

WLRM Section 8 - Stewardship Programs: From Baseline Documentation Reports to Monitoring and Enforcement

Stewardship, as it relates to land protection, means enforcing protection of conservation values that are identified in a conservation easement. Taking on an easement by being the grantee is much easier than finding another organization to assume responsibilities for the conservation easement at a later date. Holding a permanent easement equates to accepting an assignment of property stewardship, including fostering a working relationship with the landowner, from now until forever.

Stewardship Funding – Why is it needed?

Many SWCD employees and supervisors are shocked the first time they hear about someone making a land donation and then being asked to make an additional cash donation to an organization acting as the grantee. On the reverse side of things, think about how it sounds to say an organization agrees to monitor a piece of property forever and to take a future owner to court if a violation occurs in relation to the easement with no funding to carrying out these tasks. Staff time and lawyer fees equate to real costs that are part of a responsible easement holding program.

In the early 1970s when land trusts were being formed and finding their place in the land protection arena, boards and staff were anxious to make a difference. Often when land and permanent easements became available, land trusts were quick to take them on without worrying about the hidden costs of being a grantee. Easements would accumulate within the land trusts' programs without a corresponding increase in stewardship funds and staffing. More recently, the economic downturn has lead to a decreasing value of endowment funds. Today most organizations will not even consider holding an easement without the accompaniment of stewardship funds that can be invested into an endowment. It is common for an organization to require tens of thousands of dollars along with the donation of a permanent easement. Securing and maintaining sufficient funding that will cover future costs may be the most difficult part of a successful land stewardship program to accomplish.

Expecting a land owner to donate an easement and money at the same time seems extreme to anyone who is new to the land protection arena. However, for land trusts who have been involved in stewardship activities for a quarter century, it has become a responsible way of doing business. Monitoring is either done right, or it is a disservice to the donor, the public and future generations.

Before a SWCD board sets a policy on stewarding land and sources of funding to cover costs, the following questions need to be answered.

- What costs will we incur in taking on easements?
- Who is going to cover those costs today and in the future?
- Has the county agreed to cover these costs or to provide legal assistance?
- Does the SWCD have a stewardship endowment fund?
- Are there other sources of income for a land stewardship program?

- Is the SWCD prepared to monitor and enforce the easement for the next 200 years and beyond?
- Will the costs of carrying out stewardship duties increase over time?

Stewardship Funds and Methods of Management

Stewardship funding depends upon endowment contributions and income growth. Additional discussions regarding funding options for SWCD can be found in WLRM Sections 4 and 5. Stewardship costs for monitoring and enforcement increases on a sliding scale with the passage of time. Costs for monitoring and litigation can be estimated for today, but few will venture to make a guess at the amount of these costs a decade or more from now. Most SWCD have a budget based upon annual county appropriations. Land trusts are dependent on membership fees, contributions and grant funding, with no steady stream of revenue. Land trusts depend on growing endowment funding for future stewardship activities.

Current Budgeting Mechanisms

Some counties maintain rollover funds for their SWCD; unspent funds that carry forward from one year to the next. Rollover funds are not the same thing as an endowment. State law currently does not authorize local government (including the county or the SWCD) to maintain an endowment fund for easement stewardship. However, funds for an endowment can go directly from a funding source such as a grant agency to a community foundation that will maintain the funds for a SWCD. Normally community foundations manage these funds for a fee.

Every SWCD that decides to hold easements should talk with their respective county about providing legal services for easement closing and potential future enforcement. According to NC General Statute 139 the NC Attorney General's Office *may* provide legal assistance to SWCD, but the quantity and type of service is not quantified in the law and will likely not be free of charge. Generally this support is viewed as a last resort option after all other sources of legal assistance have been exhausted.

Sources of Stewardship Funds

The decision-making process for any SWCD considering holding easements and owning land should include adopting stewardship funding guidelines prior to taking on the first easement. The stewardship funding guidelines should be part of the SWCD stewardship strategy plan. Several costs and options for funding should be considered; listed below are different lines of approach being taken by SWCD.

- **No Fee** - Taking on agriculture easement with no funding. An MOU is in place stating the county will allocate funds for staff to monitor and either the county attorney or funding from the county will address legal issues. This type of arrangement should be spelled out in an MOU between the district and the county and reviewed on a yearly basis or as staff turnover occurs.

