

University of Miami Law School

## University of Miami School of Law Institutional Repository

---

Articles

Faculty and Deans

---

2012

### Who Should Protect the Forest: Conservation Easements in the Forest Legacy Program

Jessica Owley

Stephen J. Tulowiecki

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

# **Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program**

**Jessica Owley\* and Stephen J. Tulowiecki\*\***

I. INTRODUCTION .....	48
II. BENEFITS OF FORESTS .....	50
III. THE FOREST LEGACY PROGRAM.....	55
A. Background .....	55
B. The Mechanics of the Law .....	59
C. General Concerns.....	64
IV. THE USE OF CONSERVATION EASEMENTS IN THE FOREST LEGACY PROGRAM.....	65
A. Conservation Easements Generally .....	65
B. FLP Conservation Easements.....	66
C. Role of Land Trusts .....	69
1. Land Trusts and FLP Conservation Easements.....	71
2. Land Trusts and Cost-Share Conservation Easements.....	72
D. Examples .....	75
1. Federally Held: Denino Tract .....	76
2. State Held: Wappaoolah Plantation.....	78
3. Land-Trust Held: The Wild Rivers Conservation Easement .....	80

---

\*Associate Professor, SUNY–Buffalo Law School. Many thanks to Blake Hudson, Eric Biber, and Lisa Pruitt who provided comments and have already inspired future related projects and to Joshua Tallent for his invaluable research assistance. I presented a preliminary version of this work at the 34th Public Land Law Conference at the University of Montana. We would also like to thank the staff of the Public Lands and Resources Law Review for organizing that conference and guiding this article through publication. Funding for this research was provided in part by a grant from the Resources Legacy Fund.

\*\* Ph.D Candidate, Department of Geography, University of Buffalo.

V. CONCERNS WITH CONSERVATION EASEMENTS IN THE FOREST LEGACY PROGRAM.....	86
A. Conservation Easements Concerns Generally.....	86
1. Working Forest Conservation Easement Concerns .....	87
2. Enforcement Concerns .....	88
3. Transparency Concerns .....	91
VI. CONCLUSION .....	92

## I. INTRODUCTION

In the 1990 Farm Bill, Congress established the Forest Legacy Program (“FLP” or “the Program”). Administered by the U.S. Forest Service, the Program seeks to slow conversion of private forestlands to nonforest uses. It tries to meet this goal through incentive programs instead of regulation. While zoning and other land-use laws can direct development and seek to slow destruction of forestlands, no laws require landowners to actively manage their land for forest production. With that in mind, Congress created a voluntary incentive-based program relying on property rights concepts to buy forestland and to use conservation easements to deter conversion of such lands.

Conservation easements form a key element of the FLP. Usually perpetual, conservation easements are nonpossessory interests in land that restrict a landowner’s actions on her land, to yield some conservation benefit. These encumbrances on private land appear a straightforward way of protecting and promoting working landscapes, as they can limit environmentally harmful activity while promoting continuation of active forest management. However, concerns with conservation easements as land-protection mechanisms abound. Concerns exist not only regarding conservation easements in general, but also specifically over conservation easements stemming from the Forest Legacy Program.

The use of conservation easements in the FLP is complicated. The Forest Legacy Program identifies areas in particular need of protection and labels them “Forest Legacy Areas.” The Forest Service then uses FLP funds to protect parcels in the Forest Legacy Areas either through fee simple purchase or by encumbering those lands with conservation easements. The Forest Service funds 75% of

the project, requiring a 25% cost share from other sources. The Program establishes two types of conservation easements based on the source of funding for the restrictions: (1) “FLP conservation easements” arise from direct purchases with FLP funds and (2) “cost-share conservation” easements arise when donated conservation easements serve to meet the nonfederal cost-share requirements. The rules regarding these two types of conservation easements are confusing and appear to differ without justification.

The FLP is an unusual program for the Forest Service, because it reaches beyond the lands owned by the Forest Service. Where the FLP involves federal acquisition of forestlands, it appears similar to expansion of the National Forests. Much of the Program, however, involves leaving the forestlands in private hands. Instead of regulating to protect forest resources, the Forest Service uses the power of the federal fisc to encourage private landowners to keep land in active forest management.

The Forest Service views the FLP as a multi-partner program. The Service works with states, local governments, tribes, nonprofit organizations, and community members throughout the process of identifying areas meriting protection, acquiring parcels, and stewarding those parcels. Nonprofit land conservation organizations known as land trusts play a special role in the Program. In creating the Program, Congress seemed to both want to encourage the involvement of land trusts and to curb their reach. The Program draws upon the power of private organizations, and increasingly calls upon land trusts to carry out the duty of protecting forestlands and yet stops short of enabling these organizations to receive FLP funds or to enforce conservation easements purchased with FLP funds. Thus, in the FLP, Congress inches toward privatization of forestland conservation, but holds back. This stance is bewildering. If Congress was concerned with the involvement of land trusts in forestland conservation, it seems to give them too much power. If Congress wanted to encourage greater land trust involvement, it seems to stop too short.

This article examines conservation easements under the FLP. Part II outlines the benefits for forests in the United States, emphasizing the importance of protecting private forestlands. Part III sets forth the FLP, detailing its history, mechanics, and current funding. Part IV examines the role of conservation easements within

the FLP. After explaining how conservation easements work, this section presents three examples of conservation easements that arise under the FLP. These examples lay the foundation for a discussion of concerns associated with the FLP's conservation easements (presented in Part V). Drawing upon the statute and regulatory guidance, we investigate the differences between the FLP conservation easements and the cost-share conservation easements. We also explore the roles that land trusts can play in relation to these different types of conservation easements. These conservation easements are governed by different rules, but the reasoning behind the distinction is unclear. We also examine concerns that might arise with FLP conservation easements as long-term land protection mechanisms.

We conclude this article in Part VI by offering some suggestions for improving the use of conservation easements within the FLP. At a minimum, the Forest Service should clarify its guidance documents regarding the distinction between the two types of conservation easements and the requirements associated with them. Additionally, the Forest Service should insert itself in some way (as a co-holder or third-party enforcer) into each conservation easement, regardless of the holder, to facilitate enforcement of the agreements and to ensure public involvement in any challenges to or modification of these agreements. Resolving these differences and addressing these concerns will improve the programs likelihood of preventing forestland conversion in the long run.

## II. BENEFITS OF FORESTS

Forests offer many benefits that make them worth protecting. Most notably, forests play a critical role in global carbon cycles and help mitigate anthropogenic greenhouse gas emissions responsible for global climate change.<sup>1</sup> Within the U.S., forests are currently a

---

1. Duncan C. McKinley, Michael G. Ryan, Richard A. Birdsey, Christian P. Giardina, Mark E. Harmon, Linda S. Heath, Richard A. Houghton, Robert B. Jackson, James F. Morrison, Brian C. Murray, Diane E. Pataki, and Kenneth E. Skog, *A Synthesis of Current Knowledge on Forests and Carbon Storage in the United States* 21 Ecological Applications 1902-1905 (2011).

net carbon sink;<sup>2</sup> where forest ecosystems are undergoing succession, the total biomass of forests increases.<sup>3</sup> U.S. forests offset approximately 10%<sup>4</sup> to 13%<sup>5</sup> of greenhouse gas emissions nationally. Through various processes, forests are integrally linked to water quantity and quality within a watershed. Approximately 53% of the U.S. water supply<sup>6</sup> and 66% of runoff<sup>7</sup> is derived from forests, with more than 25% of the U.S. water supply being filtered by private forestlands.<sup>8</sup> Forests also help regulate water timing and availability and buffer against extreme precipitation events.<sup>9</sup> Vegetation can boost water supply throughout dry or summer seasons with positive benefits for aquatic species such as fish. Forested watersheds enhance water quality by filtering sediments, nutrients, and pollution in both natural<sup>10</sup> and urban<sup>11</sup> settings. Forest vegetation intercepts nutrients such as nitrogen, thereby lessening the risk of dangerous

---

2. *Id.* at 1906.

3. Eugene P. Odum, *The Strategy of Ecosystem Development* 164 Science 262, 262, 264 (1969).

4. Richard Birdsey, Kurt Pregitzer, & Alan Lucier, *Forest Carbon Management in the United States: 1600-2100* 35 J. Env. Q. 1461, 1461 (2006).

5. U.S. Env. Protec. Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2009*, at ES-13 (2011), available at [http://epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Complete\\_Report.pdf](http://epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Complete_Report.pdf).

6. Susan M. Stein, Ronald E. McRoberts, Lisa G. Mahal, Mary A. Carr, Ralph J. Alig, Sara J. Comas, David M. Theobald, & Amanda Cundiff, *Private Forests, Public Benefits: Increased Housing Density and Other Pressures on Private Forest Contributions* U. S. Dept. of Agriculture Forest Serv. Gen. Technical Rep. PNW-GTR-795, at 16 (2009), available at [http://www.fs.fed.us/openspace/fote/benefits\\_files/pnw-gtr795\\_pt2.pdf](http://www.fs.fed.us/openspace/fote/benefits_files/pnw-gtr795_pt2.pdf).

7. James Sedell, Maitland Sharpe, Daina Dravnieks Apple, Max Copenhagen, & Mike Furniss, *Water and the Forest Service* USDA Forest Serv. Policy Analysis (FS 660), at ii (2000), available at <http://www.fs.fed.us/publications/policy-analysis/water.pdf>.

8. Susan M. Stein, et al., *supra* n. 6, at 16.

9. Kate A. Brauman, Gretchen C. Daily, T. Ka'eo Duarte, & Harold A. Mooney, *The Nature and Value of Ecosystem Services: An Overview Highlighting Hydrologic Services*, 32 Ann. Rev. Env. & Resources 67, 74 (2007).

10. *Id.* at 77-78.

11. Francisco J. Escobedo, Timm Kroeger, & John E. Wagner, *Urban Forests and Pollution Mitigation: Analyzing Ecosystem Services and Disservices* 159 Env. Pollution 2078, 2079-2080 (2011).

nutrient concentrations in watersheds.<sup>12</sup> Increasing filtration of precipitation in forested landscapes gives more time and space for purification processes to occur. Older forests also stabilize soil and streambanks, reducing erosion and sediment inputs into watersheds. Though forests intercept water for biological processes, they can also increase groundwater storage and boost water supply.

Forests are vital in preserving plant and animal species. Given that vegetation directly and indirectly facilitates species interactions, protecting forest vegetation can have cascading positive effects for entire ecosystems.<sup>13</sup> For example, in certain ecoregional contexts, positive relationships exist between forest productivity (amount of carbon stored, per unit area, per unit time) and tree species richness (number of tree species). Thus, decline in forest integrity resulting from human land management can adversely affect biodiversity.<sup>14</sup> Large, unfragmented forests with high amounts of interior habitat can increase geographic ranges of species that depend on forests and can lower the probability of species extinction.<sup>15</sup> Greater connectivity of forests is also associated with higher quality habitat for forest-dwelling species; though, typically only a small portion of species' ranges are situated in protected areas, as seen with mammalian carnivores on global scales.<sup>16</sup> In the contiguous U.S., 60% of at-risk vertebrates, invertebrates, and plants are associated with private forests, and many species are found only on private land.<sup>17</sup> Maintaining connectivity of both public and

12. Brauman, *supra* n. 9 at 78.

13. Mads S. Thomsen, Thomas Wernberg, Andrew Altieri, Fernando Tuya, Dana Gulbransen, Karen J. McGlathery, Marianne Holmer, & Brian R. Silliman, *Habitat Cascades: The Conceptual Context and Global Relevance of Facilitation Cascades via Habitat Formation and Modification* 50 *Integrative and Comparative Biology* 158, 158-164 (2010).

