



Natural Resources Journal

44 Nat Resources J. 2 (Spring 2004)

Spring 2004

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Recommended Citation

Susan F. French, *What's a Poor Land Trust to Do - Alternatives for Dealing with an Opportunistic World*, 44 NAT. RESOURCES J. 563 (2004).

Available at: <http://digitalrepository.unm.edu/nrj/vol44/iss2/11>

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What's a Poor Land Trust to Do? Alternatives for Dealing with an Opportunistic World

Christopher Elmendorf's article, "Securing Ecological Investments on Other People's Land," raises the question whether a prudent land trust, or other conservation organization, can undertake a program of active ecological rehabilitation and management without acquiring fee simple title to the land.

To explore the problem, Elmendorf posits a scenic rural community that is beginning to experience some pressure to sell land for development of second homes. The primary land uses in the community are farming, ranching, and small-scale timber production. Most of the land in private hands is still owned by long-term residents. Much of that land has ecological value that could be considerably enhanced by rehabilitation efforts and considerably degraded by second-home and—presumably—other kinds of development.

In Elmendorf's hypothetical community, a land trust wants to protect the ecological function now served by land in the community and "restore it to ecological glory."¹ I take it this means that the land trust wants to prevent any further development in the community, except perhaps for agricultural or recreational uses, and to restore streams and wetlands, native vegetation, and habitat for wildlife that may once have occupied the property. Once this has been done, the trust wants to ensure that its investment has enduring conservation value.

I. ADVANTAGES TO LAND TRUST OF ACQUIRING A FEE SIMPLE

From a legal standpoint, the simplest way to accomplish the land trust's goals would be for the land trust to buy all the land in the community and do the restoration work, either itself or through contractors. The land trust could then lease the land or license others to use it for purposes that would not interfere with the conservation project and that would give the land trust the maximum economic and/or social-political return on its investment above and beyond the ecological values generated by the land.

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1. Christopher S. Elmendorf, *Securing Ecological Investments on Other People's Land: A Transaction-Costs Perspective*, 44 NAT. RESOURCES J. 529 (2004).

If farming, ranching, or logging is initially, or later becomes, a compatible use, the land trust can lease the land to people who are interested in carrying on those activities, including the former owners. Through reservations and covenants in the lease, the land trust can retain the right to conduct whatever activities it chooses on the land during the lease term. In addition, the trust can restrict the lessee's activities so that they do not interfere with either the ongoing rehabilitation work or the ecological functions performed by the land. If the lessee violates the lease covenants, legal relief through lease termination and eviction is readily available.

Short-term leases² would give the land trust maximum flexibility to take advantage of knowledge gained through its "adaptive management" of the site,³ changing the covenants of each successive lease to reflect knowledge gained during the previous leases. Short-term leases would also provide the opportunity to fine-tune the rent. In each lease term, the trust could charge a rent that reflects the then-current value of the property for uses compatible with the land trust's ecological purposes (including discounts it might find useful to enhance the likelihood of cooperative behavior on the part of the tenant). If the land trust's investment makes the land more valuable for the lessee's activity, the land trust would be able to capture the added value in the next lease period. Similarly, the shortness of the lease term provides assurance to the lessee that the land trust is not likely to be tempted to reduce the lessee's allowed activity (at least without compensation) even if it learns that some aspects of the operation are incompatible with the ecology project (a risk it may run in a long-term arrangement).

Although short-term leases provide the best opportunities for maintaining equilibrium in value to both lessor and lessee, longer-term leases may be needed to induce current landowners to embrace the project, to gain political support for the project, or for other reasons. If so, commercial leases provide ample precedents for devices that build flexibility into long-term leases. Lease covenants may provide for adjustments in rent and for adjustments in terms regarding use of the premises in accordance with predetermined standards. Covenants may also provide for renegotiation of the lease through a predetermined process. The absence of readily available, easy-to-apply standards against which to predict possible changes in the ecological-rehabilitation context suggests that land trusts would find renegotiation provisions more saleable than standards.