- **Grant Funding** - The SWCD or the landowner can apply directly for funds from various sources to help cover the cost of stewardship. See WLRM Section 4 for a list of funding partners. If the landowner is the applicant, they should release the funds to a community foundation willing to hold the funds in trust for the SWCD at the time of closing.
- **Donor Assessment** - Taking on easements only if they come with funding from the landowner.
- **Case-by-Case and Bartered Services** - Taking on easements and land holdings on a case-by-case basis. At least one SWCD has taken on an easement from an engineering firm where stewardship funding was provided. In another instance the SWCD agreed to monitor a county park; this responsibility came with no cash input, but the county has agreed to provide future legal assistance via the county attorney.
- **Land that Generates Income** - Taking ownership of agriculture land that will generate income in the form of a rent house and agriculture land leasing by area farmers.
- **Seller Assessment** - Easement language including a statement that reads each time the property is sold, the seller, or purchaser will donate a percentage of the sell price to the easement holder for stewardship.

Baseline Documentation Reports

The following information is a summary of guidelines provided by the Land Trust Alliance. It is recommended that every SWCD review the Land Trust Standard 11. A baseline documentation report (BDR) provides detailed property information on the conditions existing at the time a conservation easement was placed on the property. The conservation easement will always remain the primary reference document. The BDR will reference the conservation purposes of the easement and will shape how the property is monitored in the future. The conservation resources being protected will be recorded through various tools such as narrative text, maps, and photos with an aim to assist with any future remediation if the resources are damaged. A BDR is required by the IRS for any donated easement that tax deductions are being requested for and it is strongly recommended that a BDR be done for all conservation easements a SWCD is holding.

Each SWCD should adopt a set of protocol for how the BDR is drafted and how the information is preserved for future usage. It is important to involve staff that will be conducting future monitoring into the process of developing a BDR. A SWCD can consider putting together the BDR in house, but calling on specific experts as needed. For example if the conservation easement has a wildlife habitat component, unless the SWCD staff have a biology degree, a qualified professional should conduct the species assessment. The BDR should be done prior to closing and become part of the paperwork signed at closing.

Components of a Baseline Documentation Report

The IRS requires a letter signed by the grantee and grantor assuring the accuracy of the BDR information. IRS BDR minimum components include the following;

- USGS survey maps delineating property lines and other adjacent protected land (if any).
- To scale area map delineating all human-made features (structures, roads, etc.), vegetative cover, land use history, and any specific natural features being preserved (special species or community habitat).
- Aerial photography dated close to the time of closing.
- On-site photographs recording identified features and property boundaries.

A BDR should go beyond the IRS requirements since it is an integral part of a strong monitoring program. Include as much quantitative information as possible such as number of acres for specific land use or habitat being protected. The BDR must be tied directly to the restrictions set out in the conservation easement. If a primary purpose is protection of prime soils, the location of said soils should be delineated with a map and a soils description provided. It is recommended all BDR contain the following components;

- Date BDR was prepared
- Who prepared the BDR and what their qualifications were (include all who contribute)
- IRS acknowledgement statement of accurate representation
- Background information – history of property and summary of easement process
- Property description – include all features, land use, and historic land use
- Easement summary – list out purpose, restrictions, reserved rights
- Legal description of property
- Conservation values being protected – describe what/how and location of features. This is a good place to reference any required management plans and how they will be updated.
- Maps – regional, property, topography, soils, site plan with existing structures and future building envelopes.
- Photographs – photo locator map, photo log with GPS coordinates, weather conditions, camera resolution

Plan the photo documentation process carefully; this will be direct evidence for any future violations. Each SWCD should adopt a policy of how photo documentation will occur and how the information will be stored and preserved. Consider using a date stamp and high resolution camera. Record the GPS location the photo was taken at and the compass direction the camera was pointed toward in narrative/chart and map form. Photographs should record any area where reserved rights will be exercised and where potential encroachment from an adjacent property may occur. During future monitoring you will need to return to the exact spot, so make sure the location can be found again.

The Land Trust Alliance recommends three original copies of a BDR be prepared; one for the grantor, one for the grantee's office files, and one to be stored in archival storage facility away from the office. A SWCD should also make a "working copy" for use during monitoring; never take the original BDR out in the field. When any future updates are provided, such as after the

grantor exercises a reserved right like home construction, the BDR needs to be amended with each original receiving the updated information.

Record Keeping Policies

It is recommended SWCD review the current county and state record keeping policies to ensure compliance. A strong recordkeeping policy adopted by the SWCD board will be necessary for any future easement enforcement action. A primary component will be the separation of original files (one set on-site and one set off-site) and the working files. Never take the original files out of the office. Below is a summary of Land Trust Alliance Standard 9 regarding these separate files.