14. R. Travis Belote, Steve Prisley, Robert H. Jones, Matthew Fitzpatrick, & Kirsten de Beurs, *Forest Productivity & Tree Diversity Relationships Depend on Ecological Context Within Mid-Atlantic & Appalachian Forests (USA)*, 261 *Forest Ecology & Mgmt.* 1315, 1320 (2011).

15. Kevin R. Crooks, Christopher L. Burdett, David M. Theobald, Carlo Rondinini, & Luigi Boitani, *Global Patterns of Fragmentation and Connectivity of Mammalian Carnivore Habitat*, 366 *Phil. Transactions Royal Socy.* 2642, 2643, 2645 (2011).

16. *Id.* at 2645.

17. Stein, et al., *supra* n. 6, at 24.

privately owned forestlands is essential for national and global conservation efforts, especially given the additional pressures of global climate change upon species.<sup>18</sup>

In addition to the environmental and ecological benefits, forests also provide direct economic goods and services, including timber, nontimber forest products, biofuel, recreation, and enhancement of land values, not to mention numerous cultural values.<sup>19</sup> Collectively, ecosystem goods and services in the U.S. totaled \$63.6 billion (in 1994 dollars).<sup>20</sup> From 2005 to 2009, National Forests generated approximately \$13 billion in economic activity annually, in areas surrounding National Forests.<sup>21</sup> In 2007, nonwood products derived from U.S. forests, such as crafts and floral items, edibles, and landscaping plants, were worth an estimated \$508 million.<sup>22</sup>

While protecting forests is important for many reasons, they have not attained full potential for offering additional benefits.

18. Christina M. Locke & Adena R. Rissman, *Unexpected Co-benefits: Forest Connectivity and Property Tax Incentives*, 104 *Landscape & Urb. Plan.* 418, 424 (2012).

19. Robert Costanza, Ralph d'Arge, Rudolf de Groot, Stephen Farber, Monica Grasso, Bruce Hannon, Karin Limburg, Shahid Naeem, Robert V. O'Neill, Jose Paruelo, Robert G. Raskin, Paul Sutton, & Marjan van den Belt, *The Value of the World's Ecosystem Services and Natural Capital* 387 *Nature* 253, 254 (1997); Elena G. Irwin, *The Effects of Open Space on Residential Property Values* 78 *Land Econ.* 465, 465 (2002); Susan J. Alexander, Sonja N. Oswalt, & Marla R. Emery, *Nontimber Forest Products in the United States: Montreal Process Indicators as Measures of Current Conditions and Sustainability* United States Department of Agriculture Forest Service General Technical Report PNW-GTR-851, at 2 (2011), available at [www.fs.fed.us/pnw/pubs/pnw\\_gtr851.pdf](http://www.fs.fed.us/pnw/pubs/pnw_gtr851.pdf).

20. Douglas J. Krieger, *The Economic Value of Forest Ecosystem Services: A Review Prepared for The Wilderness Society* at iii (2001), available at [http://www.cfr.washington.edu/classes/esrm.465/2007/readings/WS\\_valuation.pdf](http://www.cfr.washington.edu/classes/esrm.465/2007/readings/WS_valuation.pdf). Krieger uses Costanza's estimates to assign a U.S. estimate; see Costanza et al., *supra* n. 19.

21. National Visitor Use Monitoring Results: USDA Forest Service National Summary Report at 2 (2001), available at [http://www.fs.fed.us/recreation/programs/nvum/nvum\\_national\\_summary\\_fy2009.pdf](http://www.fs.fed.us/recreation/programs/nvum/nvum_national_summary_fy2009.pdf).

22. Alexander et al., *supra* n. 19 at 23.



Extensive agricultural clearing and logging practices have resulted in an estimated 60% loss of U.S. carbon stocks since 1700.<sup>23</sup> While 40% of U.S. carbon storage capacity lost prior to 1935 has recovered,<sup>24</sup> the rate of carbon sequestration appears to be declining in the 21<sup>st</sup> century<sup>25</sup> due to the slowing of reforestation<sup>26</sup> and the increasing pressures of development of forestlands. By other estimates, U.S. forests contain approximately 17 PgC (petagrams of carbon, 1Pg = 10<sup>15</sup> g), and an additional 3 to 7 PgC could be stored by allowing developed lands, such as abandoned agricultural lands, to revert to forest cover.<sup>27</sup> Carbon storage of forests could be enhanced further by preventing deforestation, encouraging reforestation, and enacting numerous forest management practices that achieve greater carbon storage.<sup>28</sup>

Despite the above environmental, ecological, and economic benefits, fragmentation caused by population growth, exurban residential development, road construction, and other forces threaten to undo the positive impacts of forests. Although U.S. forestland has remained relatively stable (declining only 1% from 1953 to 1997),<sup>29</sup> the U.S. population has steadily increased, resulting in a forest per capita decrease of almost 50% during that same period. Twenty-six million acres will be lost to development by 2030.<sup>30</sup> Housing density could increase markedly for 57 million acres

---

23. McKinley et al., *supra* n. 1 at 1904.

24. *Id.* at 1905.

25. Birdsey et al., *supra* n. 4 at 1468.

26. *Id.* at 1464.

27. E.T. Sundquist, K.V. Ackerman, N.B. Bliss, J.M. Kellndorfer, M.C. Reeves, & M.G. Rollins, Rapid Assessment of U.S. Forest and Soil Organic Carbon Storage and Forest Biomass Carbon Sequestration Capacity U.S. Geological Survey Open-File Report 2009-1283, at 5 (2009), *available at* <http://pubs.usgs.gov/of/2009/1283/>.

28. Jared S. Nunery & William S. Keeton, *Forest Carbon Storage in the Northeastern United States: Net Effects of Harvesting Frequency, Post-Harvest Retention, and Wood products* 259 *Forest Ecology & Mgmt* 1, 11 (2010); Birdsey et al., *supra* n. 4 at 1465.

29. Jeffrey D. Kline, Ralph J. Alig, & Brian Garber-Yonts, *Forestland Social Values and Open Space Preservation*, 102 *J. Forestry* 39, 39 (2004).

30. R. Alig & A. Plantinga, *Future Forestland Area: Impacts from Population Growth and Other Factors that Affect Land Values*, 102 *J. Forestry* 19, 22 (2004).

of rural forest.<sup>31</sup> Residential and road development has contributed to an estimated 4.5% loss in forested lands in the western United States. These same forces are projected to cause an additional 1.2% forest loss by 2030.<sup>32</sup> In the eastern U.S., public and private lands exhibit differences in amounts of intact and fragmented forest: only 62% of public forest and 40% of privately owned forests are considered intact, despite privately owned forests comprising 80% of all forested areas.<sup>33</sup> Thus, the rate and amount of fragmentation depends heavily on private land management practices, perhaps more so than on relatively intact public forestlands.

### III. THE FOREST LEGACY PROGRAM

#### *A. Background*

The federal government owns nearly 193 million acres of forest<sup>34</sup> and has been an active manager of its forestlands since the dawn of the Progressive Era.<sup>35</sup> The federal government's interest in forests, however, does not end at its property line. Although the federal government has never undertaken a direct regulatory forest management role regarding private forestlands, it has been actively working with private landowners to promote and facilitate forestlands and forestry through voluntary programs. Early laws

---

31. Susan M. Stein, et al., *supra* n. 6, at 13.

32. David M. Theobald, Kevin R. Crooks, & John B. Norman, *Assessing Effects of Land Use on Landscape Connectivity: Loss and Fragmentation of Western U.S. Forests*, 21 *Ecological Applications* 2445, 2450 (2011).

33. Kurt H. Riitters, John W. Coulston, & James D. Wickham, *Fragmentation of Forest Communities in the Eastern United States*, 263 *Forest Ecology & Mgmt.* 85, 90-91 (2012).

34. The United States Forest Service manages 193 million acres. U.S. Department of Agriculture Forest Service, Fiscal Year 2013 Budget Overview at 2 (2012), *available at* <http://www.fs.fed.us/aboutus/budget/2013/fy2013-overview.pdf>. Some of the property is grassland. Additionally, some land held by other agencies such as the Bureau of Land Management and the National Park Service is also forested.

35. Samuel P. Hays, *Conservation and the Gospel of Efficiency* (1999); U.S. Forest Service, History (1959) <http://www.fs.fed.us/aboutus/history/> (last visited March 29, 2012).

regarding protection of private forestlands focused on cooperative programs for fire suppression, prevention of insect infestation, and stifling the spread of disease.<sup>36</sup> Over time, Congress expanded these laws to actively encourage the timber industry by doing things like providing seedlings to landowners to establish forests and windbreaks.<sup>37</sup> The Forest Service began to realize the importance of private forestlands in protecting public goods and services like clean water, wildlife habitat, and recreation.<sup>38</sup> Additionally, the Forest Service saw a need to protect private forests as resources of wood fiber and other nontimber forest products.<sup>39</sup>

While states and local governments regulate forestlands in various ways, federal regulation of private forests has largely been in the form of incentives.<sup>40</sup> In 1974, the federal government passed its first forestry incentive program, designed to encourage development

36. S. Rep. No. 95-879, at 3-5 (1978).

37. See Dennis C. Le Master, Joseph T. O'Leary, and V. Alaric Sample, *Forest Service Response to Changing Public Values, Policies And Legislation During the Twentieth Century in the United States*, Developments in Forest and Environmental Law Influencing Natural Resource Management and Forestry Practices in the United States of America and Canada 43, 44 & 54 (eds. Franz Schmithüsen & William C. Siegel IUFRO 1997), available at <http://e-collection.library.ethz.ch/eserv/eth:2558/eth-2558-01.pdf#page=53> (last visited July 31, 2012).

38. S. Rep. No. 101-357 at 4,934-35.

39. *Id.* at 4,936.

40. John H. Beuter, *The Evolution of Forest Management and Timber Policies in the United States*, Developments in Forest and Environmental Law Influencing Natural Resource Management and Forestry Practices in the United States of America and Canada 16, 24 (eds. Franz Schmithüsen & William C. Siegel IUFRO 1997), available at <http://e-collection.library.ethz.ch/eserv/eth:2558/eth-2558-01.pdf#page=53> (last visited July 31, 2012); William C. Siegel, *Legislative Regulation of Private Forestry Practices in the United States—Recent Trends*, Developments in Forest and Environmental Law Influencing Natural Resource Management and Forestry Practices in the United States of America and Canada 305 (eds. Franz Schmithüsen & William C. Siegel IUFRO 1997), available at <http://e-collection.library.ethz.ch/eserv/eth:2558/eth-2558-01.pdf#page=53> (last visited July 31, 2012). It may be federalism concerns that keep regulation of private forest management at the subnational level. Blake Hudson, 44 Conn. L. Rev. 925, 940-45 (2012) (arguing that state governments are currently the only entities with *recognized* constitutional authority to directly regulate forestlands).

of commercial forestry on private lands.<sup>41</sup> It was the first time that federal funds were earmarked for forestry,<sup>42</sup> and the program arose because the legislature recognized an oncoming collision of competing interests implicating forests: while the nation demonstrated a need for wood and wood products, it was witnessing a trend of reducing acreage of working forestlands.<sup>43</sup> Therefore, Congress crafted programs designed to put idle lands capable of growing trees into production.<sup>44</sup>

In 1978, Congress went even further.<sup>45</sup> Instead of just encouraging conversion of idle land to active forestlands, the Cooperative Forestry Assistance Act established programs to prevent the conversion of existing forestland to nonforest uses.<sup>46</sup> The law noted that forest products are important for the country and there are many social and ecological benefits associated with forests.<sup>47</sup> To that end, with the Cooperative Forestry Assistance Act, Congress sought to create a program to conserve private, nonindustrial, working forests.