2. By this I mean leases of up to five years or so.

3. Elmendorf, *supra* note 1, at 534.

Simultaneously, or alternatively, with leasing the land for agricultural purposes, owning the fee simple would free the land trust to open up the land for other uses to the extent it deemed desirable for the general good and for garnering political support. Subject to some constraints imposed by the need to retain goodwill and political support, the land trust could issue licenses for recreational and educational uses compatible with the goals of the trust while reserving the right to revoke the licenses or change the terms of use to meet current needs for ecological protection. Of all the legal devices for sharing use of land, the license leaves the most flexibility in the fee owner.

In addition to giving the land trust full control of the terms on which others may use the land, which makes it relatively easy to protect ecological functions of the land and to secure and exploit the value created by its investment, fee simple ownership gives the land trust complete flexibility to deal with future change. If the rehabilitation investment does not work out, or if the trust decides that the land should be freed up for some other use, the land trust can sell the land or otherwise dispose of it. Since the trust has a full and unencumbered fee, there is no dead-hand control.

Despite the simplicity and advantages of fee simple ownership, it is often not practical and may not be efficient. Buying a fee simple may require a lot more money than buying a servitude⁴ for ecological rehabilitation and protection purposes and would certainly be more expensive—at least in the short run—than making short-term contracts for the same purposes. If the land trust can accomplish its objectives without acquiring a fee, through cheaper contracts or servitudes, it can accomplish more ecological restoration for the same dollar investment. In calculating the difference in outlay required for a fee rather than a conservation servitude, it should be noted that there may not be much difference in the availability of tax subsidies. Like the landowner who donates a conservation servitude, the landowner who sells the fee to a land trust for a below-market price may be able to take a charitable deduction (measured by the difference between fair market value and the sale price). In addition, the landowner may be able to avoid realizing capital gains on the sale if the land trust buys another property of comparable market but lower ecological value and exchanges it for the ecologically valuable parcel. But, even with public assistance through tax subsidies, the land trust may not be able to raise enough money to buy all the land it needs for its project.

4. Buying a conservation servitude is cheaper than buying a fee simple because title and the right to make all uses not inconsistent with the servitude remain with the seller.

There are other problems with the fee-simple solution. Landowner resistance may be substantial. If the landowners sell out to the land trust, they face several choices. They may remain in the community and become lessees of land they formerly owned, in which case they forgo control and possible future appreciation in the value of their land. Alternatively, they may use the proceeds to move to another community where they can buy land and carry on similar activities, to change occupations, or to retire, or some combination of these. But the landowners may not want to do any of these things, even if they are offered fair market value for their land, or even if they are offered a premium price. In Elmendorf's hypothetical community, the landowners are attached to their land and apparently are not willing to sell. Even if the landowners were willing and the land trust had enough resources to make the purchase, the land trust still might not want to pursue the fee simple solution for political reasons.⁵

Even if the land trust had the money to buy and the landowners were generally willing to sell, and there were not insurmountable political problems with making the purchase, the land trust would still face the problem of negotiating with multiple landowners, each of whom has an incentive to hold out for the highest price. This problem is the same whether the land trust wants to buy a fee simple or a conservation servitude.

II. ALTERNATIVES TO ACQUIRING A FEE SIMPLE

So we come to the problem Elmendorf addresses. If a land trust cannot buy the fee simple, what can it do? Elmendorf explores several possibilities.

A. Short-Term Contracts

Short-term contracts, like short-term leases, provide maximum flexibility to adapt to change. Each contract is negotiated in light of the conditions then existing. The land trust can negotiate for the right to carry out (or have the owner carry out) activities that produce the best ecological return and restrict those that cause harm to the ecological

5. Or even for reasons of efficiency. Elmendorf suggests that the current owner may have a special talent for cultivating food or timber. He does not explain why that talent cannot be put to as good a use if the land is leased back to the current owner, but it may be that fee-simple owners generally do better than lessees — though if the lease is long enough to allow the lessee to reap the value of its investments in the land, that does not seem very likely. Certainly, much agricultural and timbering activity is carried out on leased land.

