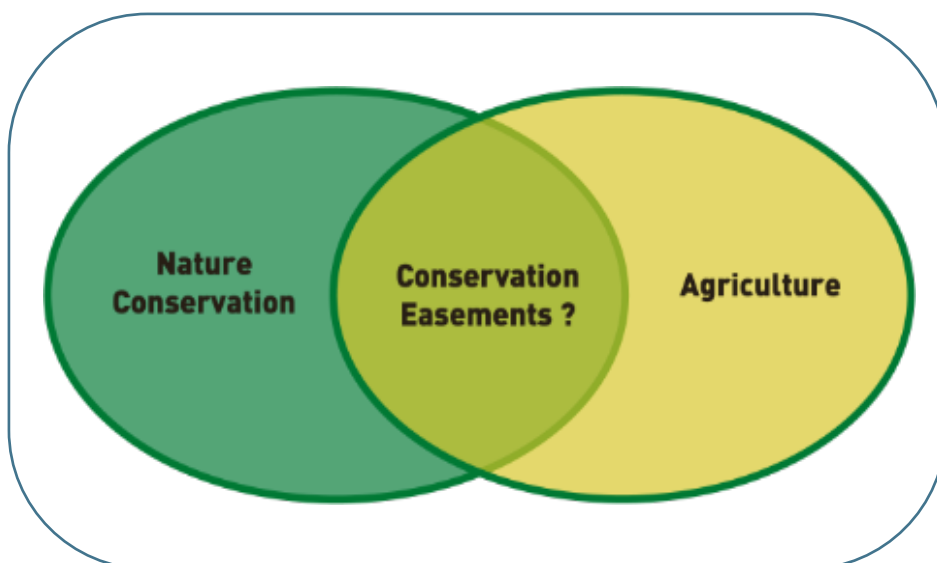


CONSERVATION EASEMENTS AND AGRICULTURE: HOW THEY CAN AND DO WORK TOGETHER

Introduction

Conservation easements and agriculture – indeed any type of working landscape – have an innate connection. A core principle of the conservation easement tool is the ability for the landowner to retain ownership of the land, often with the purpose of working it and deriving an income.

There is a space where certain types of nature conservation and certain types of agricultural operation can coexist and even synergistically support each other. At the same time, this relationship is nuanced. While nature conservation and agriculture are not mutually exclusive, they are also not perfectly overlapping circles.



THE CONSERVATION EASEMENT EXPLAINER SERIES

This document is part of a series of 'Explainer' documents describing various aspects of the conservation easement tool in plain language.

To see other Conservation Easement Explainers, as well as much more information, go to the: [Alberta Conservation Easement Resource Centre](#)

THE CORVUS CENTRE FOR CONSERVATION POLICY

The [Corvus Centre for Conservation Policy](#) is a Canadian nature-conservation charity based in Calgary, Alberta, Canada

Corvus works with government, NGOs, and others to develop and implement nature-positive policy

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In the context of conservation easements, purpose and design matter. In two provinces (Alberta and Ontario), the enabling conservation easement legislation includes the protection of agricultural land as an 'allowable' purpose. Nonetheless, even 'environmental' conservation easements can be used to protect that synergy of nature and agriculture; indeed, well over 90% of Alberta's conservation easements with a solely 'environmental' purpose were placed on parcels with active agricultural operations. In those cases, the purpose and restrictions were clearly environmentally-focused, while the design of the

agreement was conscious of maintaining the agricultural operation.

So how can that be? How does that look in the actual agreements? And ultimately how can – and do – conservation easements relate to agriculture?

This Explainer examines the interplay of nature conservation and agriculture in the context of the design and negotiation of a conservation easement.



Protecting agricultural land vs protecting agriculture

Oddly enough, understanding how conservation easements can relate to agriculture requires digging in to – of all things – the legislation around charities. That is because for a not-for-profit organization to hold a conservation easement, they must also be a charity. And to be a charity, an organization's activities must benefit Canadian society as a whole or a significant segment of it. 'Not-for-profits' can focus on a narrow segment of society (e.g., a professional association), but charities cannot.