In the 1980s, many industrial forest landowners began selling and subdividing their property.<sup>48</sup> Concerns regarding parcelization, and residential and recreational development spurred Congress to

---

41. The Forestry Incentives Program initiated in 1974 under section 1009 of the Agricultural Act of 1970.

42. S. Rep. No. 95-879, *supra* n. 36, at 6.

43. S. Rep. No. 101-357 at 4,936.

44. *Id.* at 31-32.

45. Cooperative Forestry Assistance Act of 1978, Pub. L. No. 95-313, § 2, 92 Stat. 365.

46. *Id.* (codified at 16 U.S.C. § 2101).

47. *Id.*

48. Laura S. Beliveau, *The Forest Legacy Program: Using Conservation Easements to Preserve the Northern Forest*, 20 B.C. Env. Aff. L. Rev. 507, 509 (1993). See also John M. Hagan, Lloyd C. Irland & Andrew A. Whitman, *Changing Timberland Ownership in the Northern Forest and Implications for Biodiversity*, Manomet Center for Conservation Sciences, Report # MCCS-FCP-2005-1 at iii (2005), available at [http://standards.nsf.org/apps/group\\_public/download.php/10102/Cassie%20Phillips%202005-06%20Manomet%20ForestOwnerChangeReport-011006%5B1%5D](http://standards.nsf.org/apps/group_public/download.php/10102/Cassie%20Phillips%202005-06%20Manomet%20ForestOwnerChangeReport-011006%5B1%5D). (last visited July 31, 2012) (explaining that industrial forest owners are continuing to sell property in the Northeast).

study the Northern Forest.<sup>49</sup> The resulting report, the Northern Forest Land Study Report, indicated that development pressures and abusive forestry practices were changing the landscape of northeast forests.<sup>50</sup> Each of the four northeast forest states (Maine, Vermont, New Hampshire, and New York) undertook measures to protect their forestland, but the measures were inadequate.<sup>51</sup> Economic instability reduced states' ability to finance forestland acquisition, and some property owners opposed state intervention.<sup>52</sup> Other economic pressures led to sales of forestlands, and many landowners said that they could no longer make a living solely selling timber.<sup>53</sup>

The U.S. Forest Service is part of the U.S. Department of Agriculture, but because forest regulation and management has focused on federal (not private) forestlands, there had historically been little discussion of forest management in conjunction with other agricultural issues. This shifted with the 1990 Farm Bill. With that iteration of the law, Congress stated that forestry is akin to agriculture and faces many similar challenges.<sup>54</sup> The legislature noted that most forestland in the U.S. was privately held (about 75% of the forestland at that time).<sup>55</sup> Furthermore, there was a steadily increasing demand for forest products, accompanied by an increase in conversion of forestland to other agricultural uses and suburban sprawl.<sup>56</sup>

Today, about 57% of the nation's forestland is private.<sup>57</sup> More than 420 million acres is held by approximately 11 million landowners with 8 million of those landowners having small holdings

49. Beliveau, *supra* n. 48 at 508.

50. *Id.*; U.S. Forest Service, Northern Forest Lands Study Report Summary 5 (1990).

51. *Id.* at 511.

52. *Id.*

53. Stein, et al., *supra* n. 6, at 10.

54. Section 1217 of Title XII of the Food, Agriculture, Conservation and Trade Act of 1990, P. B. 101-624, 104 Stst. 3359.

55. S. Rep. No. 101-357 at 4935.

56. See 16 U.S.C. § 2101(a).

57. U.S. Forest Service, Forest Legacy Program, <http://www.fs.fed.us/spf/coop/programs/loa/flp.shtml> (last visited July 31, 2012); Stein, et al., *supra* n. 6, at 3. There is some variation in estimates here, with some studies placing the number as high as 59%. Beuter, *supra* n. 40 at 22.

of fewer than 50 acres.<sup>58</sup> The U.S. Forest Service is worried that development pressures will cause these forestland owners to sell the land for other uses.<sup>59</sup> Such sales have been widespread with industrial forest companies, especially in the southern U.S.<sup>60</sup> The U.S. Forest Service sought to develop market-based approaches to incentivize landowners to keep the lands in productive forest use.<sup>61</sup> With this backdrop, Congress decided to add a forestry title to the Farm Bill and to establish programs to protect private forestlands beyond providing technical assistance with disease prevention and fire suppression. Thus, the Forest Legacy Program was born.

### *B. The Mechanics of the Law*

Codified at 16 United States Code Section 2103c, the Forest Legacy Program protects and promotes private forestland protection. The purposes of the program are:

[A]scertaining and protecting environmentally important forest areas that are threatened by conversion to nonforest uses, and through the use of conservation easements and other mechanisms, for promoting forest land protection and other conservation opportunities. Such purposes shall also include the protection of important scenic, cultural, fish, wildlife, and recreational resources, riparian areas, and other ecological values.<sup>62</sup>

The FLP is a cooperative program where the Forest Service works with state, regional, and local governments as well as nonprofit organizations and tribes to protect privately held forestlands. The FLP authorizes acquisition of forestland (and conservation easements on forestlands) from “willing owners.”<sup>63</sup> The statute directs the Secretary of Agriculture to identify environmental values to be protected by entry of lands into the

---

58. Stein, et al., *supra* n. 6, at 3-5.

59. *Id.* at 5.

60. *Id.* at 6.

61. *Id.* at 5.

62. 16 U.S.C. § 2103c(a).

63. *Id.* § 2103c(c).

program, as well as set forth planned management activities and how those activities might affect the identified values.<sup>64</sup>

The federal government initiated the Forest Legacy Program after the completion of the Northern Forest Land Study, which examined forest conditions in New York, New Hampshire, Vermont, and Maine and suggested areas and methods for forest preservation.<sup>65</sup> More than 85% of the land in the northern forest was in private hands,<sup>66</sup> compared to western states where large expanses are federal and state holdings.<sup>67</sup> The four states that participated in this study were automatically participants in the FLP.<sup>68</sup> The FLP began with the northern forests and gave the Forest Service one year to establish a program in the northeast and Washington.<sup>69</sup> After these pilot projects got underway, the Forest Service turned to other states. The FLP's statutory language directed the Secretary of Agriculture to establish similar studies and programs for other regions of the country.<sup>70</sup> Other states must go through a detailed process to become participants.<sup>71</sup> Fifty-three states and territories are currently enrolled in the program that has protected 2,245,180 acres in 43 states and territories.<sup>72</sup>

A state seeking to participate in the FLP (other than one of the original four) must first develop an Assessment of Need showing how its region will benefit from implementation of the FLP. The Assessment of Need identifies areas meriting protection where property interests should be acquired. All identified lands must have

64. *Id.* § 2103(d)(1).

65. P. Law No. 100-446, 102 Stat 1774 (Sept. 27, 1988); 16 U.S.C. § 2103c(d)(2).

66. Beliveau, *supra* n. 48 at 515.

67. Mark D. Nelson, *Forest Land Ownership in the Coterminous United States*, in ESRI Map Book. Vol. 22 at 75-76 (Ed. Michael Law ESRI Press 2007), available at [http://nrs.fs.fed.us/pubs/maps/map497\\_pg76.pdf](http://nrs.fs.fed.us/pubs/maps/map497_pg76.pdf) (last visited July 31, 2012).

68. 16 U.S.C. § 2103c(d)(2).

69. S. Rep. No. 101-357 at 4937-38.

70. 16 U.S.C. § 2103c(d)(2).

71. See generally 16 U.S.C. § 2103c(d) and USDA Forest Service, Forest Legacy Program Users' Guide (June 2006), available at [http://www.fs.fed.us/spf/coop/library/flp\\_usersguide.pdf](http://www.fs.fed.us/spf/coop/library/flp_usersguide.pdf) (last visited July 31, 2012) [hereinafter "FLP Handbook"]

72. U.S. Forest Service website, *supra* n. 57.

“significant environmental values or . . . be threatened by conversion to nonforest uses.”<sup>73</sup> A state’s Assessment of Need sets the criteria for which lands should be protected (identifying specific areas called “Forest Legacy Areas”), sets the goals for the program, and outlines the state’s plan for public participation.<sup>74</sup> The Forest Service and the Department of Agriculture review and approve state Assessments of Need.<sup>75</sup>

After federal approval of the Assessment of Need, the state collects project applications from landowners who possess properties in areas designated as in need of protection: parcels within Forest Legacy Areas.<sup>76</sup> Projects go through a two-step competitive process. First, states identify and rank projects working with the State Forest Stewardship Coordinating Committees.<sup>77</sup> States then forward a maximum of three projects to be evaluated by a national panel, which evaluates and ranks the projects based on national criteria. These criteria include considering whether the land is important, threatened, and strategic.<sup>78</sup> Priority for acquisition will go to lands that can be effectively protected and managed and that have important scenic, recreational, or ecological conservation values.<sup>79</sup> A final prioritized list is included in the President’s budget.<sup>80</sup>

After going through the application and budget process, the Forest Service can proceed with an individual project. The federal FLP funding covers up to 75% of land conservation costs including appraisals, surveys, closing costs, title work, and insurance.<sup>81</sup> Each project involves public acquisition of property, either in fee title or

---

73. 16 U.S.C. § 2103c(e).

74. Dan Tesini, *Working Forest Conservation Easements*, 41 Urb. Law. 359, 364-65 (2009).

75. FLP Handbook, *supra* n. 71, at 3.

76. USDA Forest Service, Final Forest Legacy Program Implementation Guidelines, 12-13 (June 30, 2003), *available at* [http://www.fs.fed.us/spf/coop/library/fpl\\_guidelines.pdf](http://www.fs.fed.us/spf/coop/library/fpl_guidelines.pdf) (last visited June 4, 2012) [hereinafter FLP Guidelines].

77. FLP Handbook, *supra* n. 71, at 53.

78. FLP Guidelines, *supra* n. 76, at 12-13.

79. 16 U.S.C. § 2103c(e).

80. FLP Guidelines, *supra* n. 76, at 14.

81. Dan Tesini, *Working Forest Conservation Easements*, 41 Urb. Law. 359, 364 (Spring 2009).



through a partial interest like a conservation easement. Initially, only the Forest Service could hold title to FLP lands (whether in fee simple or through conservation easements). The 1996 amendments to the program enabled states to manage their own programs and to hold the property interests.<sup>82</sup> All lands and conservation easements purchased with FLP funds are held by government agencies, but land trusts (nonprofit conservation organizations) assist the program by working with landowners, identifying projects, helping secure cost-share, and facilitating completion of projects.<sup>83</sup>

Once a project receives FLP funding, the landowner is responsible for managing the property in accordance with a forest management plan.<sup>84</sup> The plan must be in place before acquisition of the land or conservation easements. Specifically, there must be “a Forest Stewardship Plan or multi-resource management plan that has been approved by the landowner and the State Forester or designee.”<sup>85</sup> The FLP does not mandate any specific elements in the management plan, other than a requirement that the plan “include provisions to meet land conservation objectives of the FLP.”<sup>86</sup> The FLP does not dictate any specific forest management techniques or practices.<sup>87</sup>

In June 2003, the Forest Service issued the Final FLP Implementation Guidelines (or “Guidelines”).<sup>88</sup> These Guidelines (along with the statute itself) set the rules and procedures for the FLP process. Most of the requirements for the FLP come from the

82. Federal Agricultural Improvement and Reform Act of 1996, P.L. 104-127, Title III – Conservation; Subtitle G- Forestry; Section 374, Optional State Grants for Forest Legacy Program.