objectives. The landowner can re-price its services and forgone opportunities in light of then current values. But there is a fundamental difference between this situation and our ideal (legal) solution: the landowner may not have any deep interest in producing and maintaining ecological value. This difference leads to two problems, which Elmendorf describes as intra- and inter-contract opportunism. First, during any contract term, the landowner may be tempted to shirk or cheat by providing shoddy restoration services (if the trust has contracted for the landowner to do the restoration work) or by failing to limit its ecologically damaging activities to the agreed extent (the intra-contract problem). Second, assuming the land trust wants to renew the contract for an additional term, the landowner will be tempted to demand a renewal price that reflects the ecological value of the property at the time the new contract begins (the inter-contract problem).

Elmendorf concludes that the intra-contract problem can be solved, or at least limited, by offering the landowner a sufficient premium so that the landowner will have an incentive to do a good job in the hopes of securing future similar contracts with the trust and structuring the contract to reduce its exposure to landowner shirking.⁶ The inter-contract problem is more difficult because the current ecological value of the land will include a component created by the land trust's investment. Since the payoff from the land trust's investment is much longer than the contract term—and in fact, most of the payoff will come after expiration of the contract term—the land trust is vulnerable to losing most of the value of its investment to the landowner unless the landowner has sufficient other incentives to continue contracting with the land trust on terms that allow it to make a sufficient return on its investment to keep its donors happy. Elmendorf demonstrates quite convincingly that this problem cannot be overcome without resorting to legal devices other than short-term contracts.

From a legal standpoint, it is clear that short-term contracts cannot work because accomplishing the land trust's objectives will require curtailing over a long period of time the activities that can be carried out on the land. The land trust needs to avoid putting the landowner in a position where the landowner can capture an unacceptable amount of the value created by the land trust's investment in rehabilitation activities. To do that, the trust must severely curtail the landowner's ability to back out of the arrangement. The land trust needs a legal device that will

6. The land trust could reduce its exposure, for example, by reserving the right to conduct restoration projects itself rather than contracting for the landowner to do these.

- prevent further development of the land;
- allow the land trust to carry on rehabilitation activities; and
- restrict current and future uses that would interfere with accomplishing the land trust's desired ecological objectives for the length of time the land trust has in mind (which is probably quite a long time, if not indefinitely).

B. Servitudes

Aside from ownership, the most promising device is the servitude. The servitude leaves ownership with the private owner but sets up an arrangement that gives the land trust rights that can continue indefinitely against subsequent owners and occupiers of the land. A servitude can give the land trust rights to enter the land to carry out a program of ecological rehabilitation and to determine whether any activities on the land interfere with accomplishing the objectives of its rehabilitation program. A servitude can prevent further development of the land and restrict indefinitely any current or future uses of the land that would interfere with the land trust's desired ecological objectives. A servitude can also impose affirmative obligations on both the landowner and the land trust with respect to maintenance and investment in the property and for future payments to be made by either party to the other. Finally, the servitude can include other terms the parties might find desirable, like the right to use the property for educational purposes, dispute resolution procedures, renegotiation provisions, and even termination provisions.

Although the law of servitudes has traditionally been quite complicated and subject to odd gaps in enforceability, conservation servitudes can be used today with a high degree of confidence. They have received favorable legislative treatment in many states, and there is every reason to believe that the common law will follow suit. *The Restatement, Third, of Property: Servitudes*, published by the American Law Institute in 2000, eliminates all the common law obstacles to conservation servitudes that made the Uniform Conservation Easement Act necessary.