Working on behalf of a given industry is not a charitable endeavour, and agriculture in and of itself is an industry like any other. A charity cannot be established to support agri-business, commodity sectors, agricultural market access, etc.

However, a fuzzy line exists between agriculture as a business/industry, and our societal ability to feed ourselves. Agriculturally-oriented endeavours that would be considered charitable would tend towards food system resilience, food security, and the maintenance of the food-producing land base – all benefits to society as a whole. A conservation easement ensuring a property can perpetually provide food may in fact support the producer's ability to thrive financially, the viability of a commodity in a given area, and even the economic sustainability of a

local community. However, while these are all valuable goals, they are not 'charitable' in and of themselves.

Thus, the argument that it is charitable to conserve the land base for a single industrial activity faces an uphill battle; conversely, conservation of nature or 'the environment' is more easily seen as a benefit to all citizens. Tax benefits and opportunities seen to be accruing to an individual for 'protecting their business' raises eyebrows. Land trusts and other qualified conservation easement holders must be very careful to craft their easement around their charitable purpose, whether agricultural or environmental.



a fuzzy line exists between agriculture as a business/industry, and our societal ability to feed ourselves

Conservation easements for agricultural land

When Alberta's conservation easement legislation was first enacted in 1996, there was no mention of agricultural land in the purposes. In 2009, when the Alberta Land Stewardship Act was enacted, the enabling clauses for

most 'environment' conservation easements were constructed so as to ensure the existing agricultural operation could persist

conservation easements were transferred to that legislation almost verbatim, but with one significant change – the addition of an agricultural purpose:

"the protection, conservation and enhancement of agricultural land or land for agricultural purposes;"

For the first time, the province's land trusts and other qualified organizations had the ability to receive the grant of a conservation easement solely for the purpose of ensuring the continuity of agriculture on the parcel. Despite this, for the next decade no conservation easements were

granted for this purpose. The two primary reasons for this delay were: 1) no land trust was focused solely on agricultural land conservation, and; 2) as noted above, most 'environment' conservation easements were constructed so as to ensure the existing agricultural operation could persist.

That first dynamic changed in 2001, when the Alberta Farmland Trust was created, Alberta's first and only land trust devoted solely to conserving farmland. The organization has since completed several conservation easements for agricultural land (or CEAL for those who love acronyms).

That second dynamic (most 'environment' easements being on agricultural parcels) relies on carefully balancing the details of the agreement with the 'purpose' of the conservation easement with. Taking this approach requires integrating agricultural operations into an area whose primary management goal is to protect nature (i.e., the 'purpose' is environmental), or establishing a hybrid, environmental-agricultural purpose, which is trickier than it seems.



Establishing the purpose of a conservation easement

The purpose of a conservation easement is critical. A 'purpose' is not simply a descriptor of what kinds of restrictions will exist. It is a statement of the default, of the direction that will be taken in any given emerging situation. At the highest level, the purpose is one of the three allowed in the enabling legislation. However, it is also represented by the stated 'conservation values' of the property. From a strictly legal perspective, the few examples of conservation easements arriving in Canadian courts show the judge will look first and foremost to that purpose and the associated conservation values in their deliberations.

The relationship between agriculture and conservation easements is relatively clear when the only stated purpose is to conserve agricultural land. But what about when the purpose is 'environmental' or a mix of allowable purposes? This requires better understanding the conservation-value concept, as well as the implications of mixing purposes.

Conservation values

'conservation values' are an up-front articulation of what the conservation easement is intended to conserve.

Over the last couple of decades, a statement of the 'conservation values' has increasingly been seen as critical element of a conservation easement agreement. This involves some sort of up-front articulation of what the conservation easement is intended to conserve. Conservation

values may be articulated in general terms in the agreement, and/or more specifically by referencing the baseline report.