83. U.S. Forest Service website, *supra* n. 57.

84. FLP Guidelines, *supra* n. 76 at 21.

85. *Id.*

86. *Id.*

87. The FLP Handbook describes the basic components of a stewardship plan but does not establish any specific requirements of the plans. FLP Handbook, *supra* n. 71, at 123-24.

88. *Id.* The FLP Guidelines were amended in December 2011. FLP Guidelines, *supra* n. 76. A guidance document is an “agency statement of general applicability and future effect, other than a regulatory action . . . that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.” Final Bulletin for Agency Good Guidance Practices [OMB], 72 F.R. 3432, 3434 (Jan. 25, 2007).

Guidelines as the statute provides few details. For example, it is the Guidelines (not the statute) that require FLP conservation easements to be perpetual.<sup>89</sup> Agency guidance documents, like the FLP Guidelines, do not impose legally binding requirements.<sup>90</sup> However, agency directors can require their employees to follow agency policy based on their supervisory powers.<sup>91</sup>

In addition to the Guidelines, the Forest Service created an FLP Handbook (or “Handbook”) in 2006.<sup>92</sup> The FLP Handbook walks states and landowners through the FLP process and offers sample documents, including conservation easements. The FLP Handbook is not a product of notice and comment rulemaking or even less formal public participation processes. It is not legally binding.<sup>93</sup> The statute, Guidelines, and Handbook form the basis for the FLP and are the main sources of information regarding Program requirements.

As of February 2012, the FLP has protected 2.245 million acres.<sup>94</sup> The Forest Service usually does a 50% cost share instead of the required 25% cost share from nonfederal sources.<sup>95</sup> The FLP demand exceeds \$200 million annually.<sup>96</sup> In fiscal year 2010, the FLP received \$78.96 million and received \$55.15 million in 2011.<sup>97</sup> The President requested \$135 million for 2012,<sup>98</sup> and the Forest

---

89. The Forest Service has not promulgated any regulations associated with the implementation of this law.

90. Final Bulletin for Agency Good Guidance Practices [OMB], 72 F.R. 3432, 3434 (Jan. 25, 2007).

91. *Id.* at 3437.

92. FLP Handbook, *supra* n. 71.

93. In 2007, the Office of Management and Budget issued a bulletin setting forth rules for agency guidance documents. As both the FLP Guidelines and FLP Handbook predate this bulletin, it is not surprising that they do not adhere to restrictions within the bulletin. For example, revisions to both documents would likely require some level of public participation and the mandatory language appearing in the documents would need alteration.

94. U.S. Forest Service, Forest Legacy Program: Protecting Forests Through Partnership, (Fact Sheet handed out by the USFS at the Land Trust Alliance Rally in Milwaukee, WI in October 2011) (Oct. 3, 2011).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Service's 2013 budget seeks \$60 million.<sup>99</sup> Sixty-five percent of FLP lands are protected by conservation easements (with the remaining 35% in fee).<sup>100</sup>

### *C. General Concerns*

The FLP is not without controversy. Since its inception, there have been challenges from both the right and the left. At early hearings on the FLP, anti-regulatory and private property groups objected to the program. They seemed most worried that the designation of Forest Legacy Areas would serve to bolster efforts by governments to use eminent domain to take control of those lands.<sup>101</sup> The Forest Service assured the concerned citizens that the FLP would only involve willing landowners, no one would be coerced into participation, and land within Forest Legacy Areas would not be more likely to be condemned for public use than any other properties.<sup>102</sup> To date, the fears seem to have been unfounded.

While the Forest Legacy Program does include "vast expanses of land in the program,"<sup>103</sup> as some commenters feared, this has not led to vast expanses coming into public ownership. The size of Forest Legacy Areas may be large, but individual projects are smaller.<sup>104</sup> Increasingly, we are seeing larger projects, but many of these involve conservation easements where the underlying land remains in private hands. There are no records of public agencies

---

99. The United States Forest Service manages 193 million acres. U.S. Department of Agriculture Forest Service, Fiscal Year 2013 Budget Overview Appendix B (2012), *available at* <http://www.fs.fed.us/aboutus/budget/2013/fy2013-overview.pdf> (last visited March 29, 2012).

100. U.S. Forest Service Website, *supra* n. 83.

101. Beliveau, *supra* n. 48, at 517.

102. *Id.* at 518.

103. *Id.* at 517.

104. See, e.g., Wisconsin Department of Natural Resources, *Wisconsin's Federal Forest Legacy Program Map*, at [http://dnr.wi.gov/topic/ForestPlanning/documents/FLP\\_MapAccomplishments.pdf](http://dnr.wi.gov/topic/ForestPlanning/documents/FLP_MapAccomplishments.pdf) (last visited June 13, 2012); Department of Environmental Conservation, *Forest Legacy Program Map*, <http://www.dec.ny.gov/lands/71617.html> (last visited June 13, 2012).

using the information gathered during the Assessment of Need process to identify land to be acquired via eminent domain. There is also no record of this information serving as justification for imposing more stringent land-use controls in this area, nor has it led to increased federal involvement in local land-use decisions.<sup>105</sup>

Conservationists worry that the FLP does not go far enough and may not lead to good environmental management.<sup>106</sup> While the FLP helps keep land forested, it does little to guarantee good forest management practices. It requires land burdened by FLP conservation easements (but not fee lands or cost-share conservation easements) to have a management plan that promotes sustainable forest practices and limits development. However, nothing in the FLP prevents uses of techniques like clear-cutting or intensive pesticide use, which have negative ecological consequences. With these general concerns as a backdrop, the following sections examine the role of conservation easements in the FLP and the special concerns that arise with them.

#### IV. THE USE OF CONSERVATION EASEMENTS IN THE FOREST LEGACY PROGRAM

##### *A. Conservation Easements Generally*

Use of conservation easements is a major thrust of the FLP. Conservation easements are nonpossessory interests in land. They restrict a landowner's use of land in an effort to obtain a conservation benefit. They commonly restrict subdivision and development. The use of conservation easements has rapidly grown throughout the country, as they appear a flexible tool usable by governments and nonprofit organizations alike in their various land conservation efforts.

One of the attractions of conservation easements is that they can protect working landscapes. Instead of limiting conservation and environmental protection to nature preserves, conservationists can acknowledge that some working landscapes provide greater

---

105. Beliveau, *supra* n. 48, at 517.

106. Christine Kukka, *Strategies for Saving the Northern Forest*, *Maine Times* 21, 22 (Aug. 30, 1991).

environmental amenities than developed landscapes would. This has led to a pervasive use of conservation easements to protect agricultural and forestry land. As with other conservation easements, restrictions on working forestlands generally serve to perpetuate the status quo.

### *B. FLP Conservation Easements*

From the beginning, the FLP has been a program to create conservation easements.<sup>107</sup> Congress wanted permanent protection of forestland, but cut funding for land purchase annually since 1978.<sup>108</sup> Conservation easements appeared a cheaper way to meet the same goals. Conservation easement use is emphasized throughout the Forest Legacy Program statute including in the purposes section, which states that protection of forestland shall occur "through conservation easements and other mechanisms."<sup>109</sup> The statute prohibits exacting or condemning conservation easements under this program, requiring the property interests under the FLP to come from "willing sellers."<sup>110</sup> The statute permits, but does not require, the conservation easements involved to be held in perpetuity.<sup>111</sup> Agency guidance, however, requires perpetuity.<sup>112</sup>

Conservation easements under the FLP seek to protect a working landscape rather than protect land in a park-like preservation. Although important, ecological goals are not the primary motivation for the program. FLP conservation easements protect working forests and facilitate continued timber harvesting. Other than the fact that they protect and promote active forestry, FLP conservation easements differ greatly from each other. The conservation easements must comply with the requirements of the FLP, which are not overly cumbersome. As outlined in the FLP Guidelines, the conservation easements must be appraised by a

---

107. S. Rep. No. 101-357 at 4934.

108. *Id.* at 4935.

109. 16 U.S.C. § 2103c(a).

110. *Id.* § 2103c(c).

111. *Id.* § 2103c(d)(1).

112. FLP Guidelines, *supra* n. 76, at 18. Although agency guidance is nonbinding on others, the Forest Service can require its employees to follow agency policy and only purchase perpetual conservation easements.

qualified Review Appraiser and the land title must be free from any encumbrances that would not be consistent with the goals of the FLP.<sup>113</sup> Federal payment cannot exceed fair market value, and the sale must be voluntary.<sup>114</sup> The FLP requires development of either a Forest Stewardship plan or a “multiple resource management plan” for its working forest conservation easements (but not for fee simple holdings).<sup>115</sup> There is no requirement for third-party certification.

The statute does not dictate format or language for FLP conservation easements. The FLP Guidelines, however, indicate that FLP conservation easements must have “language pertinent to the purposes of the FLP and a reversionary provision to ensure the conservation investment of FLP into the future.”<sup>116</sup> All conservation easements contain provisions explaining their purposes. The Forest Service recommends that conservation easements associated with the FLP contain purpose language that echoes the purposes stated in the 1990 Farm Bill. Neither the statute nor the FLP Guidelines dictate specific language, but the Guidelines offer five suggested ways to state the purposes.<sup>117</sup> All five examples specifically name the FLP and provide a citation to the United States Code.<sup>118</sup> In the 2006 FLP Handbook, however, the Forest Service did set forth specific “required” language:

These purposes are consistent with the clearly delineated open space conservation goals and objectives as stated in the Forest Legacy Program as established in Section 1217 of Title XII of the Food, Agriculture Conservation and Trade Act of 1990 (16 [United States Code] Section 2103c) which was created “to protect environmentally important

---

113. *Id.* at 17-18.

114. *Id.* at 18.

115. *Id.*

116. *Id.*

117. *Id.* Appendix I.

118. *Id.*

private forest lands threatened with conversion to non-forest uses.”<sup>119</sup>

Thus, FLP conservation easements after 2006 should contain this exact phrase. As explained above, the FLP Handbook is a nonbinding document, and a conservation easement would not be invalid for failure to include such language. Where the Forest Service is party to a conservation easement, we would expect to see such language because the Forest Service can require its employees to include such language in their conservation easements. It is not clear whether these phrases must be included in conservation easements entered into by state agencies that administer the program.

The FLP Guidelines also state that FLP conservation easements must contain reversion language. The Guidelines offer only one suggested phrasing for the reversion section:

The Easement Holder acknowledges that this Easement was acquired with Federal funds under the Forest Legacy Program (P.L. 101-624; 104 Stat. 3359) and that the interest acquired cannot be sold, exchanged, or otherwise disposed, except as provided in Section 5.A, unless the U.S. is reimbursed the market value of the interest in land at the time of disposal. Provided, however, the Secretary of Agriculture may exercise discretion to consent to such sale, exchange, or disposition upon the State's tender of equal valued consideration acceptable to the Secretary.<sup>120</sup>

Again, the Guidelines do not state that this exact language must appear, it is merely offered as sample language. The FLP Handbook, however, states that this language (with some small nonsubstantive changes) is required.<sup>121</sup>

---

119. FLP Handbook, *supra* n. 71, at 81.

120. FLP Guidelines, *supra* n. 76, Appendix I.

121. FLP Handbook, *supra* n. 71, at 81

The FLP Handbook also provides “required language” regarding cost-share, identifying the state conservation easement law and federal Internal Revenue Code on conservation easements,<sup>122</sup> and confirming that the conservation easement is perpetual.<sup>123</sup> Presumably, the language regarding the cost share is only applicable for conservation easements that are used to meet nonfederal cost-share requirements,<sup>124</sup> but the FLP Handbook presents all the provisions as “Required Language.”<sup>125</sup> In multiple places, the Forest Service indicates that FLP conservation easements should follow state conservation easement laws.<sup>126</sup> State conservation easement statutes have differing requirements regarding purposes, holders, enforcement, and other provisions. Thus, we would expect FLP conservation easements to have slightly different forms based on the needs of the individual property, the date of the agreement, and the state. Additionally, there may be some variation based on what entity is the holder of the FLP conservation easement.

