

Supplement to conservation easements, not replacement, is the appropriate role of habitat leasing

In a response to our article, Brown, et al. (2023), Bennett and Brammer (2023) questioned our recommendation to increase the usage of affirmative language in conservation easements, enumerating their 4 concerns with affirmative clauses in easement language, and recommending habitat leasing as a better alternative. We are in full agreement with the potential value of habitat leasing for biodiversity protection; however, we disagree with its utility as a replacement for affirmative language, as well as the logic underpinning that assertion. Instead, we suggest an approach integrating both tools to minimize cost concerns and maximize the benefits of effective habitat management for biodiversity.

THE PROBLEM OF ECONOMIC FRAMING OF CONSERVATION EASEMENTS

In articulating their first concern with affirmative language, the responding authors state that “Logically, landowners would not be willing to transfer a conservation easement for which they will not be fully compensated” (Bennett and Brammer 2023:1). They treat this assertion as self-evident and offer no further justification. This is, for a start, a gross misrepresentation of the reasons why landowners grant conservation easements to land trusts and other qualified holders. The financial benefits conferred by the conservation easement tax deduction are based upon the reduction in value in the real estate as an asset. Because the incentive is a deduction, the maximum available compensation for a conservation easement is a mere fraction of the asset devaluation. Simply put, a conservation easement is, by definition, a financial loss. The existence of any conservation easements whatsoever disproves the authors' assertion, and nearly 200,000 conservation easements were reported to exist as of May 2021 (National Conservation Easement Database 2021).

The assertion of economic value to the exclusion of all other justifications is not just factually inaccurate, however; it is fundamentally problematic for questions of ecology. Despite efforts to quantify ecosystem services (Hanley and Spash 1993), the fundamentally nonhuman (and thus nonmarket) nature of ecosystems has led to considerable problems of valuation in addressing problems of environmental degradation (Wolff and Haubrich 2008). Worse, the framing of policy problems and evaluations in purely economic terms creates moral hazard (Balfour et al. 2020). It is precisely this philosophy of the utilization of the conservation easement tax deduction that has led to syndicated abuse of the incentive to such a rampant extent that Congressional action was required to address it (Land Trust Alliance 2023), and this fundamental misunderstanding of landowner motivations is also at the root of the concerns raised by the response authors.

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PRACTICAL DIFFICULTIES

Bennett and Brammer (2023) cite McLaughlin (2016) to assert that appraisers cannot consider management practices, habitat, or biodiversity, because of a lack of market signals to justify their financial value. This argument is tautological. Any lack of market signaling is attributable to the absence of comparable language in extant conservation easement documents; this will continue to be true until affirmative language is utilized. Further, we take issue with their assertion that no market signals exist. While we are unaware of appraisals of easements with affirmative clauses such as we proposed, other signals exist. Language requiring proactive management practices is common in agricultural easements, including the requirement of organic methods or the active cultivation of the land itself for agricultural purposes (National Young Farmers Coalition 2013), as well as language requiring restoration or enhancement of wildlife habitat (Rissman 2013)—both cited in our original article. Additionally, an income capitalization approach to appraisal is valid in an easement context and addresses the concern by integrating ongoing income and costs into the assessed value of the property (McLaughlin 2016). After all, market signals about habitat management activities themselves are plentiful, thanks to the work of wildlife consultants.

On a related note, Bennett and Brammer (2023) raise the concern that affirmative clauses may require unfunded ongoing management expenses. We do not dispute this; indeed, we discussed this fact at some length in our original article (Brown et al. 2023) and proposed solutions to that concern. We refer the authors and our present readers to our discussion therein. In addition, we note that conservation easements are voluntary agreements; landowners who are concerned about unfunded management expenses are under no obligation to donate an easement containing affirmative language (or, for that matter, to purchase a piece of property so encumbered) and may simply opt out.