'Conservation values' can be thought of as the rhetorical answer to the question of what one means by the stated purpose: "When you say the agreement conserves the environment, what exactly do you mean?" This gives a further, more-detailed tier of direction. It includes a more detailed articulation of features associated with the property such as (in the case of environmental conservation easements) wildlife habitat, wetlands, etc. The baseline report would then catalogue the physical elements that comprise the conservation values being targeted.

The same would apply for a conservation easement for agricultural land, where the agricultural features and character that prompted the effort to conserve the parcel would be articulated and catalogued.



Mixing purposes

There is no legal barrier to choosing more than one of the allowable purposes for conservation easements articulated by the enabling legislation (environmental, agricultural, or scenic).

Pragmatically, however, doing so waters down all listed purposes. The industrial practice of agriculture will often conflict with the enduring protection of natural systems; prioritizing species' habitat will often interfere with agricultural operations. While coexistence of these purposes may be the norm for the current management of a given property, at some point they will clash. In these cases, if no purpose is paramount, then functionally there is no stated purpose that can be relied on as a backstop for decision making.

Reconciling the purpose dilemma involves considering – in coarse terms – how conservation of nature and agricultural land may align and may conflict, and then looking at how that plays out practically in the drafting of a conservation easement agreement. That is the focus of the next two sections.

Alignment and misalignment between agriculture and nature

The ability to craft a nature conservation easement for a parcel that has an active agricultural operation involves delving very intentionally into where the 'conservation of nature' aligns with the 'practice of agriculture,' and where it does not. In these easements, the route from the 'purpose' to the associated 'restrictions' has to pass through the realm of agriculture, prioritizing nature while allowing agricultural activity to persist in a practical way.

Before diving into the specifics of drafting such an easement, it is valuable to look at this from a more general perspective, getting a broad sense of where agriculture and nature conservation might conflict and where they might align.

Areas of alignment may include:

- *Reduced fragmentation of parcels* – Both nature and agriculture suffer from a land-use tendency to subdivide and fragment the landscape; efforts that reduce fragmentation benefit both.
- *Prevention of intensive building* – Intensive housing, industrial, or commercial development precludes agriculture and disrupts or destroys natural systems. Natural systems can persist and even thrive in human-dominated landscapes, including many agricultural landscapes, but not where intensive development has overpowered them.
- *Sustainable grazing of native species* – Grassland systems have evolved with a level of grazing by wild species, and have come



to depend on that intermittent disruption. Livestock grazing that mimics that disturbance can be a vital part of that natural vegetation cycle.

- *Sustainable water management* – Both agricultural operations and native species depend on the persistent availability of water. The multi-generational sustainability of both agriculture and the environment can be factored into water management principles.
- *Maintenance of shelter vegetation* – In many regions, native animal and vegetation species rely on patches of woody vegetation to provide habitat, shade, moisture retention, and other benefits. In these same areas, shelterbelts and brush provide the same long-term wind and drought protection needed by farmers.

At the same time – as noted above – there is no perfect alignment between agriculture and nature conservation. This becomes the bigger challenge for conservation easement drafters in this circumstance because 'prioritizing' nature means establishing that default perspective. The agreement in front of them is about more than the current landowner's management philosophy. The easement has to protect the conservation values of the land during all future land owners' tenures as well — in other words, it has to address what will happen and what might happen. Areas where agriculture operations and nature conservation might conflict include:

- *Vegetation compatibility / diversity* – Much agricultural activity involves introducing new vegetative species and managing them

to grow as quickly and safely as possible. This may involve the introduction of nature-incongruous monocultures, and the cultivation of previously-undisturbed soils.

- *Movement of wild species* – The movement of wildlife species – everything from the seasonal movement of large mammals to



the evolutionary movement of plant species – requires movement zones that provide secure areas for them to thrive both individually and as populations; living, thriving and propagating, then moving on as needed. Many agricultural *operations* maintain land use practices that may thwart this, including impenetrable livestock fencing and removal of cover vegetation.