In addition to finding a legal device that will work, the land trust has to offer landowners a deal they will accept. Elmendorf makes several very useful suggestions about the way the trust can structure a proposed deal to allay the fears of land owners while, at the same time, reducing incentives to engage in opportunistic behavior:

- Offer a price to the landowner that will compensate for the loss of development rights and curtailment of agricultural activities on the land but structure the payment as an installment payment over the life of the project;

- Specify activities that are curtailed to protect the ecological function of the property but include a provision allowing the land trust to specify additional activities that may later be determined to interfere with the ecological project;
- Include a requirement that the land trust compensate the landowner for any forgone income due to additional restrictions on its activities; and
- Provide a dispute resolution procedure in the event they do not agree on the appropriate level of compensation, which procedure should provide fair representation of agriculturalists among the decision makers to assure the landowner of fairness.⁷

Structuring the servitude to include these provisions strikes me as an excellent idea. With these additions, the servitude described above, with its provisions for allowing entry and use by the land trust and indefinitely restricting incompatible uses of the land, should provide a satisfactory substitute for acquiring ownership of the fee simple. Although the terms of the servitude will bear some resemblance to the terms that would be included in a long-term lease back to the former owner, the servitude is somewhat more complicated and subject to somewhat more risk of judicial unwillingness to enforce the arrangement as intended than the fee simple. The servitude is close enough, however, to the fee simple that a prudent land trust could use it as the basis for an affirmative program of investment in ecological rehabilitation.

Elmendorf also discusses strategies related to using passive conservation easements as “hands-tying bonds” and signaling idiosyncratic preferences.⁸ I was not persuaded by this part of the article. To accomplish its objectives without acquiring the fee simple, the land trust will have to use a combination of active and passive conservation servitudes. An open space easement alone will not allow the land trust to secure the value of its intended investments. As to the signaling discussion, the signals he mentions might provide information that would help the land trust decide how much to offer a landowner to enter the program but could not safely be relied on to forgo creating a legally binding arrangement that covered the desired life of the ecological benefits the trust intended to create.

7. Elmendorf does not spell out just how this is to be accomplished, but providing some sort of dispute resolution procedure that both sides would consider fair is an excellent idea. It could usefully be applied to all aspects of the ongoing relationship governed by the servitude.

8. Elmendorf, *supra* note 1, at Parts III.A.4 and III.A.5.

III. LAND ASSEMBLY PROBLEMS

Having laid the groundwork for creating arrangements that would allow a land trust to make satisfactory arrangements with individual landowners, Elmendorf turns to the problem of enlisting all of the land in the community in the program. This is a land assembly problem similar to that faced by any developer that lacks the power of eminent domain. Even if all landowners are willing to sell their development rights and curtail their agricultural activities to the extent necessary to secure the ecological benefits contemplated by the program, they will have powerful incentives to engage in strategic behavior to maximize their individual prices.

Elmendorf suggests two interesting strategies for combating this problem. The first is using a terminable servitude until all the desired parcels have been enrolled in the program. Under this servitude, the land trust would retain the right to terminate the servitude and recover the compensation it had paid to the landowner. This way, if the land trust decided it had not acquired enough land in the area to make its planned investment worthwhile, it could back out without having sunk too much into the project. Although the use of terminable servitudes could reduce the incidence of holdouts among landowners who find the prospect of selling their development rights appealing, it would do nothing to overcome the problem of landowners who do not want to sell. For this problem, Elmendorf suggests the possibility of seeking legislation that would authorize the creation of special districts for conservation. If a certain percentage of landowners could be persuaded that they wanted to sell their development rights and limit their activities in the interests of environmental goals, they could be authorized to form a special district that would have the power to subject all the land in the district to the conservation program. Once the district was formed, the land trust could negotiate a deal with the district rather than having to negotiate with individual landowners.