The authors raise a conceptually associated concern about the cost of monitoring and enforcement of affirmative clauses to land trusts and claim that national accreditation standards do not require land trusts to maintain staff trained to monitor and enforce affirmative easements. We note again that our original piece acknowledges and discusses increased enforcement costs (Brown et al. 2023). Further, while it is true that the standards and practices required by accreditation do not explicitly require land trusts to train staff to manage affirmative requirements, those standards do require land trusts to maintain the capacity to enforce their easements (Land Trust Alliance 2022). As affirmative language is already present in easements held by accredited land trusts (National Young Farmers Coalition 2013, Rissman 2013), we suggest that it is disingenuous to suggest national standards and practices in the land trust sector as a counterargument to the use of affirmative clauses. Perhaps most importantly, we reiterate that easements are voluntary; land trusts that cannot afford to monitor and enforce easements with affirmative language could quite simply choose not to include such language in their legal instruments.

The final concern raised by the responding authors is that affirmative clauses may need to be amended in the future to account for changing conditions, and the amendment of conservation easements can be difficult. While it is indisputable that much Internal Revenue Service (I.R.S.) activity in recent years has been concerned with amendment of easements (e.g., *Pine Mountain Preserve v. Commissioner*. 2020), well-crafted language drafted in a fashion consistent with long-established best practices (e.g., Pennsylvania Land Trust Association 2018) offers the opportunity to improve the flexibility of both land trusts and easement landowners to address changing landscape conditions, without the necessity of changing the text of the document itself. Indeed, affirmative language may reduce the risk of I.R.S. litigation over amendments to easement language by creating not only space and legal justification for but an obligation to update the management of conserved properties to reflect changing conditions. Rather than creating a rigid, binding set of prohibitions, affirmative language can be the foundation of a flexible, adaptive relationship between landowner and land trust; where traditional language would require amendment to address a prohibition that prevents necessary adaptation to a changing landscape, affirmative language makes that adaptation part and parcel of the easement relationship.

SYNERGY, NOT REPLACEMENT

While we agree that habitat leasing presents a useful tool, we see little to suggest that it is viable as a replacement for the affirmative language we proposed. The concerns expressed by the responding authors are overstated, but perhaps the most salient point is simple: habitat leases are not perpetual. While they can indisputably produce habitat improvement over their lease period, they offer no security for the maintenance of the improvements after the agreement's expiration. The optimal role of habitat leases in biodiversity protection, then, is not as replacement for but in coordination with affirmative language in easements; leasing could easily be used to achieve short-term improvements in fulfillment of affirmative clauses in conservation easements, and those improvements would then be protected by the easement's perpetual aegis. Further, an approach that integrates habitat leasing as a means for accomplishing the active management prescribed by affirmative easement language addresses the cost concerns raised in both our original article (Brown et al. 2023) and Bennett and Brammer's (2023) response. We look forward to further discussion about the opportunity to integrate these conservation tools for the betterment of wildlife habitat.

CONFLICT OF INTEREST STATEMENT

The authors declare no conflicts of interest.

Michael A. Powell¹

Sarah A. Brown²

Robin M. Rotman³ 

Sonja A. Wilhelm Stanis⁴

¹*Truman School of Government and Public Affairs,
University of Missouri, W105 Locust Street Building, Columbia, MO 65201, USA*

²*Division of Extension, University of Wisconsin-Madison, 304 2nd Street, Shell Lake, WI 54871, USA*

³*School of Natural Resources, University of Missouri, 203H Anheuser-Busch
Natural Resources Building, Columbia, MO 65211, USA*

⁴*School of Natural Resources, University of Missouri, 105E Anheuser-Busch
Natural Resources Building, Columbia, MO 65211, USA*

Correspondence

Robin M. Rotman, University of Missouri, 203H Anheuser-Busch
Natural Resources Building, Columbia, MO 65211, USA.

Email: rotmanr@missouri.edu

ORCID

Robin M. Rotman  <http://orcid.org/0000-0003-0140-929X>

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