### C. Role of Land Trusts

Land trusts are nonprofit conservation organizations. They work to protect land, chiefly through owning land in fee title or through holding conservation easements.<sup>127</sup> Some land trusts

---

122. “WHEREAS, Grantee is a governmental unit qualified for holding conservation easements under Section 170(b)(1)(A)(v) of the Internal Revenue Code and Title \_\_, Chapter \_\_, of the [state] Code.” FLP Handbook, *supra* n. 71, at 81.

123. FLP Handbook, *supra* n. 71, at 81.

124. See discussion of cost-share conservation easements in section 2 below.

125. FLP Handbook, *supra* n. 71, at 81.

126. See, e.g., *Id.* at 17. It may at first seem obvious that FLP conservation easements should follow state conservation easement statutes, but there are arguments supporting the contention that federal conservation easements (those held by the federal government or created under a federal scheme) need not comply with federal law. Jessica Owley, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. Env. L. & Litig. 293, 336-37 n. 212 (2004); Jessica Owley, *Exacted Conservation Easements: Emerging Concerns with Enforcement*, Prob. & Prop. 51, 54 (January/February 2012).

127. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands* in *Protecting the Land* 9, 19



facilitate land transactions, purchasing land with the purpose of transferring the land or conservation easements to public agencies afterwards.<sup>128</sup> Increasingly, land trusts are working with public agencies to create, monitor, and manage conservation easements.<sup>129</sup> Additionally, in many areas, land trusts take on what might have once been considered public duties by holding and enforcing conservation easements.

The role of land trusts in the FLP is multifaceted. While Congress appeared to value land trusts, it had enough concerns about these private organization to specifically limit the role they can play in facilitating the Forest Legacy Program by prohibiting them from holding FLP conservation easements. The legislative history does not explain why Congress sought to limit their involvement.<sup>130</sup> The Forest Service recognizes the benefit of involving land trusts in making connections in the community, identifying lands to protect, promoting the FLP, and working with landowners and other stakeholders to facilitate protection of land.<sup>131</sup> In fact, the FLP Handbook identifies several land trusts by name as potential partners for FLP transactions.<sup>132</sup> Additionally, land trusts can insert themselves into the FLP process through two other routes. First, state agencies can contract with land trusts to monitor and manage publicly held FLP forestlands. Second, land trusts can hold

---

(eds. Julie Ann Gustanski & Roderick Squires 2000); Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements* 44 Nat. Resources J. 483, 484 (2004).

128. The Nature Conservancy, Press Release, *Conservation Land Transfers Add to Protected Areas of Silvio O. Conte National Fish and Wildlife Refuge*, (Nov. 15, 2011), available at <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/connecticut/newsroom/conservation-land-transfers-add-to-protected-areas-of-silvio-o-conte-natio.xml> (last visited July 31, 2012) (describing transfer from a land trust to the U.S. Fish and Wildlife Service).

129. See generally Bradford S. Gentry, J. Daniel Oppenheimer & Randal A. Strobo, *Optimizing Private Land Conservation and Public Land Use Planning/Regulation* (2010).

130. Nor does it explain why Congress or the Forest Service felt that land trusts would be good partners.

131. See FLP Handbook, *supra* n. 71, at 9-10; FLP Guidelines, *supra* n. 76 at 22.

132. FLP Handbook, *supra* n. 71, at 10-12.

conservation easements that serve to meet nonfederal cost-share requirements.

### *1. Land Trusts and FLP Conservation Easements*

Two types of conservation easements arise in the Forest Legacy Program. “FLP conservation easements” are those purchased with FLP funds. “Cost-share conservation easements” are donated conservation easements that can be used to meet the 25% nonfederal cost-share requirement. These two types of conservation easements are both important components of the program and cover key properties, but the rules regarding them differ. Neither Congress nor the Forest Service has offered justification for treating these two types of conservation easements differently. Indeed, the inconsistency in conservation easement rules is more likely to complicate the program than to facilitate it.

Forest Legacy Program properties (including both FLP conservation easements and fee title properties) must be held by a government entity, which has the responsibility to monitor and manage the property, as well as enforce any conservation easements or deed restrictions.<sup>133</sup> Land trusts, individuals, and nongovernmental organizations cannot hold FLP properties. Thus, no FLP conservation easements are held by land trusts. However, land trusts can still be important players in FLP conservation easements.

The government entity holding a FLP conservation easement can delegate or assign its duties to another government entity as long as the assignment is in writing and approved by the Forest Service.<sup>134</sup> For example, a local government might be the holder of the FLP conservation easement. It might assign its managing, monitoring, and enforcement duty to the state’s department of natural resources. This second governmental entity (who is not the holder of the property right) may again delegate responsibility for monitoring and managing the land to other parties such as land trusts, government entities, or conservation groups.<sup>135</sup> The second

---

133. FLP Guidelines, *supra* n. 76, at 20.

134. *Id.*

135. *Id.*

entity cannot delegate enforcement duties or rights. Continuing with our example above, the state department of natural resources can now delegate monitoring and enforcing duties to a local land trust. The department of natural resources retains the right to enforce. The local government holding the FLP conservation easement then has no clear responsibilities associated with the FLP conservation easement. It can, however, revoke the assignment at any time and choose to manage, monitor, or enforce the FLP conservation easement. Note, under this structure, the holder of the property right cannot directly delegate monitoring or management authority to a land trust. The government holder delegates to another government entity who then delegates to a land trust. That is, the local government could not have delegated management and monitoring of the FLP conservation easement directly to the land trust. It can delegate to the state agency, which can then delegate to the land trust. The result is the same. The statute, Guidelines, and FLP Handbook do not explain the need for this cumbersome structure.

Land trusts and other private groups can never obtain the right to enforce FLP conservation easements. Thus, while a land trust may monitor and manage a conservation easement, only a government entity (either the conservation easement holder or a governmental entity assigned the right to enforce by the original holder) can enforce the terms of the agreement. Again, there is nothing indicating why land trusts cannot be assigned the right to bring an enforcement action. The federal government appears to trust land trusts with some of the essential duties associated with holding conservation easements but for unexplained reasons it does not allow land trusts to enforce FLP conservation easements and requires land trust involvement to be mediated through a government agency. The likely explanation for such a construction is that Congress wanted the enforcement of these agreements to remain in public hands (that is, if Congress even realized the inconsistency in the program).

## *2. Land Trusts and Cost-Share Conservation Easements*

Land trusts may also become involved with the FLP as holders of cost-share conservation easements. While land trusts

cannot hold conservation easements acquired with federal funds, conservation easements that have been donated to land trusts can serve as part of the 25% nonfederal cost share.<sup>136</sup> In fact, as demonstrated by the example projects discussed below, this is a common method of meeting the nonfederal cost share.

These land-trust-held conservation easements must meet several requirements to qualify as contributions to the nonfederal cost share. First, the FLP Guidelines indicate that these privately held conservation easements must be *donated* conservation easements.<sup>137</sup> It does not explain why conservation easements purchased and held by land trusts would not qualify. Additionally, cost-share conservation easements must contribute to the objectives and priorities of the FLP, be within a Forest Legacy Area or other federal properties, be perpetual, and be held by a qualifying land trust that meets IRS requirements.<sup>138</sup> There must also be documentation from the donor indicating her intention for the conservation easement to qualify as part of the nonfederal cost share, as well as an approval of the cost-share arrangement from the lead state agency.<sup>139</sup> These requirements may exist to prevent landowners and states from using already established conservation easements (or exacted conservation easements) from qualifying as part of the 25% cost share.

These cost-share conservation easements have overlapping but not identical requirements as the conservation easements purchased under the FLP and described above. The FLP Guidelines describe these two types of conservation easements in different sections.<sup>140</sup> The section describing cost-share conservation easements contains no requirement for a Forest Stewardship or management plan. There are no requirements that federal appraisal standards be met. Unlike FLP conservation easements, cost-share conservation easements can be held by land trusts and may be

---

136. *Id.* at 17-18.

137. *Id.*

138. *Id.* at 17.

139. *Id.* at Appendix I.

140. *Cf. FLP Cost Share Requirements*, FLP Guidelines, *supra* n. 76, Part 1, § XIII (at 16-17) *with Acquisition of Lands or Interests in Lands*, FLP Guidelines, *supra* n. 76, Part 1, § XIV (at 17-18).

located outside of Forest Legacy Areas as long as they are within other federal land boundaries. Requirements for conservation easement terms also differ between the cost-share conservation easements and the FLP conservation easements. It does not appear from the FLP Guidelines that the cost-share conservation easements need to contain the same language regarding purposes or reversion as must appear in FLP conservation easements. The cost-share conservation easements must, however, contain a provision that “directs all of the [conservation] easement holder’s proceeds from a subsequent sale or exchange of interests in the land be used in a manner consistent with the conservation purposes identified for the subject interests in lands.”<sup>141</sup> Additionally, if cost-share conservation easements are “conveyed or the rights or title are modified in a way that is inconsistent with the purposes of the FLP then the State must restore the cost share value dedicated in the grant agreement.”<sup>142</sup>

While the FLP Guidelines do not indicate any specific language for cost-share conservation easements, the FLP Handbook does appear to expect certain language to appear in the agreements. One provision from the “Required Language” for conservation easements presented in the FLP Handbook appears to refer specifically to cost-share conservation easements instead of FLP conservation easements: “**Cost Share** - WHEREAS, grantors have specifically requested that the value of donation interests at transfer be used as a non-federal match for the Forest Legacy Program.”<sup>143</sup>

The other required conservation easement language in the FLP Handbook seems to focus on FLP conservation easements (and not cost-share conservation easements) because the language mentions FLP funds and/or government entities holding the conservation easements.<sup>144</sup> The only exceptions are the cost-share language above and a phrase stating that conservation easement runs with the land in perpetuity.<sup>145</sup> The three example conservation easements in the FLP Handbook are held either by the Forest

141. *Id.* Appendix I.

142. *Id.* at 17.

143. FLP Handbook, *supra* n. 71, at 81.

144. *Id.*

145. *Id.*

Service or a state agency.<sup>146</sup> They appear to be FLP conservation easement examples, not cost-share conservation easement examples. Section 1.6 of the FLP Handbook provides guidance for conservation easements and does not indicate whether it also applies to cost-share conservation easements.<sup>147</sup>

Both FLP conservation easements and cost-share conservation easements are facets of the Forest Legacy Program, yet the rules regarding them differ. Both types of conservation easements seek to fulfill the goal of the FLP: protecting important forestlands from conversion to nonforest uses. If Congress felt it was important for a public entity to have enforcement authority over conservation easements, why did it open the door for land trusts to hold cost-share conservation easements? If Congress felt it was important that protected forestlands be governed by a management plan, why didn't it require such plans for cost-share conservation easements? Neither the statute, legislative history, nor agency guidance indicates why Congress would have wanted two different types of conservation easements with such different rules regarding holders and terms.