Working Files;

- Documents summary / checklist of what is in files
- Site evaluation data
- Conservation easement
- Active contact information
- Maps
- Photos
- Baseline data
- Updated resource data
- Management plans
- Monitoring plan
- Monitoring reports

Permanent Files;

- Documents summary / checklist of what is in file
- Conservation easement
- Title report
- Escrow instructions and closing statements
- Maps
- Survey report
- Appraisals
- Board resolutions / minutes pertaining to project (ranking form, landowner questionnaire)
- IRS Forms
- Baseline data
- Updated resource data
- Management plans
- Monitoring reports

Easement Monitoring

Monitoring means keeping watch over a property per easement guidelines with a goal of protecting conservation values. Good communications between the grantor and the grantee are central to a credible monitoring program. The grantor is responsible for following all easement guidelines. However, grantor ignorance and/or disregard, Acts of God, neighbors and other users of the properties including trespassers all have the potential for violating terms of an easement. The original grantor of an easement will be familiar and favorable to the terms in the easement, but this may not be true of subsequent landowners and other users of the property. Building and maintaining a strong relationship with the grantor can save time and money, avoid problems and keep the monitoring process enjoyable. A strong and consistent monitoring program helps to keep landowners educated and identifies problems early on, when corrections are more easily accomplished. Most easements can be monitored with annual visits, except when a trigger event occurs, necessitating the need for a subsequent site visit. A strong monitoring program will incorporate the following components;

- Financial planning for stewardship costs – refer to WLRM Section 5 for more details.
- Adoption and implementation of stewardship policies including enforcement procedures
- Draft conservation easements that can be reasonably monitored
- Baseline documentation report process and content guidelines
- Consistent monitoring guidelines
- Process to maintain landowner relations
- Commit to easement enforcement including financial resources.

Triggers

Sometimes triggers or actions taken will occur that necessitate the need for site visits to occur on a more frequent basis. These triggers can include any of the following items;

- Timber harvesting
- Building construction
- An easement property adjacent to an urban area, or abutting multiple small properties
- An especially fragile ecosystem
- Extremely restrictive easements
- Easements with public access provisions

Staying on top of issues that have the potential to damage conservation values associated with an easement, will prevent future problems. When damage does occur, the approach of more frequent site visits will make for an easier fix, minimizing the time and costs required to correct violations.

Monitoring Program Guidelines

- **Beginning Considerations** - Easement monitoring starts when an organization is considering taking on an easement. The SWCD should evaluate the property and guidelines of the easement to see if it is a good fit for your priorities. Several questions should be asked up front including;
 - Is monitoring the easement feasible with existing staff and the county truck? Factors to be considered include; distance to the property, size of the easement, lay of the land and if the property is accessible only by water, or by air.
 - Are there one or multiple owners of the property? Is there clear title to the property?
 - Are stewardship funds available from a grant source or is the current owner willing to make a donation?
 - Is it clear what activities the easement restricts?
 - Does the easement require a management plan for agriculture and forestry? Who approves the management plan?
 - Does the easement include language stating that legal costs incurred while enforcing the easement guidelines will be reimbursed by the landowner?

- **Assign and Train Monitors** - Maintaining monitoring staff that are well trained in the process is essential to a strong stewardship program.

- **Monitoring Schedule** - The grantee should establish an annual monitoring schedule for all easement properties their organization is currently holding.
- **Notification to Landowner** - Each landowner should be sent a letter reminding them of upcoming inspections of their easement. The monitoring staff should call each grantor to set up a monitoring appointment, so that the landowner can be present and participate. In some instances the monitoring staff will work with a property manager instead of the owner(s).

- **Maintain Data** – Prior to the monitoring event gather material for the site visit including a camera, GPS unit, extra batteries, measuring tape, nature I.D. books, paper, pens, clip board, binoculars and copies (not the originals) of any documents that apply to the easement. Review the project file to re-familiarize yourself with the property. The document copies should include maps, aerial photos, the legal easement, baseline documentation report, past monitoring reports, the conservation/forestry management plan and monitor reporting form(s). You should never take your original documents into the field; each easement record should include the original on file and a working set of documents to use for fieldwork. It is good practice to have standard packets prepared for use with all monitoring visits.