Allowing the creation of special districts is appealing in that it provides a way for the landowners to overcome collective-action problems (assuming enough of them want to), and there is a model readily at hand for the enabling legislation needed. Enabling legislation for business improvement districts contains provisions for voting requirements and procedures to protect minority interests, drawing boundaries, and handling funds.⁹ But can the land trust persuade

9. Elmendorf's proposed special districts have quite a different function from a business improvement district, however, which might raise constitutional problems. The purpose of these special districts is to allow one group of landowners to impose a

enough landowners that they want to create such a district? Why would landowners want to give up their ability to negotiate individually? Unlike the land assembly districts Michael Heller proposes as a way for landowners to capture the surplus value created by assembly of their parcels (now lost in condemnation proceedings),¹⁰ Elmendorf's proposed special district is designed to prevent landowners from capturing the surplus ecological value created by assembling their parcels for the rehabilitation program. He suggests that enough landowners will want to sell their development rights and be willing to submit to restrictions on the way they carry on their agricultural activities that a credible threat by the land trust to pull out of the community and take its conservation dollars elsewhere will persuade them to create the special district. He may be right about this, but I am somewhat dubious.¹¹ He does not mention marketing efforts by the land trust, but it may be implicit in his approach that the trust would also be engaged in a deliberate attempt to build support for its project by persuading the landowners that they should want to participate in the program for the greater good. In designing this effort, the land trust might find helpful the literature on factors that lead people to engage in other-regarding behavior even when it is not in their economic self-interest to do so.¹²

In addition to providing the land trust with a single entity with which it can negotiate, Elmendorf also claims that the existence of a district will make short-term contracting more feasible. I am not persuaded that a land trust could safely rely on a strategy of refusing to pay holdup prices for contract renewal as a way of preventing land

conservation servitude and force a sale of development rights on land belonging to others without the owners' consent. This looks like a delegation of the power of eminent domain without the safeguard of a judicially established price or a determination of public use.

10. Michael A. Heller & Roderick M. Hills, *The Art of Land Assembly* (Draft, Jan. 9, 2003), available at <http://eres.lawlib.ucla.edu/coursepage.asp?cid=264> (last visited Apr. 12, 2004).

11. Elmendorf responds that the land trust can also offer some of the surplus generated by reduced transaction costs. See Elmendorf, *supra* note 1, n.69. This may sweeten the pot, but it will not overcome another potentially serious problem: what about the landowners who really do not want to sell? Even though their neighbors are involved in the coercion, the disaffected landowners may be able to generate substantial negative publicity about the "land grab," which may create subsequent problems for the land trust. And, of course, landowners concerned about environmental land grabs may succeed in preventing passage of the legislation necessary to authorize creation of these special districts.

12. In a very interesting paper, Lynn Stout reviews the findings from the social sciences on the surprising quantity and predictability of human responses that value cooperation and sharing resources more than maximizing one's wealth. See Lynn A. Stout, *Other-Regarding Behavior and the Law* (Draft, Oct. 4, 2002), available at <http://eres.lawlib.ucla.edu/coursepage.asp?cid=264>, (last visited Apr. 12, 2004).

owners from walking away from the conservation program altogether. I do not see how having a district solves the problem. If enough landowners become unhappy with the restrictions on their activities, or on their ability to realize the appreciation in value of their lands, what is to stop them from collectively demanding a renewal price that captures all or most of the gain from the land trust's investment? Or, if their land has appreciated in value for other purposes, what is to stop them from demanding a renewal price that reflects its value for development? Absent a servitude that binds them to the conservation program, the landowners are likely to defect unless they are truly committed to the conservation program. Even if the current generation is committed, their successors may not be. Without such a servitude, a prudent land trust could not make substantial investments in rehabilitation of land owned by another.

Elmendorf has raised the likelihood that land trusts that want to invest in active rehabilitation programs but cannot acquire a fee-simple interest in the land face serious problems of opportunistic behavior. He makes some interesting suggestions for designing pricing and negotiation strategies to overcome these problems, but I do not believe these strategies will provide sufficient security for the investment. Fortunately, he also advances some excellent ideas about how to structure long-term servitudes that will provide a sound legal alternative when ownership of a fee simple is not feasible or desirable. If the land trust can persuade landowners that they want to give up their development rights, then his proposals for stretching out payment over the life of the project and providing a process for the trust to acquire additional use restrictions in the future should reduce the land trust's exposure to risks of opportunistic behavior by landowners to an acceptable level. It could also reduce the risks of opportunistic behavior by the land trust to a level acceptable to the wary landowner.