#### *D. Examples*

To illustrate the mechanics of the FLP and enable concrete consideration of the use of conservation easements in the Program, this section presents three example conservation easements. All three have been identified as FLP conservation easements by the state agencies administering the FLP and the U.S. Forest Service. We studied dozens of conservation easements in preparing this article. These three are not meant to give a comprehensive picture of the FLP, but to provide a sampling of commonly seen conservation easements. We selected conservation easements held by each of the three possible types of holders: the U.S. Forest Service, a state agency, and a land trust. We based our examples on the holder type and then selected for a range of years and states. Thus, we have one early conservation easement from 1994 in New York held by the federal government, a 2002 conservation easement

---

146. *Id.* § 3.5.

147. *Id.* § 1.6.

held by the South Carolina Department of Natural Resources, and a 2006 conservation easement in Wisconsin held by a land trust. This variation in holder, state, and year provides readers with an indication of the variety of conservation easements that exist.

### 1. *Federally Held: Denino Tract*

New York is one of the original FLP states, as it was covered by the Northern Forest Land Study that gave rise to the FLP.<sup>148</sup> Thus, New York has some of the oldest properties protected by the FLP.

In 1994, the Deninos sold a 141-acre conservation easement to the U.S. Forest Service for \$86,393.<sup>149</sup> The Deninos then sold fee simple title over the entire property to the Town of Indian Lake for \$16,567.<sup>150</sup> The Deninos donated mineral rights to the New York State Department of Environmental Conservation.<sup>151</sup> Following a Memorandum of Understanding, the Department of Environmental Conservation is a designated third-party enforcer that manages and monitors the conservation easement.<sup>152</sup> The Department has not delegated its duties. The property encompasses 158.4 acres<sup>153</sup> between Bullhead Pond and the Indian River in the Town of Indian Lake, situated within the six-million-acre Adirondack State Park. The tract contains ninety-five acres of spruce-fir forest, twenty-two of which are wetland spruce-fir.<sup>154</sup> The remaining acres are northern hardwood forest.<sup>155</sup>

In accordance with FLP requirements, the tract is guided by a forest management plan, which is implemented by Department of Environmental Conservation.<sup>156</sup> The Denino conservation easement includes a "Forest Stewardship Plan" that serves as a

---

148. Beliveau, *supra* n. 48 at 511.

149. Deed of Conservation Easement for Denino, Hamilton County, N.Y., Received on Sept. 1, 1994, at 94 [hereinafter Denino CE].

150. *Id.* at 2.

151. *Id.* at 14-89.

152. *Id.* at 91.

153. *Id.* at 9.

154. *Id.* at 12.

155. *Id.* at 9.

156. *Id.* at 91.

management plan.<sup>157</sup> The primary goal expressed in the Plan is to improve recreational access to the Indian River,<sup>158</sup> with timber management comprising a secondary goal.<sup>159</sup> Associated goals include promoting additional undeveloped recreational uses, trail maintenance, and ecologically sound timber management.<sup>160</sup>

The objectives and purposes section of the Denino conservation easement does not include the specific language required by later-issued FLP Guidelines and FLP Handbook.<sup>161</sup> However, the conservation easement announces its adherence to “effectuate the purposes”<sup>162</sup> of Section 1217, Title XII in the 1990 Farm Bill, which outlines the goals and objectives of the FLP;<sup>163</sup> namely, the Denino conservation easement adheres to the FLP goal of providing “opportunities for public recreation.”<sup>164</sup> The Denino conservation easement does not contain any reversion section mandated by later FLP Guidelines.

The Denino Conservation Easement is a good example of an early FLP conservation easement. It is relatively small and held by the federal government. Before the 1996 amendment to the FLP, only the U.S. Forest Service could hold fee title or partial interests in land acquired under the FLP. Early projects also tended to be smaller and involve fewer parties and parcels. More recent FLP conservation easements in New York involve thousands of acres, billions of dollars, and many partners.<sup>165</sup>

---

157. *Id.* at 9.

158. *Id.*

159. *Id.* at 10.

160. *Id.* at 9.

161. FLP Handbook, *supra* n. 71.

162. Denino CE, *supra* n. 149 at 94.

163. *Id.* at 94.

164. *Id.* at 94.

165. See, e.g., New York Department of Environmental Conservation, Sable Highlands Conservation Easement Lands, *available at* <http://www.dec.ny.gov/lands/71173.html> (last visited July 31, 2012) (84,000 acres).



*2. State Held: Wappaolah Plantation*

South Carolina is facing both residential and commercial development pressure, leading to a conversion of forestlands.<sup>166</sup> Almost 88% of the state's forests are privately owned with only a small percentage of landowners being commercial forest landowners. Most of the forestlands are managed as "family forests," and the average size is only 65 acres.<sup>167</sup>

The state has administered the Forest Legacy Program in South Carolina since 1999.<sup>168</sup> The South Carolina Department of Natural Resources has received almost \$32 million of FLP funds and worked to conserve over 71,000 acres.<sup>169</sup> There are five Forest Legacy Areas in South Carolina.<sup>170</sup> Of the eleven completed FLP projects in the state, two were conservation easement acquisitions (the others were fee simple purchases).<sup>171</sup> It is not clear how many projects involved cost-share conservation easements.

In the Southern Coastal Forest Legacy Area, the Mead Easement project involved protecting 6,326 acres with multiple conservation easements.<sup>172</sup> The Wappaolah Plantation Block A Conservation Easement from 2004 was one of these. It covers 1,227.60 acres.<sup>173</sup> The Forest Service contributed \$6,795,300 to the

---

166. Draft SC Forest Legacy Program Assessment of Need Update, available at <http://www.state.sc.us/forest/sfra-leg.pdf> (last visited July 31, 2012).

167. *Id.* at 5.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at Appendix A.

172. *Id.*

173. Deed of Conservation Easement for Wappaolah Plantation Block "A" Berkeley County, S.C. Filed, recorded, and indexed on Dec. 15, 2004 (on file with author and available at <ftp://ftp2.fs.fed.us/incoming/r8/SPF/CF/South%20Carolina/Mead%20Easement%20Block%20A.pdf>) (last visited July 31, 2012) at 1. [hereinafter *Wappaolah CE*].

project as a whole,<sup>174</sup> but the text of the Wappaolah Conservation Easement does not indicate how much it cost.<sup>175</sup>

Robert and Barbara Mead granted this conservation easement to the South Carolina Department of Natural Resources.<sup>176</sup> The purpose of the conservation easement is to retain the land in its natural, scenic, and open space condition for conservation purposes.<sup>177</sup> It also identifies the property as important for protecting migratory waterfowl.<sup>178</sup>

This is an FLP conservation easement, not a cost-share conservation easement. Written in 2004, it appears to contain all of the requirements for FLP conservation easements, although it does not contain the exact phrases indicated as suggestions in the 2003 FLP Guidelines and as requirements in the 2006 FLP Handbook.

There is no information about whether the appraisal met federal standards, and we cannot assess whether the Forest Service paid more than fair market value. The conservation easement appears to meet most FLP requirements though. The Wappaolah Conservation Easement declares the property free of encumbrances<sup>179</sup> and the agreement to be a voluntary sale.<sup>180</sup> The project is the subject of a Forest Management Plan.<sup>181</sup> The plan is a simple one-page document attached to the conservation easement as an exhibit.<sup>182</sup> It is not clear whether the restrictions therein should be considered promoting “sustainable forestry” as required by the FLP.<sup>183</sup> While the Forest Management Plan does not restrict

---

174. Draft SC Forest Legacy Program Assessment of Need Update, Appendix A, *available at* <http://www.state.sc.us/forest/sfra-leg.pdf> (last visited July 31, 2012).

175. A reader of this conservation easement might (incorrectly) assume that it was a donated conservation easement because there is no purchase price or sale mention and there are multiple references to the Internal Revenue Code sections that apply to donated conservation easements.

176. *Wappaolah CE*, *supra* n. 173 at 1.

177. *Id.* at 4-5.

178. *Id.* at 2.

179. *Id.*

180. *Id.* at 4-5.

181. *Id.* at 7.

182. *Id.* at Exhibit B.

183. FLP Guidelines, *supra* n. 76, at 18. U.S. Forest Service, Forest Stewardship Program National Standards and Guidelines 8 (2009), *available at*

development of the parcel, the conservation easement does limit subdivision to four parcels.<sup>184</sup>

The agreement states the goals of the FLP, mentions that South Carolina participates in the FLP, and explains that the conservation easement will help meet the objectives for the Southern Coastal Forest Legacy Area as outlined in South Carolina's Assessment of Need.<sup>185</sup> Together, this language conveys the information offered as sample purpose language in the FLP Guidelines.<sup>186</sup> The conservation easement also has a provision that mirrors the sample reversion clause from the FLP Guidelines under the heading of "Funding," stating that the U.S. must be reimbursed the market value of the conservation easement in the event it is extinguished or amended.<sup>187</sup>

The Wappaolah Conservation Easement appears a typical modern FLP conservation easement. It was purchased with FLP funds, is held by the state agency administering the Program, and seems to contain all of the components required in the statute and FLP Guidelines. It does not contain the exact language of the FLP Guidelines or FLP Handbook, but as this FLP conservation easement was entered into two years before the FLP Handbook declared that language to be required that is not surprising.

### 3. *Land-Trust Held: The Wild Rivers Conservation Easement*

Wisconsin began its participation in the Forest Legacy Program officially in 2001 when it completed its Assessment of Need. Wisconsin has four designated Forest Legacy Areas and seven FLP projects. The Wild Rivers Project is within the "Northern Forest" Forest Legacy Area, which comprises over one-third of the northern portion of the state.<sup>188</sup>

---

[http://www.fs.fed.us/spf/coop/library/fsp\\_standards&guidelines.pdf](http://www.fs.fed.us/spf/coop/library/fsp_standards&guidelines.pdf) (last visited July 31, 2012).

184. *Wappaolah CE*, *supra* n. 173, at 6-7.

185. *Id.* [173] at 3.

186. FLP Guidelines, *supra* n. 76, at 40-41.

187. *Wappaolah CE*, *supra* n. 173, at 18.

188. See Wisconsin Department of Natural Resources, *Wisconsin's Forest Legacy Areas*, <http://dnr.wi.gov/topic/ForestPlanning/legacyAreas.html> (last visited June 13, 2012) and Wisconsin Department of Natural Resources,

The Wild Rivers Legacy Forest is over 64,000 acres, and the project is the largest land conservation effort in Wisconsin's history.<sup>189</sup> The land provides important wildlife habitat, water quality protection, and recreational opportunities.<sup>190</sup> Additionally, the land is still in active forest management, producing saw logs and wood fiber.<sup>191</sup> This complicated land protection project involves many players and several sources of funding. The land in question was originally owned by International Paper, a forest products company.<sup>192</sup> The State of Wisconsin purchased 5,629 acres in fee simple from International Paper.<sup>193</sup> Two timber investment funds (Conservation Forestry, LLC and Forest Investment Associates) acquired an additional 63,378 acres in fee simple.<sup>194</sup> The Nature Conservancy (working with the Wisconsin Department of Natural Resources) acquired working forest conservation easements over the majority of the privately held land.<sup>195</sup> It was an \$83,675,000 acquisition with funding from private and public sources.<sup>196</sup> The Nature Conservancy led negotiation efforts with International Paper and then assigned its purchase rights to the timber investment firms. The Nature Conservancy then arranged the conservation easements on the land. There are ten conservation easements in this area. We examined Conservation Easement #10, which covers a temperate, broadleaf, and mixed forest habitat.<sup>197</sup>

The investment funds holding fee simple title to the land conveyed Conservation Easement #10 to The Nature Conservancy

---

*Wisconsin's Federal Forest Legacy Program Map*, at [http://dnr.wi.gov/topic/ForestPlanning/documents/FLP\\_MapAccomplishments.pdf](http://dnr.wi.gov/topic/ForestPlanning/documents/FLP_MapAccomplishments.pdf) (last visited June 13, 2012).

