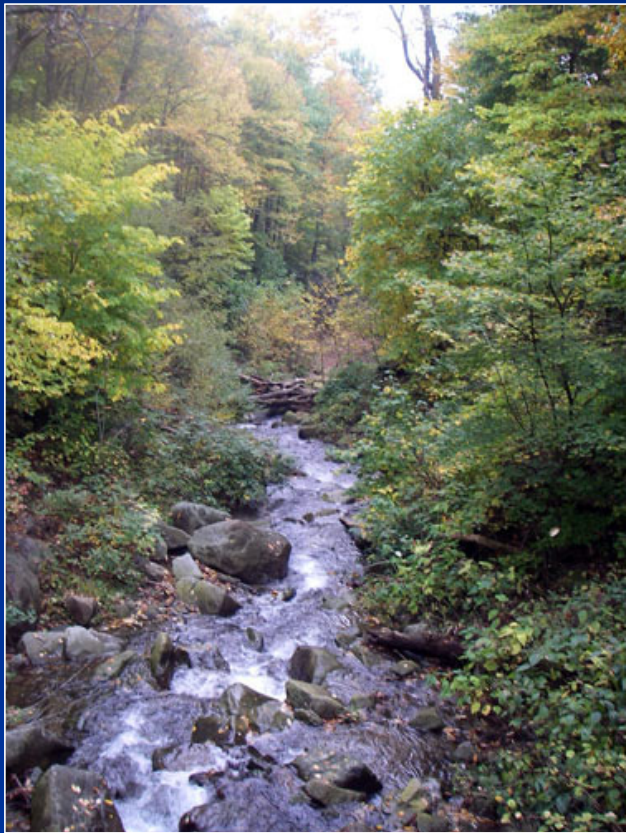


Mitigation Site Protection Considerations



Basic requirement for site protection

“...mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate.”

33 CFR 332.7(a)(1)

Involve Counsel early to:

- **Consider variation in state laws governing real estate**
- **Adapt instrument to the unique requirements of the site**
- **Determine whether instrument is legally sufficient, enforceable, and can be recorded**
- **To help minimize risk**

Site protection may be provided through:

- Conservation easements
- Other restrictive covenants
- Title transfer
- Multiple party agreements
- Conservation Land Use Agreements
- Federal facility management plans/integrated natural resources management plans
- Federal legislation

Rule Language

- “ ...consider relevant **legal constraints** on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection...
“

33 CFR 332.7(a)(1)

Site Protection Considerations

- State laws may result in termination of legal restrictions on deed
- Prohibition on incompatible uses of mitigation lands
- Other recorded easements, liens, & restrictions

Requirements

- Banks: site protection instrument must be finalized *before any credits* can be released
- ILFs: site protection instrument must be finalized before “**released**” credits are available

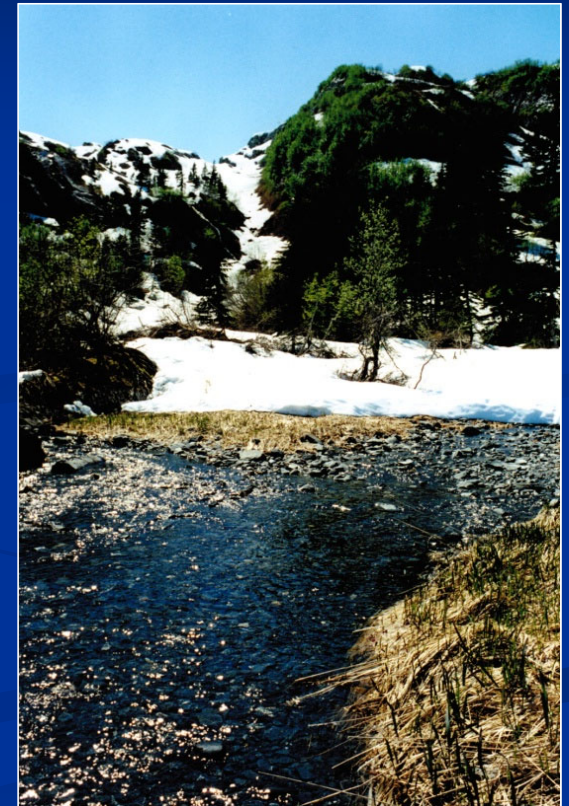


Conservation Easement Defined

Binding agreement between a landowner (**Grantor**) and another entity (**Grantee**) that permanently limits uses of the land in order to protect natural resources.