- *Wildlife habitat* – Some wild species are extraordinary adapters, able to use and even take advantage of human developments to suit and support their needs. Many are not, and many agricultural operations involve the removal of existing habitat or conversion to unusable states.
- *Water drainage and reorientation* – Water is the love/hate gremlin of agriculture: absolutely critical, but never arriving in the right place in the right quantities at the right time. For this reason many agricultural operations will actively re-orient the naturally-occurring water system to support their production needs in ways that are detrimental to the natural hydrological system and cycles on which all native species rely.
- *Pollutant and nutrient discharges* – Operationally, an agricultural producer seeks to maximize the growth rate of their crops and livestock. This often involves the application of growth stimulants or pest deterrents, many of which can interrupt the life cycle of native species or over boost their growth with excess nutrients.

Designing conservation easements for nature to accommodate agriculture

For some, reconciling the issues stated above can seem insurmountable within the context of a conservation easement, but it is not. There are four specific tactics that drafters of conservation easements for nature use to ensure that specific agricultural operations can persist, while the underlying natural systems thrive. These are:

- A defined default purpose
- Spatially-separated activities
- Customized restrictions
- Management requirements

A defined default purpose

The most fundamental mechanism for ensuring nature conservation is paramount is to establish that from the outset as the purpose of the conservation easement. Likewise, the associated 'conservation values' must be focused on nature conservation. While this may seem obvious because it states the goal, it is actually important because of what it does not state. To explain requires a step back.

Over the last few decades, conservation easement drafting has become more sophisticated in that agreements have moved from trying to identify every possible scenario and related restriction, to more intentionally matching restrictions to actions likely to impair

For some, reconciling the issues stated above can seem insurmountable within the context of a conservation easement, but it is not

the identified conservation values. This led to restrictions being more 'goal-oriented' versus 'tactic-oriented', meaning they were intended to more broadly guide land use management toward a desired ecological outcome, versus bluntly striking at a given practice.

Modern conservation easement practice assumes that if a restriction exists, it must support the identified conservation values; likewise for a management requirement. This also accommodates the reality that land management practices will change in the future in unknown ways; in other words, the practices matter less than the enduring outcome. That leaves a lot of space for interpretation when it comes to an on-the-ground future assessment of the suitability of a yet-to-be created management practice.

The purpose statement and the identified conservation values create a 'default' interpretation that fills in the gaps left open to interpretation. New and future agricultural practices may or not be allowed – the test will be their alignment to the purpose.

Spatially-separated activities

An often-misunderstood characteristic of conservation easements is that it can be applied only to certain parts of a parcel without having to formally sub-divide the property into multiple titles. The agreement will spatially identify the "conservation easement area", and apply the restrictions and requirements to that area. Similarly, within the conservation easement area, different restrictions and requirements can be applied in different ways to different areas.

An often-misunderstood characteristic of conservation easements is that it can be applied only to certain parts of a parcel without having to formally sub-divide the property

One technique used to accommodate agricultural operations is to only apply the easement to the non-agricultural areas, or to apply more intense restrictions to some areas versus others. For example, more strident restrictions may apply near water bodies, required grazing regimes may differ for tame pasture versus native grass, and existing built infrastructure may be excluded from the easement altogether.

It is critical to recognize, however, that a nature-focused land trust (or other easement holder) will consider carefully how much of this they will do based on the ultimate impact on the conservation values of the entire property, as well as the amount of increased drafting and monitoring effort that may be required.

Customized restrictions

A parcel with no agricultural operations may have a relatively simple set of restrictions related to retaining existing vegetation, limiting recreation impacts, and protecting specific features. A conservation easement for nature placed on an agricultural parcel must be much more specific regarding which agricultural practices can occur, and within what limits.

The reality that needs to be borne in mind is that if a parcel is suitable for nature conservation, that will be due to the current and past

management practices. If that land-use regime included an agricultural operation, there is no presumptive reason to exclude it. The goal is to allow the nature-compatible agricultural practices to continue while preventing any incompatible practices to occur.