189. Press Release, The Nature Conservancy, Partnership Completes Wild Rivers Legacy Forest Acquisition (July 6, 2006), available at <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/wisconsin/newsroom/partnership-completes-wild-rivers-legacy-forest-acquisition.xml> (last visited April 13, 2012).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Conservation Easement #10 at 2

for \$10, making this a donated (or technically a bargain-sale) conservation easement.<sup>198</sup> Because this is a conservation easement donated to a nonprofit organization, it qualifies as a charitable contribution under the Internal Revenue Code and the landowners should have been able to receive a tax deduction for its value.<sup>199</sup> Alternatively, the donation value of the conservation easement could have been used to meet nonfederal cost-share requirements.<sup>200</sup> It is not clear from the text of the conservation easement which approach was followed.

It appears that The Nature Conservancy plans to eventually convey the conservation easement to the State of Wisconsin.<sup>201</sup> All the parties involved and the U.S. Forest Service describe this project (and this conservation easement) as being part of the Wild Rivers Forest Legacy Project.<sup>202</sup> However, as a land-trust held conservation easement, Conservation Easement #10 could not have been purchased with FLP funds. It may be that this is a cost-share conservation easement. There is a possibility that it is neither type of conservation easement, but just covers land within the designated project area. The documents themselves do not indicate what type

198. *Id.* at 2.

199. *See* Internal Revenue Code § 170(h).

200. *See supra* § 2. Whether a conservation easement could both garner a tax deduction and satisfy nonfederal cost share requirements is not clear. It seems inappropriate to receive both government benefits for one conservation easement.

201. Wisconsin Department of Natural Resources, Natural Resources Board Agenda Item: Land and Easement Acquisition – Wild Rivers and Forest Legacy Program – Florence, Forest and Marinette Counties (April 6, 2006), available at <http://dnr.wi.gov/org/nrboard/agenda/April06/3B2.pdf> (last visited April 13, 2012).

202. Wisconsin Department of Natural Resources, *Wisconsin's Federal Forest Legacy Program Map*, at [http://dnr.wi.gov/topic/ForestPlanning/documents/FLP\\_MapAccomplishments.pdf](http://dnr.wi.gov/topic/ForestPlanning/documents/FLP_MapAccomplishments.pdf) (last visited June 13, 2012) (state map labeling the Wild Rivers Project as an FLP Project); Press Release, The Nature Conservancy, Partnership Completes Wild Rivers Legacy Forest Acquisition (July 6, 2006), available at <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/wisconsin/newsroom/partnership-completes-wild-rivers-legacy-forest-acquisition.xml> (last visited April 13, 2012) (land trust describing project as part of the FLP); U.S.D.A., Northeastern Area Forest Legacy Program Yearbook 2008 at 57 (2009) (federal government listing Wild River Project as an FLP project).

of conservation easement this is. With this uncertainty, we cannot determine which rules this conservation easement should follow. Should we expect to see it comply with the requirements for FLP conservation easements, cost-share conservation easements, or neither? We cannot determine what level of public benefits were exchanged for this conservation easement either. On its face, it looks like a donated conservation easement that we would expect to have garnered the landowners (the investment funds) a tax break. However, it may be that the conservation easement was created in exchange for receiving federal money for other portions of the project. Understanding the public commitments behind conservation easements can guide enforcers and judges in the event of future compliance or termination proceedings.<sup>203</sup>

Examining Conservation Easement #10 reveals that some of the FLP and cost-share terms are included but not all. We cannot determine from the document whether the appraisal met federal requirements or if the title is free from other encumbrances. However, it does appear to be a voluntary sale and the payment was far below fair market value, thereby meeting FLP conservation easement requirements. Additionally, there is a forest management plan that promotes sustainable forestry and restricts development.<sup>204</sup> Thus, the general guidelines for FLP conservation easements may well be met—other than the fundamental requirement of a public holder for the conservation easement.

Beyond the general requirements for FLP conservation easements, the FLP Guidelines and FLP Handbook also present specific provisions that should be included in the documents. First, there should be language pertinent to the FLP purposes. The FLP Guidelines proffer five examples while the FLP Handbook (issued three years later) presents one “required” paragraph.<sup>205</sup> All of these examples include specific citation to the Farm Bill and the United

---

203. See Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 Vermont L. Rev. 261, 300-301 (2011) (explaining the importance of understanding the origin of conservation easements for their long-term viability).

204. Conservation Easement #10, *supra* n. 197, at 11-13

205. FLP Guidelines, *supra* n. 76 at Appendix I; FLP Handbook, *supra* n. 71 at 81.

States Code sections creating the FLP. The purposes of Conservation Easement #10 are to assure long-term, professional forest management, protect conservation values, and secure public recreation.<sup>206</sup> While these purposes align with the goals of the FLP, it does not contain any of the suggested language or any explicit reference to the program or federal laws (other than the Internal Revenue Code).

Both the FLP Guidelines and FLP Handbook present suggested/required language for a reversionary provision. Conservation Easement #10 does not contain the exact reversionary language suggested/required by the federal agency. Yet, if Conservation Easement #10 does state that if it is one day acquired by the State of Wisconsin with federal funds, the U.S. must be reimbursed if the State later disposes of the conservation easement.<sup>207</sup> The provision spelling out that requirement mirrors the sample language from the FLP Handbook and Guidelines without mentioning the FLP. This provision is only applicable if The Nature Conservancy sells the conservation easement to the state of Wisconsin and Wisconsin uses federal money to fund the purchase.

The FLP Handbook also indicates that FLP conservation easements must contain a provision acknowledging that the state agency holding the conservation easement is a valid holder under both the Internal Revenue Code and the state's conservation easement statute.<sup>208</sup> Conservation Easement #10 contains this language even though it is not currently held by the state.<sup>209</sup>

The structure and language of Conservation Easement #10 seem to align closely with the requirements for FLP conservation easements, likely in preparation for a planned purchase of the conservation easement. It seems odd to have some of the FLP language but not all. This may indicate intent to use FLP funds to buy the conservation easement, but six years later it is still in the hands of The Nature Conservancy. If the state does eventually purchase this conservation easement, it is not clear whether it would have to be rewritten (and thus renegotiated and potentially need

---

206. *Id.* at 3.

207. Conservation Easement #10, *supra* n. 197.

208. FLP Handbook, *supra* n. 71 at 81

209. *Id.* Recital C.

judicial approval of amendments) to conform to the FLP as outlined in the FLP Guidelines and FLP Handbook.<sup>210</sup>

If not an FLP conservation easement, Conservation Easement #10 might serve as meeting the nonfederal cost-share requirements of the FLP. This seems a likely scenario because it is held by a land trust instead of a government agency. Cost-share conservation easements do not have many requirements beyond having purposes that coincide with the goals of the FLP and containing a provision that the “holder’s proceeds from a subsequent sale or exchange of interests in the land be used in a manner consistent with the conservation purposes identified for the subject interests in lands.”<sup>211</sup> The FLP Handbook (which was issued the same month as this conservation easement was signed) also states that cost-share conservation easements must contain a provision specifically noting that the value of donation interests at transfer be used as a nonfederal match for the FLP.<sup>212</sup> Conservation Easement #10 does not contain any specific cost-share language, but it does state that if it is extinguished the proceeds will be used in a manner consistent with the purposes of the conservation easement.<sup>213</sup> Because the cost-share language requirement was issued contemporaneously with the signing of this conservation easement, its absence is not a clear indicator that this is not a cost-share conservation easement.

Conservation Easement #10 presents issues that are arising with many Forest Legacy Projects. The projects are growing in size and in the number of partners. Although the three main parties involved (the Forest Service, Wisconsin Department of Natural Resources, and The Nature Conservancy) consider this conservation easement to be part of the Wild Rivers Forest Legacy Project, one cannot identify its exact tie to the FLP from the text of the conservation easement because it does not mention the program.

---

210. This demonstrates one reason why the FLP program is likely to lead to the creation of conservation easements but not necessarily the transfer of existing conservation easements. Additionally, where conservation easements protect property, it seems unlikely that the Forest Service (or state agency involved) would view the acquisition as a conservation priority.

211. FLP Guidelines, *supra* n. 76, at 17.

212. FLP Handbook, *supra* n. 71, at 81.

213. Conservation Easement #10, *supra* n. 197, at 28.



Moreover, even if this conservation easement plays a role in the Forest Legacy Project, one cannot determine what role it plays. It appears to meet some of the requirements for cost-share conservation easements and some for FLP conservation easements. A lack of clarity in conservation easements can create concerns for transparency and enforcement as discussed in more detail below.

## V. CONCERNS WITH CONSERVATION EASEMENTS IN THE FOREST LEGACY PROGRAM

Our examination of conservation easements associated with the FLP raised several red flags. First, as we have noted elsewhere, there are concerns generally with the use of conservation easements to protect environmental amenities. Second, it is not evident that FLP conservation easements are the best tool for working forest conservation easements in particular. Third, the uncertain role of land trusts in the FLP creates concerns related to accountability and enforcement. Fourth, the confusing requirements in the agency guidance documents combined with a lack of clarity in the conservation easement documents raises concerns regarding transparency. This section addresses each of these concerns in turn.

### A. *Conservation Easements Concerns Generally*

Conservation easements are typically static piecemeal agreements and, although innovative, have been subject to much criticism.<sup>214</sup> They tend to perpetuate the status quo by locking in current land-use practices and preferences. This is true with FLP conservation easements and indeed is the goal of the FLP, which seeks to keep forestlands in production and prevent conversion of

---

214. See, e.g., Jessica Jay, *When Perpetual is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 Harv. Env. L. Rev. 1 (2012); Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 Stan. Env. L. J. 121 (2011). Conservation easements have been criticized for myriad reasons ranging from enforcement and accountability to recordation problems and worries about neoliberalism. Many of those concerns remain salient for FLP conservation easements, but this article focuses on issues that are unique to the FLP program and therefore we do not catalogue the potential parade of horrors here.

those lands to other uses. As the landscape changes due to climate change or other drivers, or as societal needs and desires change, the conservation easements may appear less suitable.<sup>215</sup>

Some describe the emergence of conservation easements as piecemeal because they tend to occur opportunistically where landowners or conservation easement holders see opportunity either to protect an area important to them and/or for personal gain through payments and tax breaks.<sup>216</sup> By situating the conservation easements within Forest Legacy Areas established through a state's Assessment of Need, FLP conservation easements may be more likely part of a coordinated effort. However, the program still relies on willing sellers and this could lead to encumbered parcels that are not connected to other protected lands. Yet, in the end, such parcels are less likely to be selected in the application process or receive federal approval and congressional funding because of the criteria used in selecting project sites.<sup>217</sup>

### 1. Working Forest Conservation Easement Concerns

The FLP appears popular with landowners because there are more applications each year than funding available. It also appears relatively popular with Congress and the President as the program continues to receive funding even during the recession and financial crises.<sup>218</sup> While we know the amount of money invested in the FLP and the number of acres covered, it is unclear whether the program is increasing the amount of forestland (or at least slowing the

---

215. See generally Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 Law & Contemp. Problems 199 (2011).

216. See, e.g., Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 Law & Contemp. Probs. 145, 172 (2011).

217. U.S. Forest Service, Forest Legacy Program: Project Scoring Guidance (June 28, 2011), *available at* [http://www.fs.fed.us/spf/coop/library/flp\\_score\\_guide.pdf](http://www.fs.fed.us/spf/coop/library/flp_score_guide.pdf) (last visited July 31, 2012) (explaining that likelihood of conversion to nonforest uses is an important consideration in ranking project applications).