Conservation easement elements

- Purpose
- Baseline
- Rights & duties of grantee
- Restrictions/inconsistent uses of land
- Grantor's reserved rights in land
- Enforcement
- Provisions to assign, amend, or extinguish



Advantages of Conservation Easements:

- More secure form of protection than other mechanisms
- Holder monitors condition of the property
- Holder **may** assume responsibility for managing resources &/or protecting listed species.

Advantages of Conservation Easements (cont):

- Holder has right to enforce the easement against owner
- Easement remains even though property owner changes or the property passes on to heirs.
- Allows owner to retain many property rights.

Potential concerns with Conservation Easements

- Identifying an easement holder
- Easement holders (e.g. land trusts) may:
 - Cease to exist
 - Choose not to enforce easement
 - Have insufficient funds to monitor & enforce during “lean ” years
- Changes in agency policies & procedures which may be contrary to intent of mitigation

Other considerations

- Duration of Easement
- Subsequent holders may have to accept easement
- Does not limit activities on adjoining or nearby properties



Deed Restrictions

- Private agreements that affect the use of land
- Limit or prohibit certain uses
- Resources are protected as a benefit to the owner, subsequent owners and to the public.

Advantages of Deed Restrictions:

- “Runs with the land” (in perpetuity) regardless of ownership. Subsequent owners must comply.
- Owner acknowledges that property is protected for “value received” in the instrument and it is therefore a contractual agreement
- No requirement for a third party holder

Problems with Deed Restrictions

- No third party holder to determine owner compliance
- Agency may not have the resources to monitor site
- Some states may not recognize deed restrictions or limit their duration
- Owner may be able to petition court to remove deed restrictions
- Can be terminated if the original purpose of the covenant is lost

Title Transfer

- Ownership transferred to a conservation entity to manage & protect.
- Sites usually adjoin a larger protected natural resource area or watershed.
- Some land management agencies may not have experience in long term land management
- Some agencies have converted mitigation sites to other purposes
- Some missions are incompatible



Multiple Party Agreements

Project proponent (e.g. land trust or natural resource agency) is not the ultimate owner



Integrated Natural Resource Mgmt Plan or Federal Facility Mgmt Plan

- Federal agency does not have authority to record a restriction on deed.
- A conservation site can be shown on agency land use plan as designated for “environmental conservation use”
- Periodically reviewed & revised



Conservation Land Use Agreements

- Agency is land owner - no transfer of title
- Agreement may be recorded in land records office
- State &/or federal entity may become land owner but cannot **record** any limitation on the property's use
- **MOA** on the management of resources is allowed

Federal Law

- In some cases, federal law may be considered to provide long-term protection
- Examples:
 - Wilderness designation
 - Organic acts establishing Parks, Refuges
- Caution: May not restrict some land uses that may be incompatible with mitigation e.g. mining, grazing

EXHIBITS TO SITE PROTECTION DOCUMENTS

- Mitigation plan, permit, bank instrument or executive summary
- Survey/Legal Description
- Identification of other property rights/interests
- Baseline – description of conservation functions, resources on the site, habitat, vegetation and contribution to the watershed

Possible Prohibited Activities or Uses

- Clearing, cutting, mowing
- Mining, drilling, timbering
- Draining, diking
- Earthmoving, grading, topography change
- Diverting the natural flow of waters
- Spraying with herbicides that violate water quality standards
- Grazing or use by domesticated animals
- Use of off-road vehicles and motor vehicles



Potentially acceptable uses of land:

- Walking trails
- Minimal structures/boardwalks for wildlife use
- Hunting, fishing, canoeing, hiking, passive recreation
- Carrying out approved conservation and wildlife management plans
- Fence out livestock, trespassers



What do you need to know about land before accepting it as mitigation property?

- Who owns it?
- Does the owner have good title?
- Does the owner have title insurance?
- Who else has an interest in the land?
- Is the land protected already?



Interests in land

- Ownership
- Easements
- Rights-of-Way
- Lien Holders
- Property that passes by probate
- Leases, rights



How do you find out about those other interests in the land?

**Title Report &/or
Property assessment & warranty**
address whether there are :

- Outstanding mineral rights?
- Outstanding timber rights?
- Any outstanding leases? Contracts?
- Water rights affecting the property?
- Is the property subject to any uses not of record?

Title Insurance

- Title insurance company researches property history (chain of title) back 30-60 years to see if owner has clear title and if there is any conflict in ownership.
- If there is clear title, then they back their determination with insurance.

Will title insurance address all the issues regarding the property?