- **Site Visit** - During the site visit, ask the grantor about changes to the property and use the monitoring report form as a reminder of questions to ask. The visit with the landowner is a good time to discuss the easement and to address any concerns, or questions that they may have. Inspecting the property with the landowner is a recommended approach. Consider seasonal affects to your visit. If the property is heavily wooded, consider a fall or winter visit. If part of the easement is protection of an endangered species, consider timing the visit to when enough vegetation is out to identify said species.

- **Documentation and Photographs** - During the monitoring event, the property should be compared with observations and photos from the most recent monitoring visit. Documentation and pictures should be taken from established monitoring photo points, while noting the condition of the land in writing. Observation notes should also include date, time, and weather conditions.
- **Validate** - If the monitoring staff identifies issues of concern, they should not draw conclusions as to how the concern occurred, but rather record the facts. The landowner should not be confronted during the monitoring visit; there may be issues that first need to be clarified before a correct judgment can be made. Any corrective action should be determined by the board and not just the staff person during the field visit.
- **Document** - If problems are confirmed during the monitoring visit, the issues must be documented both in writing and photographically to protect the SWCD future right to enforce the easement.
- **Activities After Site Visit** - The monitoring staff should complete the monitoring report as soon as possible following the monitoring visit. All staff involved in the monitoring visit should sign and date two copies of the completed report. The two copies should be sent to the landowner with a request for signature. One copy of the report is for the landowner to keep. The second copy of the report is for office records and should be returned to the SWCD within one month. The report serves as documentation that monitoring has occurred. Remember to make a working copy of the signed original for your working folder. The evidence of consistent monitoring visits is most important for use in the event of a court case, or auditing by a tax agency.
- **Mitigation of Easement Violations** - When an easement violation is found, the landowner must be contacted in writing and given an opportunity to respond. Then a solution can be worked out with both parties; the grantee and the grantor. If damaged conservation values are identified, consider mitigation options that are comparable to the level of severity of the violation. Allow time to negotiate a solution. Mitigation out of court is a much cheaper option than enforcing the terms of the easement within the court system. However, if all options of negotiation fail, legal action will be the last result in seeking restitution.
- **Archive** - Correspondence, documentation and photos should be filed and maintained for each easement property. Two sets should be maintained, a working folder and a permanent folder where originals of documents are maintained. Also consider how you store any electronic data and how backups of electronic and hardcopy files are maintained within the office.

Forms and Paperwork

Monitoring Forms and Checklist are included in WLRM Section 6 Further information Sources – 12 Steps to Conservation Easement Acquisition. Other forms are available in The Land Trust Alliance Standards and Practices Guidebook: An Operating Manual for Land Trusts Volume II.

The 12 Steps document includes the following;

- Monitoring Inspection Checklist
- Monitoring Documentation File Checklist
- Conservation Easement Monitoring Inspection Report

Qualities of a Successful Easement Monitoring Program

A well thought out and executed monitoring program, with trained staff, scheduled visits, landowner communications, proper forms and record keeping is key to a successful stewardship program. A quality program should aim to achieve the following objectives;

- Protection of conservation values for perpetuity.
- Maintaining public confidence in your program and conservation easements as a whole.
- Avoiding justification for the court to rule that the SWCD has waived the right to enforce an easement.
- Maintaining the SWCD authority to accept easement donations as an IRS / DOR qualified land stewardship organization.
- Promoting public support of the SWCD as a credible land steward.
- Minimizing the chance of being involved in costly and time consuming litigation in defense of a conservation easement.
- Minimize staff time and costs associated with a SWCD easement program.

Recommended Stewardship Monitoring Policies

Each SWCD should adopt a set of policies for conducting the monitoring process. The following are specific components recommended as a starting point;

- Recordkeeping policy
- Baseline documentation report process
- Stewardship fund requests and fund management
- Monitoring process
- Enforcement process
- Easement amendments
- Notification of reserved rights be exercised process
- Landowner contact

Further Information Sources

- WLRM Section 5 - Stewardship Endowment Calculation Examples. 2008. Compiled by Charles Brummitt.

Resources beyond the Manual – can be purchased online

- The Conservation Easement Handbook. Byers, Elizabeth and Ponte, Karin Marchetti. Washington, D.C. Land Trust Alliance. 2005.
- The Land Trust Standards and Practices Guidebook: An Operating Manual for Land Trusts. Volume One Organizational Management Standards 1 – 7. Land Trust Alliance. 2006.
- The Land Trust Standards and Practices Guidebook: An Operating Manual for Land Trusts. Volume Two Land Transactions Standards 8 – 12. Land Trust Alliance. 2006.