218. U.S. Forest Service, Forest Legacy Program: Funded and Completed Projects, *available at* [http://www.fs.fed.us/spf/coop/programs/loa/flp\\_projects.shtml](http://www.fs.fed.us/spf/coop/programs/loa/flp_projects.shtml) (last visited June 14, 2012) (describing projects funded annually since 2006).

conversion of forestland). Conservation easements can cost up to 80% of a property's fee simple purchase. With such high purchase costs, some question whether conservation easements that simply reiterate current laws and land uses are worth the public expenditures.<sup>219</sup>

Working forest conservation easements restrict allowable forest management practices, but studies indicate that the practices proscribed are those that the landowner would have engaged in without the conservation easements in place. A conservation easement does not affect the likelihood of the land being used for timber harvests.<sup>220</sup> The presence of conservation easements does not affect the amount of wood cut or the method of harvesting used.<sup>221</sup>

Although the FLP designates important lands, reliance on a willing seller model means that nothing ensures protection of the most desired lands within the Forest Legacy Areas. In fact, it may be that the lands enrolled are those most likely to remain working forests. Several conservationists have expressed concerns that the most likely landowners to participate will be those who did not plan to change the use of their land.<sup>222</sup> Thus, it may be that those most likely to participate are those least likely to need the program.

## 2. *Enforcement Concerns*

Much has already been written about enforcement concerns with conservation easements, generally.<sup>223</sup> With a relatively short

219. Beliveau, *supra* n. 48, at 516

220. Kermit deGooyer & David E. Capen, *An Analysis of Conservation Easements, and Forest Management in New York, Vermont, New Hampshire, and Maine*. Final Report. Prepared for North East State Foresters Association at 21-22 (July 2004), available at [http://www.nefainfo.org/publications/nefa\\_final\\_report\\_7.2004.pdf](http://www.nefainfo.org/publications/nefa_final_report_7.2004.pdf) (last visited March 21, 2012).

221. *Id.* at 22.

222. Beliveau, *supra* n. 48, at 526.

223. See, e.g., Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 Vermont L. Rev. 261 (2011); Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 Law & Contemp. Probs. 279 (2011); Amy Wilson Morris & Adena R. Rissman, *Public Access To Information On Private Land Conservation: Tracking Conservation*

history (and few court cases), it is not yet clear how courts will address conservation easement enforcement actions. Rules regarding violations, amendments, and termination are unclear. Jurisdictions are largely unsettled on who has standing to bring enforcement actions, as well. These concerns are present with the FLP as well.

Enforcement concerns may be greater for working forest conservation easements than for other conservation easements. Because most FLP conservation easements require adherence to a management plan, monitoring for compliance may be more arduous. In 2001, when the Land Trust Alliance produced its report on Working Forest Conservation Easements, the idea of incorporating outside documents (like a management plan) into a conservation easement was relatively new and land trusts were not sure exactly what problems might arise. Specifically, they wondered what types of violations would be probable and what the right route for enforcement would be (via the forest management plan or via the conservation easement).<sup>224</sup> What level of violation of a management plan would rise to the level of a conservation easement violation? More than ten years later, these questions remain. Arguably, violations of a management plan incorporated into a conservation easement constitute violation of the conservation easement. Then conservation easement holders would enforce the management plan. But it is not clear that all holders have the capacity to monitor such plans. Instead of annual monitoring by an untrained volunteer, it may be necessary to have a licensed forester examine the property. While this may often occur, the law does not require it.

As part of a federal program funded and administered by the U.S. Forest Service, the public may have a heightened interest in ensuring FLP and cost-share conservation easements are enforced (compared with donated conservation easements not associated with such projects). Forest Legacy funding from the federal government

---

*Easements*, 2009 Wis. L. Rev. 1237 (2009); Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions* 6 Env. Law. 441 (2000).

224. Brenda Lind, *Trends in Working Forest Conservation Easements: A report from the April 2001 meeting of the Land Trust Alliance, Working Forest Conservation Easements Advisory Panel 4* (Nov. 2001).

cannot fund either monitoring or enforcement<sup>225</sup> even though such investments are key for ensuring the success of the program. Additionally, one might assume that the Forest Service or state agencies retain a right to enforce the conservation easements, but that does not appear to be the case. None of the conservation easements we reviewed contained provisions designating any co-holders or third-party enforcers. Without designated rights for co-holders, third-party beneficiaries, or third-party enforcers, it is not clear that anyone has the ability to enforce a cost-share conservation easement that a land trust fails to enforce. The Forest Service might argue that it has the ability to enforce any conservation easements associated with the FLP (whether FLP conservation easements or cost-share conservation easements), but nothing in the statute, FLP Guidelines, or FLP Handbook supports such an interpretation.

The same holds true for state public agencies administering the FLP. Unless state law provides otherwise, they have no power to enforce the conservation easements held by others or the associated management plans. The FLP Handbook indicates that FLP conservation easements should follow state laws regarding conservation easements.<sup>226</sup> In some states, the state attorneys general or other designated public entities may enforce the agreements.<sup>227</sup> Of course, this is not always true and even where there is possible enforcement by a public official, the choice of whether to enforce is always within that official's discretion.<sup>228</sup> Only Tennessee allows citizen enforcement of conservation easements, and it only does so for conservation easements predating July 2005.<sup>229</sup> The absence of multiple enforcement routes may be a cause for concern. While the public is invested in these conservation easements, there are few options for public oversight.

---

225. FLP Guidance, *supra* n. 117 at 14.

226. FLP Handbook, *supra* n. 71, at 81.

227. See Jessica Owley, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. Env. L. & Litig. 293, 339 (2004).

228. *Id.*

229. Douglas M. Humphrey, *The "Interior" Revenue Service: The Tax Code As a Vehicle for Third-Party Enforcement of Conservation Easements*, 37 B.C. Env. Aff. L. Rev. 425, 433 (2010) (citing Tenn. Code Ann. § 66-9-307(b)); see also Carol Necole Brown, *A Time to Preserve: A Call for Formal Private-Party rights in Perpetual Conservation Easements*, 40 Ga. L. Rev. 85 (2005).

### 3. *Transparency Concerns*

The conservation easements associated with the FLP as well as the rules regarding them can be confusing. To begin with, the distinction between FLP conservation easements and cost-share conservation easements is difficult to determine and understand. Cost-share conservation easements are governed by different rules than the FLP conservation easements are. Yet, there does not seem to be any persuasive justification for treating these conservation easements differently. The goals of the two types of conservation easements are the same: restrict development and promote sustainable, working forests. Even so, the two categories of conservation easements have different requirements and different permissible holders.

In crafting the Farm Bill and its amendments, Congress chose not to allow land trusts to hold property (either in fee simple or in the form of conservation easements). The law clearly explains that this program supports the creation of publicly held property rights.<sup>230</sup> The reasons for prohibiting land trusts from holding property rights purchased with FLP funds are unclear. Perhaps legislators were concerned about the capacity of land trusts to steward the land. Perhaps they did not want it to appear that they were funneling federal funding to private organizations. During the early debates about the FLP, some commentators argued that land trusts should not be permissible holders because they lack political accountability.<sup>231</sup> Regardless of congressional motivation, it is even more perplexing to realize that the FLP does in fact allow land trusts to hold the many conservation easements that come under the FLP in the form of cost-share conservation easements. Why land trusts are permissible holders for cost-share conservation easements but not FLP conservation easement is not explained.

The conservation easement examples above also demonstrate other transparency concerns that arise. It may not be possible to tell when viewing a conservation easement whether it is a part of the FLP, either as an FLP conservation easement or a cost-share

---

230. 16 U.S.C. § 2103c(c).

231. Beliveau, *supra* n. 48, at 517 (quoting comments from the Pacific Legal Foundation).

conservation easement. Conservation Easement #10 from the Wild Rivers Project in Wisconsin illustrates this well. The conservation easement did not mention the FLP anywhere in its text. The agreement appeared to meet some of the requirements for both cost-share conservation easements and FLP conservation easements. Citizens (and courts) should be able to view a conservation easement deed and understand what types of public funding and interest underlie the agreement. Such information would be important during amendment, extinguishment, or enforcement proceedings.

## VI. CONCLUSION

The Forest Legacy Program has already protected millions of acres of land and it continues to receive funding. Projects under the FLP are involving more money, more land, and more partners. It is difficult to assess, however, whether the lands protected under this program would have been converted to nonforest use but for this program. However, if we accept as fact that the FLP is protecting important areas and should be continued, a few measures could improve the program.

The U.S. Forest Service should clarify the program requirements. The FLP Guidelines and FLP Handbook are somewhat confusing when it comes to the requirements for conservation easements. The Forest Service should clarify the requirements for the two types of conservation easements that emerge under the Program and issue new guidance. The Forest Service should clarify these issues through promulgation of regulations, which will enable full notice and comment proceedings. Such a process would provide the Forest Service an opportunity to articulate the differences between the types of conservation easements and foster a discussion regarding what types of terms should be included in them and what role land trusts should play in the Program.

The Forest Service should also improve opportunities for enforcement by ensuring that it has a right to enforce conservation easements arising under the FLP. Currently, the Forest Service does not require that it be identified as a co-holder, a third-party beneficiary, or third-party enforcer. It may be that the mention of the Forest Service in context with the FLP is enough for a court to

acknowledge that the federal government has some type of third-party interest, but there is no reason not to make that explicit in the text of the conservation easement. Failure to include such language adds to the confusion regarding enforcement of FLP conservation easements. It is not clear from the statute, agency guidance, or conservation easements themselves that the federal government has an ability to monitor or enforce the agreements. There is nothing to indicate that members of the public have any ability to do so either. State agencies should include similar language affirming rights of enforcement where land trusts hold cost-share conservation easements.

Congress acknowledged that protection of our forestlands, including protecting our established national forests, must involve consideration of private forestland. Understanding this reality gave rise to the FLP. As with many government programs designed to protect land, the FLP makes extensive use of conservation easements. This article illustrates the mechanics of such conservation easements and presents both concerns with their use and suggestions for improvement. Perhaps the most important consideration, however, is an assessment of whether conservation easements are truly the best tool for the job. There may be better alternatives. Whether through fee simple purchases or conservation easement acquisition, the FLP seeks to create perpetual property rights that promote forestry. Perhaps the Forest Service should explore paying landowners to practice sustainable forestry or keep their land in production. For example, the Healthy Forest Reserve Program creates ten-year management agreements and funds purchases of thirty-year and ninety-nine-year conservation easements.<sup>232</sup> Given the age of working forest conservation easements generally and FLP conservation easements in particular, we do not yet have data to assess the value of this land protection strategy as compared to other proposed voluntary programs.

---

232. U.S. Department of Agriculture, Natural Resources Conservation Service, *Healthy Forests Reserve Program (HFRP)*, at [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/forests/?&cid=nrcs143\\_008410](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/forests/?&cid=nrcs143_008410) (last visited June 14, 2012).