There is a balancing act at play. In order to be truly said to be an easement for nature conservation, the agreement has to set limits on agricultural activities in favour of nature, but not set limits on natural systems in favour of agricultural operations. Such restrictions might include prohibitions or limits on:

- Future structures (often with modest allowances for future outbuildings);
- Removal of trees or brush (often with allowances for fence and other maintenance, or downed wood for firewood);
- New cultivation;
- Construction of new fencing or relocations of existing fencing;
- Drainage or alteration of wetlands or other water bodies (while this is generally illegal without a provincial permit, the restriction

would prevent seeking that permit);

- Disturbance of vegetation or soil on shorelines, watercourses, or other water bodies;
- 'Wildlife-proof' fencing (meaning fencing types that would disrupt the movement of animals);
- Operation of motorized vehicles (often with specific allowances for fence maintenance or haying);
- Application of chemical pesticides, fertilizers, or other chemicals (except as required by law);
- Excavation of sand and gravel; and/or
- Placement of garbage, waste, debris or refuse.

Management requirements

A notable characteristic of a conservation easement (when compared with, for example, a restrictive covenant) is the ability to not only restrict certain activities and uses, but also to require them. This can be a critical component for a nature conservation easement on an agricultural parcel, because it proactively



addresses the landowner question, "What CAN I do?".

The two most common approaches to using this ability are: 1) the articulation of management principles in the actual agreement; and 2) the creation of a management plan(s) outlining the required practices with regard to the use of the land, and attached to the easement agreement.

These tools provide the all-important opportunity for nuance. Restrictions are critically important for drawing various lines in the sand, but these management tools can address what happens before – and in order to avoid – those lines.

Again, these will vary significantly based on the qualified organization, specific easement agreement, and the nature of the parcel itself, as well as the goals and values of the landowner as expressed during the negotiation. However, examples that commonly exist for conservation easements with agricultural operations include guidance for:

- Vegetation management – This may deal with practices both within and outside the cropping and harvesting of the operation, and may include allowable practices for brushing, management of invasive weeds, and retention of shelter belts.
- Grazing management – For operations with livestock grazing, these plans would include specific requirements to ensure the such activities are sustainable and do not adversely impact the conservation values.
- Health assessments – In order to provide concrete, measurable frameworks around

what might otherwise be vague guidance, some agreements will require some sort of health assessment ('range' and 'riparian' are the two most common), and a commitment to manage toward a particular level.

- Fencing – Fencing for livestock, security, delineation, and privacy will take many forms, and can be prone to significant change over the years. Guidance here might include the types of fencing, amounts, notification requirements, and/or location guidelines.
- Selective harvest – For operations that have merchantable timber, or even small woodlots that provide a sustained source of fibre, this guidance would set out management and selective harvest approaches that would support the identified conservation values.
- Riparian management – While a simple restriction to protect riparian areas may be sufficient in most conservation easements, more detail may be required for an active agricultural operation, including elements such as off-stream watering, fencing, setbacks, and access.
- Pesticide, fertilizer applications – General prohibitions on the application of chemicals may also need clarification for an agricultural operation, where in some cases portions of the property will be excluded from the easement area, but still require setbacks, or when invasive vegetation incursions affecting natural species exceed the limits of mechanical control.

Designing conservation easements for agricultural land to retain nature

It is worth noting that, while the discussion thus far has focused on conservation easements for nature that accommodate agricultural operations, it is also possible to have conservation easements that were created to protect agricultural land but which seek to protect nature as ancillary benefit.

In these cases, the reverse of the above is true: when the agreement leaves space for interpretation, the continuation of the agricultural operation is paramount. However, conservation easements for agricultural land have many de facto benefits for nature, and can also add restrictions that favour nature, but in such a way so as not to impair the agricultural operation. Some examples include:

- Reduced fragmentation of parcels;
- Prevention of intensive housing, industrial, or commercial development;
- Requirements for grazing versus cultivation or monoculture cropping;
- Requirements for the maintenance of wetlands;
- Allowance of only selective tree harvest;
- Requirements for maintaining healthy riparian areas (cleaner water has been shown to support weight gains in cattle);
- Exclusion of motorized vehicles, except for specific agricultural needs;
- Control of invasive species; and/or
- Preclusion of sand and gravel mining.