NO

- Title insurance just assures clear title
- It may not list all existing interests other than ownership
- A search for other interests should be conducted

Common Exceptions To Title Insurance Policies

- **Boundary line disputes**
- **Taxes or special assessments**
- **Mineral rights leased, granted or retained by current or prior owners**
- **Issues relating to right of access, ingress, egress**
- **Easements or claims of easements**
- **Land agreements, covenants, use restrictions**
- **Any adverse claim to land or other legal actions affecting property**

Property Assessment & Warranty (PAW)

- Summary of liens, encumbrances, interests, or other exceptions to title and the affect to the conservation values of the property
- Assessment attachments include:
 - Legal description and boundary survey
 - Current title report
 - Copies of all encumbrance documents
 - Maps illustrating the area of the property affected by each lien, encumbrance, interest, or other exception to title

When to request this information?

- Develop a policy/process with Counsel.
- Consider requiring:
 - submittal of title report with prospectus
 - Property assessment/warranty at draft or final instrument
 - Updated title report and title insurance prior to final instrument
- No point in proceeding until issues that conflict with site protection requirements are resolved

**Will the Site Protection Instrument be
Given PRIORITY OVER RECORDED
Property Interests?**

Priority of Interests

- Generally depends on when interest was recorded
- 1st in Time, 1st in Right



FORECLOSURE

- If property is used as collateral and borrower defaults on the loan, financial institution can foreclose on the property.
- If the site protection instrument was recorded after the deed to secure the debt, it could be wiped out.

How can this be prevented?

Subordination Agreement

Provides more assurance that the site will withstand adverse actions.

Gives conservation interest primacy over other interests

Consider subordination provision in site protection document

Consent and Subordination

The undersigned (Lender) beneficiary under a Deed to Secure Debt (dated) and recorded in (Deed Book) and (Pages) in the (County, State) records, for itself, its successors and assigns, consents to the foregoing (easement/covenant).

Lender agrees that, upon recordation of the (document) the provisions of the (document) shall run with the land which serves as security for the debt evidenced by the Security Deed and further agrees that any foreclosure or enforcement or any other remedy available to Lender will not render void or otherwise impair the validity of the (easement, covenant).

The undersigned acknowledges that it has received and reviewed a copy of the (document and exhibits).

Why would an interest holder agree to subordinate its interest to a conservation interest?

- The resources on site cannot be impacted without authorization.
- The property may not diminish substantially in value.
- A lender wants to lend money and have the mitigation banker succeed (and pay interest)

Severed Rights/Interests

- In some states, holders of other interests (e.g. sub-surface, timber) **MUST** consent to Conservation Easements (e.g. KY, AL)
- In other states, other interests are **NOT** impaired by CE without consent (e.g. OH, TX, WV, VA)

Potential approaches to other interests

- Subordination
- Discrete entry points
- Exclude encumbered areas
- Remoteness determination
- No surface occupancy agreement
- Alternate mitigation



**You must receive 60 day notice when there
is a proposal to amend site protection
mechanism**

33 CFR 332.7(a)(3)



Who may want to amend the site protection document?

- Land owners
- Developers
- Linear project proponents
- Local & state government
- Other Federal agencies



Reasons given to impact protected resources

- Only impacting buffer.
- Best project alternative. Other alternatives will impact homes, businesses, etc.
- Less expensive to cross the protected site than go around it
- Functions provided are not important
- Overriding national needs/National Security

Suggested policy for amendments

- Property Owner must consent
- Alternatives analysis – cost is a factor, but not the most significant consideration
- Determine if impact will affect the entire site and not just the portion directly impacted
- More mitigation may be required for impacts to protected sites than for permit actions

What is Eminent Domain?

The power of the government to appropriate property for public use.

Condemnation proceedings are held.

Owner loses title to all or part of the property and is paid the **fair market value** of the land.

Eminent Domain

Court might consider the loss of **consequential value in addition to fair market value** where the site protection document cites the conservation values provided to the public.



OR



Enforcement

“...Where practicable, establish in an appropriate third party the right to enforce sites and provide the resources necessary to monitor and enforce the sites protected...”

33 CFR 332.7(a)(1)



What about change in resource status?

The site protection document should state:

“The site will remain protected even though it may later be determined through case law decisions or otherwise not to have jurisdictional waters of the US.”

Owner acknowledged receipt of value in return for instrument and agreed to protect the mitigation project.

Other approaches to site protection

- Involve counsel
- SOPs
- Checklists
- Templates
- Permit conditions



Questions?

