



CONSERVATION LEGACY

# Oil and Gas/ Conservation Easements

Conservation easements and oil and gas development are not mutually exclusive.

BY LORIE WOODWARD CANTU

“Under certain circumstances, oil and gas development can occur on lands placed under a conservation easement,” said Blair Fitzsimons, CEO of the Texas Agricultural Land Trust (TALT). “Landowners shouldn’t automatically dismiss the possibility of a conservation easement because of potential oil and gas development.”

While each property and each ownership situation requires individual legal and technical analysis, generally the IRS permits sub-surface extraction, as long as there is “limited, localized impact... that [is] not irretrievably destructive of significant conservation interests,” Fitzsimons said. In other words, to obtain the IRS deduction, the extraction of the sub-surface minerals, such as oil and/or gas, must not cause major, permanent damage to the land, which then lessens or eliminates its conservation value.

“The landowner who is granting the conservation easement must have a degree of control over surface damages, either through a surface use agreement or surface protection provisions in the lease itself,” Fitzsimons said. “Otherwise, the deductibility of the donation may be questioned by the IRS.”

In Texas, there is a long history of oil and gas development, and the minerals have been routinely severed from the surface estate. With advances in technology and the discovery of widespread, far-flung shale fields, areas that have never been developed must now, at least for planning purposes, be considered potential oilfields.

As a result, one of the first questions that TALT asks potential conservation easement donors, regardless of where their property is located, is, “Who owns the minerals?”

Generally, the search for the answer leads to one of four scenarios. Each has its own implications for the donation of a conservation easement.

**The landowner owns the minerals, and the minerals are not leased.** This scenario poses the least risk to the deductibility of a conservation easement. A landowner who owns the mineral estate and has not previously leased the minerals can either subordinate the mineral interest to the conservation easement, or ensure adequate surface use protections when negotiating a lease. The landowner can also pursue a surface use agreement that specifically protects the conservation values as part of mineral development.

**The landowner owns the minerals, and the minerals are leased.** The risk involved with donating a conservation easement under this scenario will depend on the lease’s terms. Unless expressly restricted in the lease, a mineral lessee’s use of the surface will be governed by common law doctrine, which affords the landowner little protection from the mineral lessee’s use of the surface. The landowner runs a risk of not qualifying for the tax deduction, unless the mineral lessee agrees to subordinate its interest to the conservation easement or enter into a surface use agreement with surface protections.

**The landowner does not own the minerals, and the minerals are not leased.** This scenario is a bit more complicated. The landowner must first determine who owns the oil and gas minerals. Once ownership is clarified, the deductibility of a conservation easement will depend on who controls surface mining and whether the conservation values can be protected through a surface use agreement.

**The landowner does not own the minerals, and the minerals are leased.** As in the second scenario, the landowner must look at the terms of the oil and gas lease

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*Editor’s Note: This is the fifth installment in a six-part series focusing on conservation easements as a tool that can help keep ranches intact and facilitate their passage to the next generation of land stewards. The series has been developed in collaboration with the Texas Agricultural Land Trust (TALT). Created by landowners for landowners, TALT’s mission is to protect private working lands, thus conserving Texas’ heritage of wide open spaces. For additional information about TALT, see the organization’s website at [www.txaglandtrust.org](http://www.txaglandtrust.org).*

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to determine if there are adequate surface protections. If there are none in the lease, the mineral lessee will have the right to use the surface without restriction, in which case the landowner runs a high risk of not obtaining the deduction.

It is important to understand that only sub-surface mineral development is allowed under a conservation easement. Surface mining is not allowed under any circumstances, so it is also important to know who owns the surface minerals. In some cases, these have been severed, as well.

“In Texas, minerals are broadly defined in state law, and there are some disagreements about what constitutes a mineral,” Fitzsimons said. For instance, it is not clear whether sand, caliche, and gravel can be classified as minerals.

As a result, TALT takes a very conservative approach when dealing with any type of surface mining, she said. If a property contains a gravel, caliche or sand mine, TALT recommends that the landowner carve out the pit from the primary easement and cover that area with a non-deductible easement. This precaution is becoming a stan-

dard practice in the land trust community, she said.

“We recommend this extra step because we believe it isn’t necessary – or wise – to jeopardize the entire conservation easement over a 10-acre pit,” she said. “This is just one more example of a repeated theme – the details matter.”

Because oil and gas law is a highly specialized field, it may be helpful to have an oil and gas attorney as part of the team negotiating the conservation easement, Fitzsimons said. With their knowledge, they are equipped to recognize the ways that oil and gas development and conservation easements can be compatible.

“As the only land trust in Texas dedicated to conserving agricultural lands, TALT has a stake in ensuring the surface remains diverse, healthy and productive,” Fitzsimons said. “But we also know that oil and gas development has funded a lot of conservation in Texas. We look for ways to balance oil and gas production with conservation, so society can enjoy the benefits of both.” 🌱



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