Practical considerations

The discussion above has centred on the implications for natural systems when choosing to grant a conservation easement for nature on a parcel with agricultural operations. However, there are also several practical considerations that both the landowner and the qualified organization who will hold the easement need to consider.

Program funding

For landowners who need some amount of cash compensation for the grant of a conservation easement, there may be limits in drafting a conservation easement with too much consideration of agriculture. Because the conservation easement tool was originally conceived for conserving nature, the enabling legislation in most provinces does not consider protection of agricultural as a viable purpose.

More importantly, this history means program funding is overwhelmingly oriented to conservation easements for nature. Philanthropic funders are more likely to support nature conservation, and government funders may consider their support for 'agriculture' to be provided through other programs and in other ways.

Drafting a conservation easement for nature that skews too hard to agriculture may confound funding opportunities.

there may be limits in drafting a conservation easement with too much consideration of agriculture

Tax incentives

Compensation for the grant of a conservation easement comes largely in the form of a charitable tax receipt, but it cannot be said to be a 'tax incentive'. The grant of a conservation easement is a disposition of an interest in land that is valued by a qualified real estate appraiser and compensated as such.

However, conservation easements for nature do have access to a significant federal tax incentive program – the Ecological Gifts or 'EcoGifts' program. Through the certification process, landowners can receive forgiveness of the accumulated capital gains taxes on the property they donate, in exchange for giving the federal government the right veto any future changes in land use, and subjecting the easement holder to large tax liabilities.

This forgiveness of capital gains taxes is not available for the donation of a conservation easement on a property the federal government does not deem 'ecologically significant.' That determination varies from province to province and can be very subjective, meaning properties where agricultural operations predominate are generally not eligible.

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Private Protected Areas and OECMs

An odd tension exists in the nature conservation world currently, especially in Canada, as parties debate the labels for various types of conserved areas.

A parcel with a conservation easement for nature is considered by the body that provides international guidance on protected areas (the International Union for the Protection of Nature or IUCN) to be a 'Privately Protected Area'. It is therefore eligible to be entered into the international database as a protected area. This designation is very important to some agencies and some conservation easement holders.

A property with a conservation easement for agricultural land may be considered an Other Effective Area-based Conservation Measure (or OECM). The OECM tag is given to areas that do not have nature conservation as their primary management objective, but do in fact protect nature nonetheless. Despite extensive efforts by the IUCN to explain that an OECM is not 'lesser' than a Protected Area, many in the protected areas community view this as hierarchy, often assigning it the pejorative diminution of being 'just a conserved area.' Again, this distinction is important to some organizations and agencies.

If this distinction is important to a landowner, an easement holder, or any of the funders and agencies with whom they work, it is worthwhile knowing how conservation easements for agricultural land and conservation easements for nature that include agricultural land might be viewed.

Conclusion

Can conservation easements for nature and agricultural operations co-exist? Most definitely. Will that always be the case? Definitely not.

The realms of nature conservation and agricultural production overlap but not perfectly, and the drafting and granting of conservation easements needs to be fully aware of this. For an easement to be said to be truly for nature, the purpose and the conservation values have to be clearly designed to favour nature conservation

The greatest challenge is developing the restrictions and the management prescriptions in a way that, allows agricultural operations to exist, sets limits on agricultural activities in favour of nature, but does not set limits on natural systems in favour of agricultural operations.

On the other hand, Alberta (and Ontario) legislation allows for a conservation easement to be created solely for the protection of agricultural land. There may be numerous environmental benefits in these, both intentional and unintentional.

Finally, any landowner or conservation easement holder considering mixing nature conservation and agricultural operations needs to also be aware of some of the practical limitations they might face.

Can conservation easements for nature and agricultural operations co-exist? Most definitely. Is that always the case? Definitely not.





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